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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1891

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.
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.
CHARLES HENRY ALDRICH, Solicitor General.
JAMES HALL McKENNY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshall.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1891.

FICKLEN *v.* SHELBY COUNTY TAXING DISTRICT.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 97. Argued March 18, 21, 1892. — Decided April 11, 1892.

F. and C. & Co. were commercial agents or brokers, having an office in Shelby County, Tennessee, where they carried on that business. In 1887 they took out licenses for their said business, under the provisions of the statute of Tennessee of April 4, 1881, (Sess. laws 1881, c. 96, § 9, 111, 113,) imposing a tax upon factors, brokers, buyers or sellers on commission, or otherwise, doing business within the State, or, if no capital be so invested, then upon the gross yearly commissions, charges or compensation for said business. During the year for which they took out licenses all the sales negotiated by F. were made on behalf of principals residing in other States, and the goods so sold were, at the times of the sales, in other States, to be shipped to Tennessee as sales should be effected. During the same time a large part of the commissions of C. & Co. were derived from similar sales. They had no capital invested in their business. At the expiration of the year they applied for a renewal of their license. As they had made no return of sales, and no payment of percentage on their commission, the application was denied. They filed a bill to restrain the collection of the percentage tax for the past year, and also to restrain any interference with their current business, claiming that the tax was a tax on interstate commerce. *Held,*

(1) That if the tax could be said to affect interstate commerce in any way it did so incidentally, and so remotely as not to amount to a regulation of such commerce;

Statement of the Case.

(2) That under the circumstances the complainants could not resort to the court, simply on the ground that the authorities had refused to issue a new license without the payment of the stipulated tax.

Robbins v. *Shelby County Taxing District*, 120 U. S. 489, examined and distinguished from this case.

This case having been submitted on briefs, the submission was set aside by the court, and an oral argument ordered. When the case was reached neither party appeared by counsel, but an offer was again made to submit on the briefs. The court thereupon ordered the case dismissed for want of prosecution in the manner directed by its previous order; but subsequently this dismissal was set aside on motion, and argument was heard.

THIS case was submitted January 4, 1889, under the 20th rule. On the 4th of February, 1889, the submission was set aside, and the case was restored to the docket, to stand for oral argument. On the 6th of November, 1891, it was assigned for argument. When reached on the 24th of that month, an offer was again made to submit on the briefs. The court thereupon ordered the case dismissed for failure to prosecute it in the manner directed by the court.

Mr. W. Hallett Phillips, December 21, 1891, on behalf of the plaintiffs, moved the court to rescind the order dismissing the cause, to restore the same on the docket, and to set it down for oral argument, and, in support of the motion, submitted the following statement:

"The cause was set down at the present term for oral argument at a day certain. Counsel not then appearing, it was, on November 24, 1891, ordered that the cause be dismissed for want of prosecution in the manner directed.

"The court stated as the ground of its action that counsel for plaintiffs in error had declined to comply with its order.

"I am requested to state by the counsel referred to that they disclaim any purpose to disregard the order, and to express their extreme regret that the court should have taken a different view.

"Counsel, not being familiar with the practice of this court in such matters, supposed that the order setting down the cause for argument was intended to invite an oral discussion and not to direct one.

"While their error may not be regarded as a legal justifica-

tion, they trust it may be sufficient to show that their action was not intended as a discourtesy to the court or an intentional disobedience of its authority.

"Plaintiffs in error represent that the matter involved is of much consequence to them and others similarly situated.

"The case involves an important constitutional question, which it is hoped may receive the final decision of your honors.

"Arrangements have been made with counsel to argue the case, if the court, in its indulgence, should accord the opportunity."

The cause was thereupon restored to the docket, and was duly argued. The case, as stated by the court, was as follows:

This was a bill filed in the Chancery Court of Shelby County, Tennessee, by C. L. Ficklen, and Cooper & Company, against the taxing district of Shelby County, and Andrew J. Harris, County Trustee.

The bill alleged that complainants were "commercial agents or merchandise brokers located within the taxing district of Shelby County, where their respective firms rent a room for the purpose of keeping and, at times, exhibiting their samples, and carrying on their correspondence with their respective principals; that they use no capital in their business; that they handle or deal in no merchandise, and are neither buyers nor sellers; they only engage in negotiating sales for their respective principals; they do precisely the same business that commercial drummers do, the only difference being that they are stationary, while the commercial drummers are transitory, and go from place to place and secure a temporary room at each town or city in which to exhibit their samples. That each solicits orders for the sales of the merchandise of their respective principals and forwards the same to them, when such orders are filled by shipping the goods direct to the purchasers thereof in the county of Shelby."

It was then averred that all of the sales negotiated by complainant Ficklen were exclusively for non-resident firms, who resided and carried on business in other States than Tennessee, and all the merchandise so sold was in other States than Ten-

nessee, where the sales were made, and was shipped into Tennessee, when the orders were forwarded and filled.

That at least nine-tenths of the sales negotiated and effected by complainants Cooper & Company, and at least nine-tenths of their gross commissions, were derived from merchandise of non-resident firms or persons, and which merchandise was shipped into Tennessee, from other States, after the sales were effected.

That section 9, chapter 96, of the Acts of 1881, of Tennessee, (Sess. laws of 1881, pp. 111, 113,) made subsection 17 of section 22 of the Taxing District Acts, (Taxing District Digest 50,) provides:

"Every person or firm dealing in cotton, or any other article whatever, whether as factor, broker, buyer or seller, on commission or otherwise, ($50) fifty dollars per annum, and in addition, every such person or firm shall be taxed *ad valorem* (10 cts.) ten cents on every one hundred dollars of amount of capital invested or used in such business; *Provided, however*, that if such person or firm carry on the cotton or other business in connection with the grocery or any other business, the capital invested in both shall only be taxed once; but such person or firm must pay the privilege tax for both occupations; *And provided, further*, that if the persons taxed in this subsection have no capital invested, they shall pay 2½ per cent on their gross yearly commissions, charges or compensations for said business, and at the time of taking out their said license, they shall give bond to return said gross commissions, charges or compensation to the trustee at the end of the year, and at the end of the year they shall make return to said trustee accordingly, and pay to him the said 2½ per cent."

Complainants charged that, as they were neither dealers, buyers nor sellers, but only engaged in negotiating sales for buyers, they were not embraced within the meaning of said section, and further stated that they had each heretofore paid the privilege tax and the income tax, except for the year 1887, and had tendered the privilege tax of $50 and costs of issuing license for the year 1888 to the trustee, who refused to accept

the same unless complainants would also pay the income tax for the year 1887.

From the bill and exhibits attached it appeared that complainants in January, 1887, each paid the sum of $50 for the use of the taxing district, and executed bonds agreeably to the requirements of the law in that behalf, and received licenses as merchandise brokers within the limits of the district for the year 1887, and that in January, 1888, they tendered, as commercial brokers, to the trustee fifty dollars and twenty-five cents, each, as their privilege tax and charges for the year 1888, which he refused to accept because they refused to pay for the year 1887 two and one-half per cent upon their gross commissions derived from their business for the year 1887, although they executed bonds in January, 1887, to report said gross commissions.

Complainants charged that the law in question was in violation of the commerce clause of the Constitution of the United States and also of the Constitution of Tennessee, and prayed as follows:

"That an injunction issue to restrain the defendants or either of them from instituting any suit or proceeding against them or either of them for the collection of said 2½% tax upon their respective gross commissions from their said business or from issuing any warrant for their arrest for their failure to pay the same for the year 1887, and that defendants be also restrained from in any way interfering with them in the carrying on their said business for the year 1888; and upon final hearing they, the defendants, be restrained perpetually from collecting from them or either of them said 2½ per cent tax upon their said gross commissions from their said business, and from collecting said privilege tax of $50, and they pray for general relief, and will ever pray," etc.

To this bill the defendants filed a demurrer, which was overruled by the chancellor, and, the defendants electing to stand by it, a final decree was entered, making the injunction perpetual in behalf of Ficklen as to the entire tax, including the $50; and, as to Cooper & Company, adjudging that they were legally bound to pay the sum of $50 and the tax of two

and one-half per cent on their commissions, to the extent that those commissions were upon sales of property owned by residents of Tennessee, and perpetuating the injunction in all other respects.

From this decree the defendants prayed an appeal to the Supreme Court of the State, and that court decided that the act of the legislature in question was not in violation of the state constitution, and, further, that "inasmuch as it appears from the bill that the complainants at the beginning of the year 1887 applied for and received, respectively, license to carry on the business of commission brokers without qualification, and that they, the complainants, held said license throughout the year 1887, complainants were chargeable with the privilege tax, as fixed by the act aforesaid, without regard to the amount or character of the business carried on under said licenses or the places of residence of their principals, and that complainants must have reported and paid 2½ per cent on the gross commissions received by them during the year 1887 before they could have become entitled to licenses for the year 1888. . . . That when at the beginning of the year 1888 the complainants applied for license as merchandise brokers they were rightfully required (1) to report and pay 2½ per cent on their commissions received during 1887, and (2) to pay the fixed charge of $50 and give bond to report their gross commissions at the end of the year 1888. . . . That the said act is not, as to these complainants, violative of article first, sec. 8, of the Constitution of the United States, by which the power to regulate commerce between the States is conferred upon the Congress of the United States; and . . . that complainants, having applied for, accepted and held for and during the year 1887 unqualified license as commission brokers, and having applied for the same unqualified license for the year 1888, cannot question the validity of the said act as being in conflict with said provisions of the Constitution of the United States, for that the said complainants were not entitled to the said license upon the facts stated in the bill, whether the business actually done and theretofore conducted by them was or was not exonerated from said

privilege tax under the said provision of the Federal Constitution."

The decree of the chancellor was accordingly reversed, the demurrer sustained, and the bill dismissed, whereupon a writ of error was taken out from this court.

Mr. W. Hallett Phillips for plaintiffs in error.

The single question is whether the negotiation in one State, by samples, of sales of goods in another State, can be taxed by the State in which the negotiation is carried on. Is not a state license or tax on such an occupation an unconstitutional restriction upon the business or calling of introducing into one State the goods and wares that are manufactured in another? It seems to us that this controversy was adjudicated in *Robbins* v. *Shelby County*, 120 U. S. 490. In that case this court declared that the negotiations of sales of goods which are in one State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. It was also agreed that to tax the offer to sell such goods before they are brought into the State is a tax on interstate commerce itself. The very ground of the decision was that the Federal Constitution prevents the levy of a state tax, or the requirement of a license for making negotiations in the conduct of interstate business. It has frequently been decided by this court, and more especially in late years, that a tax which operates as a burden against the introduction and sale of the products of other States is a regulation of interstate commerce, and a tax to do business is a tax on the business to be paid by and out of the business. In the present case the effect and operation of the tax is to exact a duty for permission to exercise interstate commerce within the State of Tennessee. It is for the privilege of making contracts within the county of Shelby to sell merchandise, the product of other States, for merchants of such States to residents of Tennessee, that the tax is exacted. It is for the faculty of doing that business that the license is required. Now there can be no question but that a law requiring a person to take out a license in order to confer upon him the faculty or privilege of conducting a busi-

ness, is a regulation of that business; and when the law requires the plaintiffs to take out a license in order to acquire the privilege of conducting interstate commerce, that is a regulation of interstate commerce. Here business between States is conducted by means of agents called merchandise brokers, and it is not in the power of one State to prohibit such business, unless a license is taken from the State in which the agent is located and where the business is partially transacted. It is the *business* which is taxed and it is that fact which constitutes the invalidity of the tax. Its constitutionality can in no wise depend on the fact that the agent resided in the State of Tennessee, or that the business was partially transacted there. If the business was interstate, it was not subject to exaction in any form by the State. The validity of a tax must necessarily be determined by the nature of the business taxed, and not by the residence of the agent upon whom the tax is in form levied. These principles have been so frequently declared by the court as to make them axioms of constitutional jurisprudence. It is argued that an exception to such general rules is created by the particular facts of this case. It is said that the business transacted by the plaintiffs in error was a general business, and that they were empowered to do a state, as well as an interstate business, and that the fact that one of the parties did entirely an interstate business, and the other did almost entirely such a business, cannot exempt them from regulation and taxation by the State, since they were authorized to do also a business confined to the State. It seems to us that this argument simply raises the question that the law made no discrimination as against interstate business. In other words, it imposes a tax and exacts a license for doing the business of a merchandise broker. But does the fact that under a license demanded by the law, a strictly local business as well as interstate business might be transacted, confer any right upon the State of Tennessee to demand a license tax for doing interstate business or empower it to levy a tax upon the gross proceeds of such interstate business? A negative answer is furnished by the decisions of this tribunal. The tax is not less objectionable, the nature of the exaction is not changed,

because it does not discriminate in favor of domestic business.

If the fact that Ficklen & Company might have done business purely internal to the State of Tennessee, affords excuse for the State of Tennessee levying a tax upon the interstate business transacted by them, what becomes of the reasoning of this court in its decisions regarding the taxation of express companies, telegraph companies and of other institutions and persons engaged in the transaction of interstate commerce? In each of these instances the business done or which might have been done was of a general nature, partly domestic and partly interstate, but this court held that that fact afforded no justification for a State levying a tax upon interstate commerce transactions. Take for instance the case of *Telegraph Co.* v. *Texas*, 105 U. S. 460, a tax on the business of telegraphing. There the legislature had imposed an occupation tax upon every telegraph company doing business within the State, of one cent for every message sent and one-half for every message less than full rate. The company did a general business, a large portion of its messages being confined to the State of Texas, and a large portion going beyond the boundaries of that State. The company was required by the Texas statute, to report the number of all the messages sent, and the comptroller of the State was required to exact the tax according to the reports. The company at first submitted to the tax, but afterwards it refused to pay it further, and action was brought by the State to compel the company to make payment. The answer of the company was that while it was transacting business within the State of Texas a large portion of its business constituted interstate commerce, and was therefore free from state taxation. This contention was upheld and as *to such business* the tax was declared to be unconstitutional. The State was left free to exact this tax as to all business of a purely domestic character.

It has been supposed that the decisions of this court holding that a State had power to tax all property within its *situs*, although employed in interstate commerce, had some bearing upon the controversy, but it is not perceived that this is so, for the vital distinction is that in the one case the tax is on prop-

erty situated within the State, while in the present case, the tax is for the privilege of introducing the merchandise of other States within the State. It is simply a tax on account of the negotiation of sales of non-resident merchandise, and a license for the privilege of doing interstate business. As has been frequently emphatically declared by this court, a State cannot make it a state privilege to transact interstate commerce, but, as said in the Robbins case, and as it has been frequently declared before, when goods are once sent from one State to another State for sale or in consequence of a sale, they become part of its general property and amenable to its laws. The point has also been made that this court in the Robbins case held, that the State of Tennessee had a conceded right to tax Tennessee drummers, but it is to be observed that the very paragraph in which this announcement is made, shows that the court intended by this expression to denote drummers transacting the domestic business of Tennessee; for the court said as a reason for this announcement, that the State might tax its own *internal* commerce, but that did not give it any right to tax interstate commerce. Nor does it seem to us that the reference made by opposing counsel to the recent decision of this court in *Maine* v. *Grand Trunk Railway*, 142 U. S. 217, affords any argument in favor of the present tax. There, the tax was for the privilege of a foreign corporation transacting business within the State of Maine. This court declared that the tax in question was an excise tax for the privilege of operating a railroad within the State. The railroad within the State was constructed under the franchise of the State, and as declared by this court, the privilege rested entirely in the discretion of the State; it could be conferred upon such conditions as the State in its judgment might deem most conducive to its interests. The character of the tax or its validity did not depend upon the mode adopted in fixing its amount or the times of its payment. Therefore, while in form, the tax was to be ascertained by a reference to the gross receipts, this court was careful to say that this was merely for the purpose of ascertaining the value of the business done, and thus obtain a guide to the amount of the excise which should be

levied, and that there was no levy on the receipts themselves either in form or in fact. If the amount ascertained had been specifically imposed in the first instance, the court observed, no objection to its validity would have been pretended. In the case at bar, there can be no pretence but that the tax is a tax on the gross receipts of the business, both in form and in effect and inasmuch as in the case of one of the parties that business was wholly interstate, and in the case of another of the parties, almost entirely so, the case falls within the settled adjudications of this court, that a tax cannot be laid on the receipts derived from interstate business. Nor are the rights of the plaintiffs in error in anywise prejudiced by the fact that they had in the past paid the tax, or that they had for the year previous to filing the bill, given a bond to return the amount of the proceeds of their business for that year. The object of the bill filed in 1888, was to enable these parties to transact their interstate business for the future free from state interference, whether by way of taxation or license, and thus protect their constitutional rights. And the specific prayer was not only that the defendant should be restrained from issuing warrants for their arrest for their failure to pay the tax on the commissions for 1887, or from instituting suit against them on that behalf, but it also prayed an injunction against state interference in the carrying on their interstate business for the year 1888, and for all future time. Some intimation has been made in the opposing argument that the parties should have contented themselves with doing their interstate business, and should not have held themselves out as general merchandise brokers. But they could not have transacted their interstate business without either taking out a license under the law, or subjecting themselves to the criminal laws of the State. The taxing act itself declared every such business to be a taxable privilege, and the exercise of any such privilege without first paying the tax was declared to be a misdemeanor. We submit that the plaintiffs in error were not compelled to adopt the alternative of violating the law of the State or refraining from doing business. The fact that they had in the past paid the license fee for transacting their business, or had given a bond

for the year 1887, cannot estop them from showing the unconstitutionality of this legislation. We cannot perceive what possible effect this can have upon their right to demand the interposition of the judiciary to prevent the future interference by the State with their constitutional rights. We cannot see how the court can uphold the decision of the Supreme Court of Tennessee, without overruling the underlying principle of the Robbins case. We can perceive no distinction between that case and this except in the fact that in the Robbins case the party negotiating the sale was transitory in Tennessee, but in the present case permanent. The fact that the business was partly carried on within the State of Tennessee does not subject it to state burden, if in its nature it is interstate business, because the power of the general government to regulate commerce does not stop at the borders of a State but permeates it. Formerly, it is true, it was the opinion of this court that a tax on business carried on within the State, and without discrimination between its citizens and citizens of other States, might be constitutionally imposed. This principle was the basis of the decision in the case of *Osborne* v. *Mobile*, 16 Wall. 479, but that decision has been directly overruled, and the principle no longer constitutes the doctrine of this court. *Leloup* v. *Mobile*, 127 U. S. 640, 645. It is true, Judge Bradley in his enumeration in the Robbins case, of the subjects of state taxation, specifies taxation upon avocations and employments pursued within the State not directly connected with foreign or interstate commerce. But here the business as declared in that same decision, *constitutes interstate commerce*, and therefore, must be free. As declared by this court in *Fargo* v. *Michigan*, 121 U. S. 230, 244, the proposition had often been made that a State can by way of a tax on business transacted within its limits regulate such business, and that proposition has been made as a defence to the allegation that the taxation was an interference with interstate commerce. But the court had always said when the business *was commerce itself* and *commerce among the States*, the constitutional provision could not thereby be evaded. It is true, in the present case, the tax is in form a tax on the broker, but the inquiry must be upon what does the tax really

fall? The Tennessee law answers this inquiry; the tax is one on *the business done.* The constitutionality of a state tax cannot be determined by the form or agency through which it is collected, but by the subject upon which the burden is laid. *State Freight Tax Case*, 15 Wall. 232. The decision of this court in *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, shows that a tax on gross receipts derived from interstate commerce is void, and so likewise a tax on the "gross receipts derived from business done in this State" is void when levied on a telegraph company as far as concerns messages carried either into the State from without, or from within the State to another State. *West. Un. Telegraph Co.* v. *Alabama*, 132 U. S. 472, 477. The case of *McCall* v. *California*, 136 U. S. 104, 110, is in direct line with the preceding decisions. There the tax was for the privilege of maintaining an agency within the State of California, for soliciting business for railroads, and the business actually done by the agent taxed, was that of soliciting business for an interstate railroad. The tax was declared void, as being a tax upon a means or occupation of carrying on interstate business pure and simple. Without a further discussion of cases, we refer to those of *Norfolk &c. Railroad* v. *Pennsylvania*, 136 U. S. 114, where it was held that a State could not exact a license for the privilege of keeping a railroad office within the State, when the business done or largely done by the railroad was interstate commerce. The tax was one upon a means or instrumentality of such commerce. Also to *Crutcher* v. *Kentucky*, 141 U. S. 47, where it was held, that a license could not be required of agents of express companies before they were authorized to carry on business within the State, and this for the reason that it embraced interstate business as well as business wholly within the State, and therefore not within the power of the State.

In conclusion, we content ourselves with a particular reference to *Leloup* v. *Mobile*, *supra*, where it was determined that the State of Alabama could not compel a telegraph company to pay a license fee for the transaction of business within the State, although the telegraph company did a *general business.* The determination of the court was that the tax affected the

entire business of the company, interstate as well as internal, and *for that reason* it was void.

Mr. Henry Craft filed a brief for plaintiffs in error.

Mr. S. P. Walker for defendant in error.

It appears by the bill that all the principals of Ficklen & Co. are residents of other States; and that nine-tenths of the business of Cooper & Co. is done for principals of other States. Upon this state of facts it was held by the chancellor that Ficklen & Co. were not liable, either for the fixed charge of $50, or the 2½ per cent on commission; and that Cooper & Co. were liable for the fixed charge of $50 and for one-tenth of the 2½ per cent on commissions. This ruling, based on the doctrine of non-interference with interstate commerce, was reversed by the Supreme Court of the State, and the plaintiffs in error adjudged liable for the whole tax, as fixed by the statute.

This court from the case of *Brown* v. *Maryland*, 12 Wheat. 419, to the very recent cases of *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Leloup* v. *Port of Mobile*, 127 U. S. 640; and *Crutcher* v. *Kentucky*, 141 U. S. 47, has so frequently considered the question involved in this case, that it is not our purpose to attempt an extended review or discussion of the authorities. We shall only, therefore, as briefly as possible, undertake to show that the tax in question is not a regulation of interstate commerce.

I. The tax in question is (as was held by the state court) a privilege tax, graduated by the amount of commissions received. If, as complainants contend, they were not taxable, then *they did not need and should not have taken out the license.* Having taken it out they must pay what they in effect *agreed* to pay for it.

It appears from the bill that complainants are, and hold themselves out as, general merchandise brokers. For 1887 they took out license as such. For 1888 they applied for the same character of license.

The fact that their principals are non-residents of the State

is a fact which, though true on the day the bill was filed, might not be true the next day. If, therefore, plaintiffs are right in their contention, the true method of procedure by them would have been simply to have contented themselves with *private agencies* of given non-resident principals, instead of assuming the rôle of general "commission merchants."

The case is not within the principles of the opinion in *Robbins* v. *Shelby County*, 120 U. S. 489. (*a*) Robbins was the representative of *one* non-resident firm, and the case was treated as if his principals had come into the State to make sales, and the State had undertaken to seize and tax them. (*b*) The tax was held to be in effect not a tax on Robbins, but on his principals. Here the reverse is clearly true.

So, too, it is distinguishable from *Cook* v. *Pennsylvania*, 97 U. S. 566. In that case, the State of Pennsylvania exacted a certain percentage of the *proceeds* of foreign goods sold at auction, for the privilege of thus selling them; and the tax was held to be a duty on imports, and unconstitutional, under the principles of the leading case of *Brown* v. *Maryland*, 12 Wheat. 419. In this case the State of Tennessee requires that every person pursuing the vocation of merchandise broker, shall pay a vocation tax of two and one-half per cent of the commissions earned. Can the tax be disputed, on the fact that the goods sold were, at the time of the sale, in another State, and that, as between the principals — buyer and seller — the transaction was one of interstate commerce? Is the State's exaction so directly connected with the commerce as to make it a burden upon or a regulation of interstate commerce? We submit that it is not a tax upon the commerce between the States, but that it is what it purports to be — a tax upon the broker himself, graduated by the amount realized by him from the transaction, and that, except in that indirect and remote way, which this court has never allowed to affect the validity of state taxation, it has no tendency to prevent or burden the interstate commerce itself.

The ultimate question being whether or not the power of the State to lay a vocation tax on one of its resident citizens, graduated according to the profits realized by him from the

pursuit of that vocation, can be denied on the ground that the citizen is engaged, wholly or partially, in negotiating sales between resident and non-resident merchants of goods situated in another State, we will examine such of the decisions of this court as seem to bear most pertinently on the question, without in the least attempting an exhaustive citation or analysis of all the cases arising under the interstate commerce clause of the Constitution.

This court has often ruled that the State has power to tax all property having a *situs* within its limits, and that property employed in interstate commerce is not on that account withdrawn from the power to tax. There must not, however, be any discrimination against such property because it is so used, nor against property brought from other States or countries because of that fact. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 206; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117; *Woodruff* v. *Parham*, 8 Wall. 123.

In the latter case the court said: "The merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all state, county and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the State nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens. These cases are mentioned as illustrations. But it is obvious that if articles brought from one State into another are exempt from taxation, even under the limited circumstances laid down in *Brown* v. *Maryland*, the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible."

Conceding that this case is not in harmony with later utter-

ances of the court upon the exact point decided, the language above quoted is fully supported by such cases, so far as concerns the general proposition that the States have full power of taxation over all property within their limits, subject only to the qualifications already shown. The *subjects of commerce* are not exempt from state taxation, provided they be not taxed *as such* — taxed in such manner as that the burden is unequal because of the use to which they are put.

II. Advancing from the question of the power to tax property to that of taxing vocations, business, franchises, we first notice the case of *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365, 374. In that case the municipality imposed an annual license fee of $100 on the ferry company, whose boats plied between East St. Louis and St. Louis. The company was chartered by the State of Illinois and domiciled in East St. Louis, the case differing in that respect from the case of *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196. The court said: "The exaction of a license fee is an ordinary exercise of the police power by municipal corporations. When, therefore, a State expressly grants to an incorporated city, as in this case, the power to license, tax and regulate ferries, the latter may impose a license tax on the keepers of ferries, although their boats ply between landings lying in two different States, and the act by which this exaction is authorized will not be held to be a regulation of commerce."

The cases of *Asher* v. *Texas*, 128 U. S. 129, and *Stoutenberg* v. *Hennick*, 129 U. S. 141, were identical, in all essential particulars, with that of *Robbins* v. *Shelby County*.

In the case of *McCall* v. *California*, 136 U. S. 104, 113, the tax was "for every railroad agency, $25 per quarter." McCall became personally involved merely by reason of his representation of the railroad company, and the effort to enforce the tax against him personally by fine and imprisonment. The court, in the opinion in that case, commented upon the case of *Smith* v. *Alabama*, 124 U. S. 465, where the statute in question was one imposing a license tax on locomotive engineers, and said: "We held, however, that the statute in question was not in its nature a regulation of commerce;

that so far as it affected commercial transactions among the States *its effect was so indirect, incidental and remote* as not to burden or impede such commerce, and that it was not therefore in conflict with the Constitution of the United States or any law of Congress." The California tax on the railroad agency, an agency that was instituted "to increase, and [that] doubtless did increase, its interstate passenger traffic," was held invalid, for the reason that "according to the principles established by the decisions of this court [it was] a tax upon a means or an occupation of carrying on interstate commerce, pure and simple."

Perhaps the doctrine of the State's power to tax and its proper limits are found best stated in *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 341, 342. This court there said: "The tax in the present case is laid upon the gross receipts for transportation *as such*. Those receipts are followed and caused to be accounted for by the company, dollar for dollar. It is those specific receipts, or the amount thereof, (which is the same thing,) for which the company is called upon to pay the tax. They are taxed, not only because they are money, or its value, but *because they were received for transportation*. No doubt a ship-owner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it and seriously affects it. A review of the question convinces us that the first ground on which the decision in *State Tax on Railway Gross Receipts* was placed is not tenable; that it is not supported by anything decided in *Brown* v. *Maryland;* but, on the contrary, that the reasoning in that case is decidedly against it.

"The second ground on which the decision referred to was based was that the tax was upon the franchise of the corporation granted to it by the State. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because by the terms of the act it was laid equally on the corporations of other States doing business in Pennsylvania. If intended as a tax on the franchise of doing business, which in this case is the business of transportation in carrying on interstate or foreign commerce, it would clearly be unconstitutional. . . . Interstate commerce, when carried on by corporations, is entitled to the same protection against state exactions which is given to such commerce when carried on by individuals."

In accord with the distinctions here laid down, this court, in the case of *Maine* v. *Grand Trunk Railway*, 142 U. S. 217, sustained a statute of the State of Maine as being a valid tax upon the corporate franchise — the law imposing a tax on the franchise according to the amount of the gross receipts in the State, such amount to be ascertained by dividing the total gross receipts by the total number of miles operated, and multiplying that amount by the number of miles operated in the State.

Tested by these decisions, is the state tax here in question void? It is not a tax on a non-resident merchant, through the resident broker. It is not a tax on the goods, or on the proceeds of the goods sold. It is an occupation or privilege tax, exacted of a resident citizen pursuing the vocation of a general merchandise broker, graduated in amount by the value of the business transacted; or it may be considered in the light simply of an income tax on the resident citizen. The plaintiff is not specially the representative or accredited agent of any one non-resident merchant or manufacturer. He has a regular office, holds himself out as a general broker, and, in his line of business, is ready to serve all comers.

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

In *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489,

it was held that section 16 of c. 96 of the laws of Tennessee of 1881, enacting that: "All drummers and all persons not having a regular licensed house of business in the Taxing District of 'Shelby County' offering for sale, or selling goods, wares, or merchandise therein by sample, shall be required to pay to the county trustee the sum of $10 per week, or $25 per month for such privilege," so far as it applied to persons soliciting the sale of goods on behalf of individuals or firms doing business in another State, was a regulation of commerce among the States and violated the provision of the Constitution of the United States which grants to Congress the power to make such regulations. The question involved was stated by Mr. Justice Bradley, who delivered the opinion of the court, to be: "Whether it is competent for a State to levy a tax or impose any other restriction upon the citizens or inhabitants of other States, for selling or seeking to sell their goods in said State before they are introduced therein," (p. 494;) and it was decided that it was not. At the same time it was conceded that commerce among the States might be legitimately incidentally affected by state laws, when they, among other things, provided for "the imposition of taxes upon persons residing within the State or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the Constitution and laws of the United States." And it was further stated: "To say that the tax, if invalid as against drummers from other States, operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument, because the State is not bound to tax its own drummers; and if it does so whilst having no power to tax those of other States, it acts of its own free will, and is itself the author of such discrimination. As before said, the State may tax its own internal commerce; but that does not give it any right to tax interstate commerce," (p. 499).

In the case at bar the complainants were established and did business in the Taxing District as general merchandise brokers, and were taxed as such under section nine of chapter ninety-

six of the Tennessee laws of 1881, which embraced a different subject matter from section sixteen of that chapter. For the year 1887 they paid the $50 tax charged, gave bond to report their gross commissions at the end of the year, and thereupon received, and throughout the entire year held, a general and unrestricted license to do business as such brokers. They were thereby authorized to do any and all kinds of commission business and became liable to pay the privilege tax in question, which was fixed in part and in part graduated according to the amount of capital invested in the business, or if no capital were invested, by the amount of commissions received. Although their principals happened during 1887, as to the one party, to be wholly non-resident, and as to the other, largely such, this fact might have been otherwise then and afterwards, as their business was not confined to transactions for non-residents.

In the case of Robbins the tax was held, in effect, not to be a tax on Robbins, but on his principals; while here the tax was clearly levied upon complainants in respect of the general commission business they conducted, and their property engaged therein, or their profits realized therefrom.

No doubt can be entertained of the right of a state legislature to tax trades, professions and occupations, in the absence of inhibition in the state constitution in that regard; and where a resident citizen engages in general business subject to a particular tax the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another State, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution.

The language of the court in *Lyng* v. *State of Michigan*, 135 U. S. 161, 166, was: "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs

solely to Congress." But here the tax was not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business; and complainants voluntarily subjected themselves thereto in order to do a general business.

In *McCall* v. *California*, 136 U. S. 104, it was held that: "An agency of a line of railroad between Chicago and New York, established in San Francisco for the purpose of inducing passengers going from San Francisco to New York to take that line at Chicago, but not engaged in selling tickets for the route, or receiving or paying out money on account of it, is an agency engaged in interstate commerce; and a license tax imposed upon the agent for the privilege of doing business in San Francisco is a tax upon interstate commerce, and is unconstitutional." This was because the business of the agency was carried on with the purpose to assist in increasing the amount of passenger traffic over the road, and was therefore a part of the commerce of the road, and hence of interstate commerce.

In *Philadelphia and Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 345, Mr. Justice Bradley, speaking for the court, said: "The corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government." And this of course is equally true of the property, the business and the income of individual citizens of a State. It is well settled that a State has power to tax all property having a *situs* within its limits, whether employed in interstate commerce or not. It is not taxed because it is so employed, but because it is within the territory and jurisdiction of the State. *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196.

And it has often been laid down that the property of corporations holding their franchises from the government of the United States is not exempt from taxation by the States of its *situs*. *Railroad Company* v. *Peniston*, 18 Wall. 5; *Thomson*

v. *Pacific Railroad*, 9 Wall. 579; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530.

So in *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365, 374, where an annual license fee was imposed on the ferry company by the city of East St. Louis, the company having been chartered by the State of Illinois and being domiciled in East St. Louis, its boats plying between that place and St. Louis, Missouri, the court said: "The exaction of a license fee is an ordinary exercise of the police power by municipal corporations. When, therefore, a State expressly grants to an incorporated city, as in this case, the power 'to license, tax and regulate ferries,' the latter may impose a license tax on the keepers of ferries, although their boats ply between landings lying in two different States, and the act by which this exaction is authorized will not be held to be a regulation of commerce."

Again, in *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217, we decided that a state statute which required every corporation, person or association operating a railroad within the State to pay an annual tax for the privilege of exercising its franchise therein, to be determined by the amount of its gross transportation receipts, and further provided that when applied to a railroad lying partly within and partly without a State, or to one operated as a part of a line or system extending beyond the State, the tax should be equal to the proportion of the gross receipts in the State, to be ascertained in the manner provided by the statute, did not conflict with the Constitution of the United States. It was held that the reference by the statute to the transportation receipts and to a certain percentage of the same, in determining the amount of the excise tax, was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied. In this respect the tax was unlike that levied in *Philadelphia Steamship Company* v. *Pennsylvania*, *supra*, where the specific gross receipts for transportation were taxed as such, taxed "not only because they are money, or its value, but because they were received for transportation."

Since a railroad company engaged in interstate commerce is liable to pay an excise tax according to the value of the business done in the State, ascertained as above stated, it is difficult to see why a citizen doing a general business at the place of his domicil should escape payment of his share of the burdens of municipal government because the amount of his tax is arrived at by reference to his profits. This tax is not on the goods, or on the proceeds of the goods, nor is it a tax on non-resident merchants; and if it can be said to affect interstate commerce in any way it is incidentally, and so remotely as not to amount to a regulation of such commerce.

We presume it would not be doubted that, if the complainants had been taxed on capital invested in the business, such taxation would not have been obnoxious to constitutional objection; but because they had no capital invested, the tax was ascertained by reference to the amount of their commissions, which when received were no less their property than their capital would have been. We agree with the Supreme Court of the State that the complainants having taken out licenses under the law in question to do a general commission business, and having given bond to report their commissions during the year, and to pay the required percentage thereon, could not, when they applied for similar licenses for the ensuing year, resort to the courts because the municipal authorities refused to issue such licenses without the payment of the stipulated tax. What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise upon this record.

The judgment of the Supreme Court is

Affirmed.

Mr. Justice Harlan dissenting.

It seems to me that the opinion and judgment in this case are not in harmony with numerous decisions of this court. I do not assume that the court intends to modify or overrule any of those cases, because no such purpose is expressed. And

yet I feel sure that the present decision will be cited as having that effect.

In *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 496, 497, it was held that Tennessee could not require, even from its own people, a drummer's license for soliciting the sale of goods there on behalf of individuals or firms doing business in another State. This rule, the court said, "will only prevent the levy of a tax, or the requirement of a license, for making negotiations for the conduct of interstate commerce, and it may well be asked where the State gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States marshal. The mere calling the business of a drummer a privilege cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country are citizens of the United States, as well as of the individual States, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them." Again: "It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers — those of Tennessee and those of other States; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of *The State Freight Tax*, 15 Wall. 232. The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case, it is an act of foreign, and, in the other, of interstate, commerce, both of which are subject to regulation by Congress alone."

In *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, a tax, imposed in Pennsylvania, upon the gross receipts of a steamship company, incorporated under the laws of that State, such gross receipts being derived from the transportation of persons and property by sea, between different States, and to and from foreign countries, was held to be a regulation of interstate and foreign commerce, and, therefore, unconstitutional.

In *Leloup* v. *Port of Mobile*, 127 U. S. 640, 648, an ordinance of that port requiring a license tax from telegraph companies was held to be invalid in its application to a company having a place of business in Mobile, and being engaged there in the occupation of transmitting messages from and to points in Alabama to and from points in other States. This court, overruling *Osborne* v. *Mobile*, 16 Wall. 479, said that "no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

In *Asher* v. *Texas*, 128 U. S. 129, a state law exacting a license tax to enable a person, within the State, to solicit orders and make sales there for a person residing in another State, was held to be repugnant to the commerce clause of the Constitution.

In *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 147, the question was whether an act passed, in 1871, by the legislative assembly of the District of Columbia, requiring commercial agents engaged in offering merchandise by sample to take out and pay for a license, was invalid when applied to persons soliciting in the District the sale of goods on behalf of individuals or firms doing business outside of the District. Referring to the particular clause of the act upon which it was attempted to sustain the case, this court said: "This provision was manifestly regarded as a regulation of a purely municipal character, as is perfectly obvious, upon the principle of *noscitur*

a sociis, if the clause be taken as it should be, in connection with the other clauses and parts of that act. But it is indistinguishable from that held void in *Robbins* v. *Shelby County Taxing District*, and *Asher* v. *Texas*, 128 U. S. 129, as being a regulation of interstate commerce, so far as applicable to persons soliciting, as Hennick was, the sale of goods on behalf of individuals or firms doing business outside of the District."

In *McCall* v. *California*, 136 U. S. 104, it was held that a license tax imposed by an ordinance enacted by the board of supervisors of the city and county of San Francisco upon an agent engaged at that city in the business of soliciting travel for a line of railroad between Chicago and New York was invalid under the commerce clause of the Constitution.

In *Norfolk &c. Railroad Co.* v. *Pennsylvania*, 136 U. S. 114, a tax imposed by Pennsylvania upon a railroad company incorporated in another State, and whose line extended from Philadelphia into other States, for the privilege of keeping an office in Pennsylvania, to be used by its officers, stockholders, agents and employés, was a tax upon commerce among the States, and therefore void.

In *Crutcher* v. *Kentucky*, 141 U. S. 47, the court adjudged to be void an act of the legislature of Kentucky, so far as it forbade foreign express companies from carrying on business between points in that State and points in other States, without first obtaining a license from the State.

The principles announced in these cases, if fairly applied to the present case, ought, in my judgment, to have led to a conclusion different from that reached by the court. Ficklen took out a license as merchandise broker and gave bond to make a return of the gross commissions earned by him. His commissions in 1887 were wholly derived from interstate business, that is, from mere orders taken in Tennessee for goods in other States, to be shipped into that State when the orders were forwarded and filled. He was denied a license for 1888 unless he first paid two and a half per cent on his gross commissions. And the court holds that it was consistent with the Constitution of the United States for the local authorities of the Taxing District of Shelby County to make it a condition

precedent of Ficklen's right to a license for 1888 that he should pay the required per cent of the gross commissions earned by him in 1887 in interstate business. This is a very clever device to enable the Taxing District of Shelby County to sustain its government by taxation upon interstate commerce. If the ordinance in question had, in express terms, made the granting of a license as merchandise broker depend upon the payment by the applicant of a given per cent upon his earnings in the previous year in interstate business, the court, I apprehend, would not have hesitated to pronounce it unconstitutional. But it seems that if the local authorities are discreet enough not to indicate in the ordinances under which they act their purpose to tax interstate business, they may successfully evade a constitutional provision designed to relieve commerce among the States from direct local burdens. The bond which Ficklen gave should not, in my opinion, be construed as embracing his commissions earned in business, upon which no tax can be constitutionally imposed by a State.

The result of the present decision is that while, under *Robbins* v. *Shelby County Taxing District*, a license tax may not be imposed in Tennessee upon drummers for soliciting there the sale of goods to be brought from other States; while, under *Leloup* v. *Mobile*, a local license tax cannot be imposed in respect to telegrams between points in different States; and while, under *Stoutenburgh* v. *Hennick*, commercial agents cannot be taxed in the District of Columbia for soliciting there the sale of goods to be brought into the District from one of the States, — the Taxing District of Shelby County may require, as a condition of granting a license as merchandise broker, that the applicant shall pay a license fee and, in addition, 2½ per cent upon the gross commissions received, not only in the business transacted by him that is wholly domestic, but in that which is wholly interstate.

For these reasons I am constrained to dissent from the opinion and judgment of the court in this case.

SESSIONS *v.* ROMADKA.

ROMADKA *v.* SESSIONS.

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

Nos. 262, 263. Argued March 30, 31, 1892. — Decided April 25, 1892.

An assignee in bankruptcy is not bound to accept the title to a patent for an invention, vested in the bankrupt at the time of the bankruptcy, if, in his opinion, it is worthless, or may prove to be burdensome and unprofitable; and his neglect for a year, during which he winds up the estate, to assume the ownership of such property, and his statement to a person desiring to purchase it that he has no power to do anything with it and that the bankrupt is the only one who can give title, are convincing proof of an election not to accept it.

It does not lie in the mouth of an alleged infringer of a patent to set up the right of an assignee in bankruptcy to the patent as against a title acquired from the bankrupt with the consent of the assignee.

Section 4917 of the Revised Statutes, which provides for disclaimers "whenever, through inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, a patentee has claimed more than that of which he was the original or first inventor or discoverer," and allows the patentee to "make disclaimer of such parts of the thing patented as he shall not choose to claim or hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent," is broad enough to cover disclaimers made to avoid the effect of having included in a patent more devices than can properly be made the subject of a single patent.

The power of a patentee to disclaim is a beneficial power, and ought not to be denied except when resorted to for a fraudulent and deceptive purpose.

The effect of delay by a patentee to make a disclaimer under Rev. Stat. § 4917 until after the commencement of an action for the infringement of his patent goes only to the recovery of costs.

Where the Revised Statutes adopt language of a previous statute which had been construed by this court, Congress must be considered as adopting that construction.

The invention patented by letters patent No. 128,925, issued July 9, 1872, to Charles A. Taylor for an improvement in trunks was novel and patentable; and the letters patent are infringed by the fasteners constructed in accordance with the descriptions in letters patent No. 145,817 dated December 23, 1873, and the improvements thereon described in letters

patent No. 163,828, dated April 10, 1875, both issued to Anthony V. Romadka.

The pioneer in an art, who discovers a principle which goes into almost universal use, is entitled to a liberal construction of his claim.

When a patented invention is infringed by its use upon another article of which it forms an inconsiderable part, taking the place of something previously serving the same uses, and there is no established royalty by which to measure the damages, they may be ascertained by finding the difference between the cost of the patented article and the cost of the article which it displaces; but this rule may be modified, if law and justice seem to require it.

When it is doubtful from the evidence whether the word "patented" could be affixed to a manufactured article, or whether a label should be attached with a notice of the patent, under the provisions of Rev. Stat. § 4900, the judgment of the patentees is entitled to weight in determining the question.

A defendant in a suit for the infringement of letters patent, who relies upon a want of knowledge on his part of the actual existence of the patent, should aver the same in his answer.

When an assignee in bankruptcy refuses to accept a transfer of a right of action existing in the bankrupt at the time of the bankruptcy, and abandons it to the bankrupt before the expiration of the time within which an assignee in bankruptcy could bring suit upon it, the right of action of the bankrupt and of a purchaser from him are governed by the general statute of limitations, and not by the rule prescribed for an assignee in bankruptcy.

THE court stated the case as follows:

This was a bill in equity by the appellant Sessions for the infringement of letters patent No. 128,925, issued July 9, 1872, to Charles A. Taylor, for an improvement in trunks.

The patent included several devices used in the manufacture of trunks. First, a yielding roller to be applied to the outside of the trunk; second, in spring catches to hold the trunk shut; third, in a brace of peculiar construction applied to the outside of the trunk for the purpose of holding up the lid; and, fourth, in a spring arm for supporting the tray when turned up. In the specification the patentee made the following statement with regard to the spring catch, which was the only feature of the invention claimed to have been infringed in this suit:

"Instead of providing the top of the trunk with the usual

straps for fastening it down, I attach to its front two spring catches, I, and to the top two tangs or plates, J, which lock into and are held by the catches. Each catch consists of a metal socket, *e*, provided with a hinged latch or hook, *f*, and with a flat spring, *g*, which bears against the lower end of the latch, and keeps its upper end pressed inward against the socket. The upper end of the latch or hook is provided with a prong, *i*, which extends through into the socket as shown in Fig. 4, the upper side of the prong being bevelled off, as shown. The tangs on the top or lid are provided with bevelled ends and with holes, or openings, as shown. When the top is pressed down, the tangs slide down into the sockets and the prongs, *i*, of the latches lock through them, in the manner shown in Fig. 4, so as to hold the top or lid down securely. In order to unlock latches it is only necessary to turn back the upper ends of the hooks or latches so as to draw the prongs out of the tangs. After the latches are turned back a certain distance the springs hold them in position, as shown in Fig. 1 and in dotted lines in Fig. 4, so that it is only necessary to attend to one of them at a time."

The only claim which was alleged to have been infringed was the third, which reads as follows:

"3. The spring catches, I, constructed and applied to the front of the body, as described, in combination with the tongues or hasps, J, on the top, when arranged to operate as set forth."

The answer denied the validity of the patent and infringement of the same. After the testimony had been taken, the plaintiff entered with the Commissioner of Patents a disclaimer of all the claims of the patent except the one in suit, and upon the hearing upon pleadings and proofs the court adjudged the patent to be valid, and that the defendants had infringed, and referred the case to a master to ascertain and report to the court the number of trunk fasteners made, used and sold by defendants, and the profits which they had received and which had accrued to them since December 12, 1874, from their infringement, together with all damages in excess of such profits sustained by plaintiff and his assignor since that date.

Subsequent to the entry of the interlocutory decree, which was opened for that purpose, and pending proceedings before the master, the defendants by leave of the court amended their answer by alleging that the title to the patent was in the assignee in bankruptcy of one Poinier, who assigned the patent to the plaintiff subsequent to his adjudication in bankruptcy. The bill was also amended by averring that the assignee never accepted title to the patent, but neglected and refused to assert any claim thereto, and that he is now estopped from claiming any title or exercising any dominion over such patent, or the invention thereby secured; and is also barred by the provisions of the bankruptcy act requiring suit to be brought within two years after the accruing of any cause of action. In his report, made under the order of the court, the master found that the testimony left no doubt that "at the date of the granting of the patent to Taylor the only known device for accomplishing the results produced by the trunk fastener was the ordinary trunk strap used in conjunction with the simple dowel pin. It seems, therefore, that the profits for which the defendants must account to complainant under the decree of this case are to be found by arriving at the cost of making and applying the strap and dowels and deducting therefrom the cost of making and applying the infringing trunk fastener manufactured and sold by the defendants."

Figuring upon this basis, the master found that the sum of $11,455.03 had been saved by the defendants by the manufacture and use of 2500 gross of fasteners admitted to have been made and used by them, over what it would have cost them to have made and applied the straps and dowels necessary and proper to have been used for the same purpose in lieu of such infringing fasteners. No computation was made of damages for the reason that the testimony showed that the profits allowed by him largely exceeded any actual damage sustained by the plaintiff. Exceptions were filed by both parties to this report, and a final decree was entered sustaining the exceptions filed by the defendants to the master's report, vacating and setting aside such report, and decreeing nominal damages

for the infringement. 21 Fed. Rep. 124. Both parties appealed from this decree to this court.

Mr. C. E. Mitchell for Sessions.

Mr. F. C. Winkler (with whom was *Mr. J. G. Flanders* on the brief) for Romadka.

I. Under the sweeping language of the Bankrupt Act, all the bankrupt's property, of every species, whether scheduled or not, passed to the assignee. *Comegys* v. *Vasse*, 1 Pet. 193; *Milnor* v. *Metz*, 16 Pet. 221; *Clark* v. *Clark*, 17 How. 315; *Phelps* v. *McDonald*, 99 U. S. 298. The transfer being by operation of law and by public record is *ipso facto* effective against any subsequent purchaser, though not recorded. *Prime* v. *Brandon M'f'g Co.*, 16 Blatchford, 453. The assignee can neither be required nor permitted by a speculative discretion to settle questions of ownership between himself and the bankrupt. *Berry* v. *Gillis*, 17 N. H. 9; *S. C.* 43 Am. Dec. 584; *Hillary* v. *Morris*, 5 Carr. & Payne, 6; *Streeter* v. *Sumner*, 31 N. H. 542; *Mount* v. *Manhattan Co.*, 41 N. J. Eq. 211.

There can be no doubt that this patent right (and all rights under it) vested completely and absolutely in the assignee in bankruptcy. *Morse* v. *Godfrey*, 3 Story, 364; *Phillips* v. *Helmbold*, 26 N. J. Eq. 202; *Wickersham* v. *Nicholson*, 14 S. & R. 118; *S. C.* 16 Am. Dec. 478; *Mays* v. *Manufacturers' Nat. Bank*, 64 Penn. St. 74; *Bank* v. *Sherman*, 101 U. S. 403. This suit, therefore, stands as if Henry W. Poinier, notwithstanding his bankruptcy, brought suit on the patent, seeking to recover on what he had assigned to his creditors.

It is claimed, however, that an assignee has the discretion to reject onerous or *unprofitable* assets and that in such case they revert to the bankrupt; and a line of cases, resting upon a line of English cases, is relied upon as supporting this contention. We submit that this principle is subject to the following limitations.

First. It is of course true that the assignee may fail to reduce specific property to his possession, and in that case the

party having possession will have his possessory title, which will be protected against the assaults of any mere trespasser. This is necessarily confined to corporeal property. It can have no application to a patent right. That passes at once by the assignment and requires, and can have, no act of reducing it to possession. There can be no adverse possession. Infringers may perhaps, to the extent of their infringement, hold a *quasi* adverse possession. This may, unless timely action is brought, protect them in the enjoyment of the fruits of their acts. But there is and can be no adverse possession of the right. It is not a "thing in possession."

Secondly. There are some things which, when assigned, impose upon the assignee who accepts the assignments the obligations of a covenantor, obligations which are enforceable, not against the property only by way of lien, but against the assignee personally, as against a promisor. The common instance of this is a lease. The assignee of a lease, by reason of privity of estate, becomes *personally* bound by its covenants. Hence it is held that an assignment in bankruptcy does not operate to vest this kind of property in the assignee, but that it vests only upon his express acceptance.

Subject to these two modifications, all property of the bankrupt, not exempted by statute, vests absolutely in the assignee. It is not sound that the assignee may say to the bankrupt, This thing, I think, is not worth much and I will let you keep it. The law vests it in the assignee without regard to value. The only case in which such a transaction can have any effect is where possessory rights accrue as a consequence. The supposed exception as to "unprofitable" property rests wholly upon English authority. It does not, therefore, exist except so far as it is recognized by English adjudications. A mere *dictum* or use of a word where the actual question is not involved cannot extend it.

No claim is made that the patent was ever reassigned to Poinier. He did not schedule it. The assignee never knew of its existence. The principle of our bankrupt law was: (1) To divest the bankrupt of all his property not exempt, and make it over absolutely to his creditors for the payment of his

debts; (2) To leave to the bankrupt all he might thereafter earn, and give him release from his old debts upon compliance with proper conditions.

The property transferred to the assignee he does not get back unless his debts are paid in full. An assignee may be discharged, or an assignee may die, but the trust remains while there is property unadministered and debts remain unpaid. "No principle," says Judge Story, "is more firmly established than that a trust will never fail for want of a trustee."

Hence we find that when long after estates in bankruptcy have apparently been closed assets are found to exist, the court will appoint a new trustee to take charge of and administer them. *Clark* v. *Clark*, 17 How. 315.

II. The patent is void on its face, for that it covers several distinct inventions, and this defect cannot be cured by disclaimer.

The Taylor patent of 1872 covers four entirely distinct inventions, in no way connected in design and consideration. The patent is therefore void. *Evans* v. *Eaton*, 3 Wheat. 506; *Barrett* v. *Hall*, 1 Mason, 447; *Moody* v. *Fiske*, 2 Mason, 112; *Wyeth* v. *Stone*, 1 Story, 273. The decision of the department, as well as of the courts, has been uniform that such diverse inventions cannot be united in one patent.

This patent was held void by the court below for this reason. *Sessions* v. *Romadka*, 21 Fed. Rep. 124; but the court held that the defect was within the remedial reach of a disclaimer. Thereupon, on the 30th of July, 1884, John H. Sessions, the complainant, filed a disclaimer of the first, second and fourth claims. All infringement had ceased a year before this disclaimer was filed.

It is true that if this patent could be saved by a disclaimer it saved the suit. But did it save damages which accrued before it was filed? Perhaps it did so far as they accrued to the party who files the disclaimer. But could it possibly save damages which accrued to the former owner, Poinier? He has not disclaimed. While he held the patent it was void. What claim for damages could he transfer to plaintiff in 1878?

If he transferred none, how can any subsequent act of Sessions create them?

III. The allowance of nominal damages only was correct. The burden of proof to show the defendants' profits is wholly on the complainant. *Garretson* v. *Clark*, 15 Blatchford, 70; *S. C.* on appeal, 111 U. S. 120; *Dobson* v. *Hartford Carpet Co.*, 114 U. S. 444; *Goulds' Man'g Co.* v. *Cowing*, 12 Blatchford, 243; *S. C.* 14 Blatchford, 315; *Ingersoll* v. *Musgrove*, 14 Blatchford, 541. Unless he furnishes the requisite evidence on every essential point, he can have nominal damages only. *Rude* v. *Westcott*, 130 U. S. 152. The mode adopted by the master furnished a false test.

And further, so far as the damages before the assignment by Poinier are concerned, the right to recover them never passed out of him.

IV. Section 4900 of the Revised Statutes provides that "it shall be the duty of all patentees, and their assigns . . . vending any patented article . . . to give sufficient notice to the public that the same is patented, either by fixing thereon the word 'patented,' together with the day and year the patent was granted, or when *from the character of the article this cannot be done*, by fixing to it or to the package wherein one or more of them is enclosed, a label containing the like notice, and in any suit for infringement by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement and continued after such notice to make, use or vend the article so patented."

The complainant in this case was a large manufacturer and vendor of the patented article in question. Two specimens offered in evidence were sworn to by him as embodying the patent and to be of his manufacture. It was obvious to the court from their inspection that it could not be truthfully said of them that "from the character of the article" the affixing of the word "patented" with the date of the patent "could not be done." The complainant claimed in general terms that he had notified defendants by letter, but made no sufficient proof to that effect.

Opinion of the Court.

The statute is that no damages shall be recovered by the plaintiff "except on *proof* that the defendant *was duly notified of the infringement* and continued *after such notice* to make, use or vend the article so patented."

Here is a notice to be given which is expected to be acted upon, and the non-action will involve substantial pecuniary consequences. We submit that such a notice must be given in writing; also, that a complainant who would rely upon it, in place of complying with the statute duty of marking his goods, should allege it and make satisfactory proof.

It is no answer to say that the defendants "doubtless" knew of the Taylor patent. That is not "being notified of the infringement." The rights enjoyed by complainant are great. They levy tribute on the whole country. They are a privilege. *But they are purely statutory.* Compliance with the statute is the condition precedent to their enjoyment. As the benefits conferred are great, it is but due that compliance with that condition should be insisted on. At best complainant would be entitled to damages only after notice given.

V. This was a mere claim for a tort to third persons. It passed to the assignee by the assignment. The assignee had to assert it by suit within two years after his appointment. When it passed back to the bankrupt by reason of the refusal of the assignee to take it, assuming such to be the case, it passed subject to the statute of limitations governing the assignee, and had to be asserted within the two years, which was not done.

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

1. Defendants attack the title of the plaintiff to this patent upon the ground that Poinier, who bought the patent of Taylor in 1872, and subsequently, in 1878, sold it to Sessions, had, prior to such sale, and in September, 1876, been duly adjudicated a bankrupt in the District Court of the United States for the District of New Jersey, and an assignee appointed, in whom, it is claimed, the legal title to the patent

vested. It seems, however, that Poinier did not include this patent in his schedule of assets, upon the ground, as he said, of its being unproductive property and of no value. Indeed, all that he seems to have done with the patent was to make a lot of trunk fasteners in 1872, which proved to be failures, and which appear to have been the cause of his insolvency. He made no others for the three years before he went into bankruptcy. On May 15, 1877, he received his discharge, and on November 27 of the same year his assignee was discharged. On June 12, 1878, thirteen months after Poinier had received his discharge, and six months after his assignee had been discharged, Sessions bought a shop right of Poinier, for which he paid him $500, and in the same year purchased the patent itself, for which he paid him $1000 additional. Mr. Shepard, who acted as the agent of the plaintiff in making this purchase, testifies that he went to Newark on the morning of June 6, 1878, and inquired for Henry W. Poinier. "I was informed that one Mr. Miller was his assignee, and that I could learn of his affairs by seeing him. I then went to the office of Mr. Miller and found him there, introduced myself, and told him that I had come to see him about a patent for a trunk fastener which was owned by Henry W. Poinier, and under which said Poinier had been making trunk fasteners; and I asked Mr. Miller if he would sell me said patent, or give me a shop right thereunder, as the assignee of Mr. Poinier. Mr. Miller replied that he could not do so; that the estate was all settled up; he had made his return to the court, and had been discharged as assignee, and he had no power to do anything in the matter. I asked him what I could do, and he said the only thing was to go to Mr. Poinier; that Poinier was the only one who could give me any title. . . . I learned that Mr. Poinier was in Rochester." While the assignee does not recollect the conversation, there is nothing to disprove Mr. Sessions's version of it; nor is it strange that Miller did not recollect it, as he acted as assignee in some six or seven hundred cases, and could hardly be expected to remember all the transactions connected with them. It is undisputed that Shepard went to Newark to find Poinier, and subsequently went to

Rochester and found him there. The first assignment from Poinier was executed August 16, 1878, and conveyed only the title to the patent itself; but a second assignment, bearing date September 24, included also all rights of action for infringement from the date that Poinier himself acquired the title to it.

While, under the provisions of the bankrupt law, the title to this patent undoubtedly passed to the assignee in bankruptcy of Poinier, it passed subject to an election on his part not to accept it, if, in his opinion, it was worthless, or would prove to be burdensome and unprofitable. And he was entitled to a reasonable time to elect whether he would accept it or not. *American File Co.* v. *Garrett*, 110 U. S. 288, 295; *Sparhawk* v. *Yerkes*, 142 U. S. 1; *Amory* v. *Lawrence*, 3 Cliff. 523, 535.

In this case the assignee had taken a year to wind up the estate, and had given no sign of his wish to assume this property, if indeed he knew of its existence. On being asked with reference to it by the proposed purchaser, he replied that the estate was all settled up, that he had no power to do anything in the matter, and that Poinier was the only one who could give a title. A plainer election not to accept can hardly be imagined. Granting that up to that time he had known nothing about the patent, it was his duty to inquire into the matter if he had any thought of accepting it, and not to mislead the plaintiff's agent by referring him to the bankrupt as the proper person to apply to. Under the circumstances, plaintiff could do nothing but purchase of Poinier. Bearing in mind that no claim to this property is now made by the assignee, but that his alleged title to it is set up by a third person, who confessedly has no interest in it himself, it is entirely clear that the defendants ought not to prevail as against a purchaser who bought it of the bankrupt after the assignee had disclaimed any interest in it.

Had the existence of this patent been concealed by the bankrupt, or the assignee had discovered it subsequently — after his discharge — and desired to take possession of it for the benefit of the estate, it is possible the bankruptcy court

might reopen the case and vacate the discharge for that purpose. *Clark* v. *Clark*, 17 How. 315. But it does not lie in the mouth of an alleged infringer to set up the right of the assignee as against a title from the bankrupt acquired with the consent of such assignee.

It is quite evident from the facts stated that this patent, which seems to have been the cause of Poinier's insolvency, was thought to be of little or no value, that the assignee so regarded it, and that its real value was only discovered when the plaintiff had brought to bear upon the manufacture of the device his own skill and enterprise.

2. Defendants are charged with infringing the third claim of the Taylor patent, which was for a spring fastener, modifications of which are now in almost universal use, as a substitute for the old-fashioned strap and buckle. Upon the hearing in the court below, it was claimed the patent was invalid by reason of the joinder of distinct inventions in the same patent — inventions, which, though applicable to the same article, viz.: a trunk, do not co-operate in the use of such article. The court below was evidently inclined to this opinion, but permitted the plaintiff to enter a disclaimer of all the claims but the one in suit. Whether these different devices were properly embodied in the same patent or not, we think this was a proper case for a disclaimer under section 4917. While the language of this section provides for disclaimers "whenever, through inadvertence, accident or mistake, and without any fraudulent or deceptive intention, a patentee has claimed more than that of which he was the original or first inventor or discoverer," it allows the patentee to "make disclaimer of such parts of the thing patented as he shall not choose to claim or hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent." We think this section broad enough to cover disclaimers made to avoid the effect of having included in the patent more devices than could properly be made the subject of a single patent. The power to disclaim is a beneficial one, and ought not to be denied except where it is resorted to for a fraudulent and deceptive purpose. In *Tuck* v. *Bramhill*, 6 Blatchford, 95, a disclaimer was allowed by

Mr. Justice Blatchford where two or more inventions were covered by a single claim. In *Hailes* v. *Albany Stove Co.*, 123 U. S. 582, 587, it was said by Mr. Justice Bradley to be "usually and properly employed for the surrender of a separate claim in a patent, or some other distinct and separable matter, which can be exscinded without mutilating or changing what is left standing."

The only difficulty connected with the question of the disclaimer in this case arises from the final sentence of section 4917, that "no such disclaimer shall affect any action pending at the time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing it." There is an unfortunate choice of language here which has rendered this sentence very ambiguous and difficult of construction. It was held by Mr. Justice Story in *Reed* v. *Cutter*, 1 Story, 590, 600, that, if the disclaimer were filed during the pendency of the suit, the plaintiff would not be entitled to the benefit thereof in that suit — a ruling which had also been made in *Wyeth* v. *Stone*, 1 Story, 273, 294. It was held in *Tuck* v. *Bramhill*, 6 Blatchford, 95, that the provision meant that a suit pending when a disclaimer is filed is not to be affected by such filing so as to prevent the plaintiff from recovering in it, unless it appears that the plaintiff unreasonably neglected or delayed to file the disclaimer. And such was also the ruling of Mr. Justice Nelson in *Guyon* v. *Serrell*, 1 Blatchford, 244; and in *Hall* v. *Wiles*, 2 Blatchford, 194, 198. We think that section 4917 ought to be read in connection with section 4922, providing that the patentee may maintain a suit at law or in equity for the infringement of any part of the thing patented, notwithstanding the specifications may embrace more than that of which the patentee was the first inventor or discoverer; but in every such case in which a judgment or decree shall be rendered for the plaintiff no costs shall be recovered, unless the proper disclaimer has been entered at the Patent Office before the commencement of the suit. This was practically the construction given to corresponding sections of the act of 1837 by this court in *Smith* v. *Nichols*, 21 Wall. 112; and of the Revised Statutes in *Dunbar*

v. *Myers*, 94 U. S. 187, 193. Under section 4922 the effect of delaying a disclaimer until after the commencement of the suit goes only to the recovery of costs. We adhere to that construction. Congress, having in the Revised Statutes adopted the language used in the act of 1837, must be considered to have adopted also the construction given by this court to this sentence, and made it a part of the enactment.

3. The essential feature of the Taylor patent consists of a plate attached to the body of the trunk, which contains a socket and hinged catch, and a double acting spring whose function is to hold the catch either open or shut, and a tang fastened to the lid, which, as the lid is closed, drops into the socket holding the catch, which, when closed, holds the lid firmly in place. It also acts as a dowel to keep the cover from racking.

Of the alleged anticipating devices the patent to Gaylord of 1861 is a trunk lock, not, as in this case, a fastener, designed to supplement the lock, and differing from the old-fashioned and well-known trunk lock principally in discarding the hinged hasp and using a rigid tang attached to the cover, which sinks into the socket in the body of the trunk prepared to receive it, and is there self-locked, but is unlocked only with an ordinary key. It was not designed at all to supersede the buckle and strap, but was only a substitute for, and an improvement upon, the ordinary lock. In short, it is a modification of the spring lock previously used upon trunks.

The Roulstone patent of 1866 is for an improvement in travelling bags, and shows a spring-locking device for securing the two parts of the bag firmly together. It has no features in common with the trunk fastener of Taylor, and is not adapted to hold the lid of a trunk firmly to the body. It has no means for holding the catch out of engagement when desired, and is wholly unlike the modern trunk fastener.

The patent to Semple of 1868 covers an angle plate upon the trunk cover provided at the end side with a dowel in combination with a small plate upon the box, provided with a loop into which the dowel enters, and at the front side with a hasp and staple to be used with a padlock. The object was to

fasten and hold together the box and the cover of the trunk, but the means provided for accomplishing this are so different from those employed by Taylor that they can hardly be compared. Besides the device is evidently of no utility.

The patent to Cutter of 1868 was also for an improvement in trunk locks, especially adapted for security against an unauthorized opening of the trunk, and operated only by an independent and detachable key. It appears to be self-locking and does not differ materially from the ordinary spring lock. It is not a trunk fastener, as distinguished from a lock, and is not designed to be used as a substitute for the strap and buckle.

The patent to Locke of 1871 consists of straps made of hoop iron, steel or brass, or other metals which yield readily, their upper ends resting loosely in caps or escutcheons, so as to have a slight degree of lateral play, the lower ends being formed dovetailed and adapted to engage with catches attached to the body of the trunk. The lower end of the strap rides over the lugs of the catches until the cover is fully closed, when the inclines of the strap and the lugs coincide, and the straps then drop into place and remain locked. This device is undoubtedly a fastener, as distinguished from a lock, but it lacks the rigid tang, the hinged catch, the spring — in short, all the essential features of the Taylor invention.

The Hillebrand patent is also for a trunk lock, and, like the others, is operated by an independent key, and also lacks the features of the Taylor patent.

The Ransom patent is for a trunk fastener, consisting of two parts, one of which is attached to the body of the trunk and the other to the lid. It does not, however, contain the socket open at the top and designed to receive a rigid tang, nor does it contain the other mechanism of the Taylor patent. While intended to accomplish the same purpose, the means used are so different that it is far from being an anticipation.

There are none of these patents which contain the peculiar combination of the Taylor device, none which, had Taylor known of them, would have suggested his own invention. While his device is somewhat crude, as compared with the im-

proved styles of trunk fasteners now in use, it contains the underlying principle of all of them. In short, we find no difficulty in holding that there is patentable novelty in the Taylor fastener, and that it is not anticipated by any of the devices put in evidence. If there were any doubt of this, in view of the fact that Taylor seems to have been the first to invent a practical trunk fastener to take the place of the old-fashioned strap and buckle, and that, improved upon, as it undoubtedly has been, it has completely taken the place of the earlier devices, we should be inclined to resolve this doubt in favor of the patentee.

4. The question of infringement is not so easy, as the Romadka patent,[1] under which the defendants manufacture, approximates more closely to the ordinary form of the spring lock than does the Taylor patent. The difference between the two patents, however, is more in their outward appearance than in their substantial features. Both resemble the spring lock in having a rigid tang with a notch in it to receive a catch actuated by a spring, and in being self-locking if the catch be closed when the tang enters the socket; both differ from it in the fact that the device may be unlocked without the aid of a key by a simple motion of the finger, and hence is not designed to protect against unauthorized opening. The essential features of each are the same. Both have a rigid tang attached to the cover of the trunk — in the Taylor patent with a hole in it, and in the Romadka patent with a notch to receive the catch; both have a socket attached to the body of the trunk containing a hinged catch actuated by a spring which fits into the hole or notch in the tang. In the Taylor patent the catch is held open and shut by a flat spring, and operates at right angles to the plane of the trunk; in the Romadka device the catch is held by a wire spring, and is moved sideways or parallel with the plane of the trunk by a slight projection at the side of the socket. Both are identical in principle,

[1] No. 163,028, issued April 10, 1875, to Anthony V. Romadka, stated by him to have "for its object a certain improvement upon the fastener patented to me, December 23, 1873," by letters patent No. 145,817, of that date. [Reporter.]

operation and design, though the trunk fasteners now in ordinary use resemble the Taylor more than the Romadka patent. In view of the fact that Taylor was a pioneer in the art of making a practical metallic trunk fastener, and invented a principle which has gone into almost universal use in this country, we think he is entitled to a liberal construction of his claim, and that the Romadka device, containing as it does all the elements of his combination, should be held an infringement, though there are superficial dissimilarities in their construction.

5. It only remains to consider the question of damages. Before the invention of these fasteners, straps and buckles were universally used to hold the lid of the trunk fast to the body, in aid of the lock, and dowels appear to have been in common use to prevent a lateral movement of the lid. Trunks with straps to support the lock were considered imperfect and unserviceable, and the dowels had become a recognized necessity, except where strength and durability were of no consequence. In this connection the master allowed the difference between the cost of trunk fasteners and the straps, buckles and dowels previously in use for the same purpose, and the court overruled the measure of damages thus adopted, and entered a decree for nominal damages only.

It seems the defendants did not manufacture these fasteners for sale, but did manufacture them for use on the trunks made and sold by them. Obviously their profits upon the entire trunk would not be a proper measure of damages, since the fasteners were only an inconsiderable part of the trunk, and profits upon the entire article are only allowable where such article is wholly the invention of the patentee, or where its entire value is properly and legally attributable to the patented feature. *Seymour* v. *McCormick*, 16 How. 480; *Mowry* v. *Whitney*, 14 Wall. 620; *Littlefield* v. *Perry*, 21 Wall. 205; *Garretson* v. *Clark*, 111 U. S. 120. This court has, however, repeatedly held that, in estimating damages in the absence of a royalty, it is proper to consider the savings of the defendant in the use of the patented device over what was known and in general use for the same purpose anterior to the date of the

patent. Thus, in *Mowry* v. *Whitney*, 14 Wall. 620, 649, it was said by Mr. Justice Strong, that "it is the additional advantage the defendant derived from the process — advantage beyond what he had without it — for which he must account." In that case the master reported the difference between the cost of certain car wheels and the price for which they were sold as the profits realized by the defendant, thus charging him the profit obtained from the entire wheel, instead of that resulting from the use of the patentee's invention in a part of the manufacture. It was held not to be a legitimate construction of the findings that the benefit which the defendant derived from the use of the complainant's invention was equal to the aggregate of profits he obtained from the manufacture and sale of the wheels as entireties, after they had been completed; but that the question to be determined was — what advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result? The same principle was applied in the case of the *Cawood Patent*, 94 U. S. 695, 710, in which the defendant made use of an infringing swage block for the purpose of reforming the ends of railroad rails which had become exfoliated by wear, and it was held that the gain in mending these rails by the use of the plaintiff's device, compared with the cost of mending on the common anvil, and the saving in fuel and labor, were the proper measure of damages. "They had the choice of repairing them on the common anvil or on the complainant's machine. By selecting the latter, they saved a large part of what they must have expended in the use of the former. To that extent they had a positive advantage, growing out of their invasion of complainant's patent." The subject is also fully considered in the case of *Tilghman* v. *Proctor*, 125 U. S. 136, in which it was held that the plaintiff may, instead of damages, recover the amount of gains and profits the defendants have made by the use of his invention, over what they would have had in using other means then open to the public and adequate to enable them to obtain an equally beneficial result. The patent in this case was for a

process of manufacturing fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure. In his report of damages the master found that the complainant derived no profit from the invention otherwise than by granting licenses to others to use the same, but that the defendant had derived large profits and savings by the use of the plaintiff's patented process, which plaintiff sought to recover in the suit. It was held by this court that, when a bill in equity is filed by the owner against the infringers of a patent, the plaintiff is entitled to recover the amount of gains and profits the defendant has made by the use of his invention, not those he might reasonably have made, but those which he did make, or, in other words, the fruits of the advantage which he derived from the use of that invention over what he would have had in using other means then open to the public and adequate to enable him to obtain an equally beneficial result.

An analogous rule was applied in *Williams* v. *Railroad Company*, 18 Blatchford, 181, 185, wherein the patent was for an improvement in locomotive lamps, which enabled the burning of kerosene instead of lard oil in locomotive head lights. The defendant used a number of the patented lamps on its locomotives, and it was held that its profits were the difference between the cost of the kerosene which it burned and the lard oil which it would have had to burn in lieu thereof but for the use of the plaintiff's lamps. "The statute," said Mr. Justice Blatchford, (Rev. Stat. § 4921,) "expressly gives to the plaintiff, on a recovery in a suit in equity for an infringement, 'the profits' to be accounted for by the defendant. . . . The defendant made its election when it infringed and subjected itself to a suit in equity, and the plaintiff is entitled to the result of the choice he made of suing in equity and not at law. The plaintiff made his inventions for the purpose of enabling any one using them to successfully burn kerosene oil in lamps for locomotive head lights, and to obtain the full advantage of its great light-producing capacity. The defendant used them for that purpose and with that result, and must pay the profits or savings made thereby."

We see no reason why this measure of damages should not be applied to this case. The only argument to the contrary is that the instances in which this court has applied this rule are confined to those wherein the defendant has made use of the complainant's invention in the operation and conduct of his business, and that it ought not to be extended to cases in which the defendant manufactures and sells the devices. Without questioning at this time the soundness of this contention, we think this case falls within the former rather than within the latter category. The defendant does not manufacture and sell trunk fasteners as such, but he does make and use them in the business of manufacturing trunks, and the difference between such use of them and the use of the old-fashioned strap and buckle represents his profits. If the defendant manufactured and sold trunk fasteners to be attached to trunks by his vendees, it might be justly claimed that he did not use them; but if he manufactures them solely to be attached to trunks made and sold by himself, it is none the less a use of them than if he had used the trunk to which they were attached for his own purposes. If, to put an analogous case, a person made a business of manufacturing and selling steam engines to which he attached a patented lubricator, it could hardly be claimed that he was a manufacturer and seller of lubricators, but he would clearly be liable as a user of them.

In such case it makes no difference whether his general business has been conducted at a profit or loss, or whether he has derived an additional profit from the sale of trunks equipped with this device over those not so equipped, although the presumption would be, from the saving made by him in the use of this device, that an additional profit upon the sale of the trunks was made, unless it were shown that the use of this device in some way resulted in a diminution of profits upon the entire manufacture. As was said in the *Cawood Patent*, 94 U. S. 695, 710: "If their general business was unprofitable, it was the less so in consequence of their use of the plaintiff's property. They gained, therefore, to the extent that they saved themselves from loss. In settling an account

between a patentee and an infringer of the patent the question is, not what profits the latter has made in his business, or from his manner of conducting it, but what advantage has he derived from his use of the patented invention." See also *Tilghman* v. *Proctor*, 125 U. S. 136.

The master apparently computed the profits received by the defendants from the infringement upon the basis of the interlocutory decree referring the case to him to ascertain and report the number of fasteners made and used by the defendants, and the gains, profits and advantages they received from the infringement, etc.; and as, in the view we have taken of this case, there was nothing inequitable in this measure of damages, we see no reason for disturbing the report of the master in that particular.

6. Further objection is made to a recovery of profits in this case upon the ground of a non-compliance with the requirements of Rev. Stat. sec. 4900, in failing "to give sufficient notice to the public that the same" (that is, the article) "is patented, either by affixing thereon the word 'patented,' together with the day and year the patent was granted, or when, from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is enclosed, a label containing the like notice; and in any suit for infringement, by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use or vend the article so patented." The averment of the bill in this connection is "that great numbers of trunk catches, containing and embodying the said invention . . . have been manufactured by your orator and the previous owners of said letters patent, which said catches were marked with the word 'patent' and with the year and day of the month of the date of said letters patent; that the public generally have acknowledged the validity of said letters patent and have generally acquiesced in the right aforesaid of your orator." It appears that the plaintiff did stamp upon the larger sizes the fact and the date of the patent, but that he failed to affix such stamp to the

smaller sizes, on account of the difficulty of marking them in such way that the mark would be legible when the catches were japanned or tinned. It is not altogether clear that the stamp could not have been made upon the smaller sizes, but, in a doubtful case, something must be left to the judgment of the patentee, who appears in this case to have complied with the alternative provision of the act, in affixing a label to the packages in which the fasteners were shipped and sold. He testified in this connection that, with the two small sizes, it was impracticable to cast the stamp upon the castings; but that he always marked the packages "patented." The fact that this device was patented could hardly have escaped the notice of Romadka, since the earliest fasteners made under the patent, which were manufactured and sold by Poinier, were duly stamped, and Romadka had dealt with him, bought bags of him, and said to Sessions that he could have bought the patent for a low price. Although there is an averment in the answer that the defendants have no knowledge or information save from said bill of complaint, whether the catches were marked with the word "patented," etc., and therefore deny the same, there is no denial of their knowledge that the Taylor device was patented; and in view of the fact that all letters patent are recorded, with their specifications, in the Patent Office, a record which is notice to all the world, it is not an unreasonable requirement that the defendant, who relies upon a want of knowledge upon his part of the actual existence of the patent, should aver the same in his answer, that the plaintiff may be duly advised of the defence. *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 801; *Allen* v. *Deacon*, 10 Sawyer, 210.

7. A further point is made that the plaintiff is not entitled to recover for any profits accrued prior to September 12, 1876, when Poinier was adjudicated a bankrupt, that any right of action which he then possessed passed to his assignee and, so long as it remained in his hands, became subject to the statutory limitation of two years within which, by Rev. Stat. sec. 5057, the assignee is bound to institute suit. It is insisted that if he abandoned the claims against third parties for infringe-

ment he abandoned them subject to the limitation of two years within which he was himself obliged to bring suit, and that Poinier himself, and the plaintiff, his assignee, took them subject to that limitation. In this connection the defendant relies upon the case of *Kenyon* v. *Wrisley*, 147 Mass. 476. In this case the assignee abandoned to the bankrupt the right to sue upon a promissory note which he considered worthless, and the plaintiff brought suit upon the same nine years after the adjudication and assignment. It was held that the plaintiff had no right to recover; but the decision was placed upon the express ground that the assignee did not elect to abandon the claim, and did not consent to a suit upon it by the plaintiff, until after his right of action was barred by the statute: and it was held that, as the right of suit upon the note was barred while in the hands of the assignee, it was not revived by the election of the assignee to abandon it to the plaintiff. In *Gifford* v. *Helms*, 98 U. S. 248, and in *Wisner* v. *Brown*, 122 U. S. 214, it was held by this court that purchasers of property from an assignee in bankruptcy could not maintain a suit in equity against third persons claiming adverse interests in such property, if, at the time of the purchase from the assignee, his right of action was, under the bankruptcy act, barred by the lapse of time.

In *Greene* v. *Taylor*, 132 U. S. 415, 443, the court went a step further, and held that if, at the time of the purchase from the assignee, the statute had begun to run against the claim or right in the hands of such assignee, the purchaser took the right subject to the statutory limitation, and to the consequence that when sufficient additional time should have run against it in the hands of the purchaser to make up the entire two years, the claim or right would be wholly barred. "No initiation of a new period of limitation, under any statute, begins to run in favor of the purchaser at the time of his purchase, whether the two years wholly elapsed, or only a part thereof elapsed, while the claim was owned by the assignee." We are of opinion, however, that this rule does not apply where the assignee, before the expiration of the statutory time, elects to abandon the property to the bankrupt. In such case the abandonment

relates back to the commencement of the proceedings in bankruptcy, and the title stands as if no assignment had been made. Such abandonment is not so much a transfer of an existing interest in the assignee as an election on his part to treat the assignment as having never included that claim. We do not find it necessary to express an opinion whether the same rule would apply if, as held in *Kenyon* v. *Wrisley*, the statutory limitation were a bar to an action by the assignee when the abandonment was made.

In the case under consideration, Poinier was adjudicated a bankrupt September 12, 1876, the assignee was appointed October 17, 1876, and the abandonment took place, according to the testimony of Mr. Shepard, early in June, 1878, less than two years from the time the cause of action accrued to the assignee. As Poinier recovered the right to sue infringers by abandonment from the assignee before that right had become barred by the statute in his hands, we think he should be considered as receiving it unaffected by the statute, and that he and the plaintiff, his assignee, were entitled to bring this suit as if the assignment had not been made.

May 16, 1892, judgment was entered that the decree of the court below be

Reversed, and the case remanded with directions for further proceedings in conformity with the opinion of this court, with authority, however, to the Circuit Court, if in its opinion law and justice shall so require, to modify the total amount of damages as found by the master.

OREGON RAILWAY AND NAVIGATION COMPANY *v.* OREGONIAN RAILWAY COMPANY (Limited).

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

No. 335. Submitted April 20, 1892. — Decided April 25, 1892.

For reasons stated in the motion, the court grants a motion to submit this case, when reached in regular call, without printing the record.

Statement of the Case.

The judgment below is reversed upon the authority of *The Oregon Railway and Navigation Company* v. *The Oregonian Railway Company, Limited,* 130 U. S. 1.

On the 14th day of December, at the present term, the following motion, entitled in this case, and the accompanying statement were submitted by *Mr. Dolph*, of counsel for the plaintiff in error, together with the further statement by *Mr. Edmunds* as *amicus curiæ*, *Mr. Edmunds* being also the attorney of record of the defendant in error.

"Now, at this day, comes the plaintiff in error and moves the court for an order suspending Rule 10 of the Rules of this Court as to the above entitled cause, and allowing the plaintiff in error to submit the same upon printed brief, when reached in its order, without printing the record.

"J. N. Dolph,
"*of Counsel for Plaintiff in Error.*

"STATEMENT.

"In this cause four separate actions, each being for a half yearly instalment of rent, were consolidated in the court below and tried as one. The actions so consolidated were brought by the Oregonian Railway Company, Limited, alleged to be a corporation formed in Great Britain under the Companies' Act of 1862, against the Oregon Railway and Navigation Company, a corporation formed under the general laws of Oregon, on the covenants in an indenture of lease, alleged to have been executed on August 1, 1881, by which the former company undertook to demise to the latter its railway in Oregon for the term of ninety-six years, upon a rental, to be paid in advance, in semi-annual instalments, of $68,131, on May 15 and November 11; being the same instrument which was held by this court to be void in *Oregon Railway and Navigation Company* v. *Oregonian Railway Company*, (*Limited*,) 130 U. S. 1, and in three cases with the same title, being Nos. 236, 237 and 238, October Term, 1889,

submitted and decided at said Term, but in which there were no printed opinions.

"The questions involved in this case are precisely the same questions which were passed upon in those cases, and are:

"*First. Whether under the constitution and general laws of Oregon a corporation, organized under the laws of that State, could, at the date of the execution of the indenture of lease in question, take a lease of the railroad of another company and operate the same for ninety-nine years?*

"*Second. Whether the laws of Oregon at said date conferred on a foreign corporation the right to make a lease of a railroad within the State for such a term?*

"*Third. Whether under the facts of the case the lessee was estopped from setting up the want of power of the lessor to make such a lease, or of itself to take such a lease?*

"There is no controversy about the facts, and it is believed they can be sufficiently presented by a brief.

"The estimate of the Clerk of this court for printing the record is about $600.

"After the decision of the first case, reported in 130 U. S. 1, it was proposed by some of the attorneys representing the defendant in error to avoid the expense of printing the record by disposing of the remaining cases by stipulation; but the Oregonian Railway Company, limited, went into liquidation in Scotland, and the assignee or liquidator declined to enter into any arrangement about the matter for alleged lack of authority.

"In the three cases submitted at the October Term, 1889, the records were printed at a cost of over $1400.

"Said Oregonian Railway Company, Limited, has sold its railroad in Oregon and it has no property in that State out of which a judgment for costs against it can be satisfied.

"The attorneys who tried the case in the court below, fearing they are liable for the costs, under a statute of the State of Oregon, relating to the bringing actions by non-residents, are anxious to avoid the apparently unnecessary expense of printing the record in this case.

"J. N. Dolph.

Counsel for Plaintiff in Error.

"UNITED STATES OF AMERICA, } ss.
"District of Columbia. }

"I, Joseph N. Dolph, being first duly sworn, say that I am attorney for plaintiff in error in the above entitled action, and that the foregoing statement is true, as I verily believe.

"J. N. DOLPH.

"Subscribed and sworn to before me, this second day of December 1891.

"JAMES H. MCKENNEY,

[SEAL] "*Clerk Supreme Court, U. S.*

"I think it right to state as *amicus curiæ* that I was counsel for the defendant in the cause in which the rights of the parties to that and to this cause were involved, and that, as I understand it, precisely the same questions existed and were determined in that cause that exist in this cause, and I think there is no good reason for printing the record.

"GEORGE F. EDMUNDS.

"AIKEN, S. C., December 5, 1891."

The court thereupon made the following order, entitled in the cause, on the 21st day of the same December.

"On consideration of the motion for leave to submit this cause when the same is reached in regular call of the docket on a printed argument, without printing the record,

"It is now here ordered by the court that said motion be, and the same is hereby, granted."

The cause was reached in regular call on the 20th of April, 1892.

Mr. J. N. Dolph for plaintiff in error submitted on his brief.

No appearance for defendant in error.

THE CHIEF JUSTICE: The judgment is reversed and the cause remanded upon the authority of *The Oregon Railway and Navigation Company* v. *The Oregonian Railway Company, Limited*, 130 U. S. 1.

Syllabus.

LEWIS *v.* BARNHART.

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

No. 1211. Submitted November 3, 1891. — Decided April 25, 1892.[1]

In 1838 R. L., a resident of Ohio, received a patent from the United States of public lands in Illinois. In 1842 he made his will in Ohio, where he continued to reside until his death in 1843. After disposing of other property he devised his Illinois lands and bequeathed the remainder of his personal estate to his wife J. N. L. and to the heirs of her body, to be equally divided between them, share and share alike, and he appointed her sole executrix of the will. He left no issue surviving him, (although he had had children,) but he left brothers and the issue of deceased brothers. His will was duly proved in Ohio, and the widow, who elected to take under it, qualified as executrix in 1843. In 1846 the Illinois lands were sold for nonpayment of taxes assessed in 1845. The county records show no judgment for the tax sale. The lands were purchased at the tax sale by a brother-in-law of the widow, who assigned the certificate to the widow, and the deed was made to her directly. She then, through her attorney in fact, made sales of various tracts of this land, at various times, until all were disposed of. The purchasers duly entered into possession, and took title, and they and those claiming under them continued in possession and paid all taxes on the lands occupied by them respectively for periods ranging from 29 to 33 years. In 1853 a deed of a part of the tract from the widow to one M. was put on record, in which it was recited that the land conveyed by that deed had been held by R. L. and had been devised by him. The county records also contained a copy of the Book of Land Entries, furnished by the auditor to the county clerk for the purpose of taxation: but, with these exceptions those records contained nothing pointing to the patent to R. L., or to his will, or to the interest devised by it to his widow, J. N. L., until 1866, when what purported to be a copy of the will was filed in the office of the recorder of the county. To this copy were attached copies of the affidavits of the subscribing witnesses to the will in proof of its execution, and a certificate signed by the judge and by the clerk of the probate court in Ohio that these were copies of the will and affidavits and order and proceedings taken from the originals in that court; but there was no copy of the

[1] With this case were submitted at the same time, and on the same briefs, No. 1212, LEWIS *v.* PHILLIPS; No. 1213, LEWIS *v.* JOHNSON; No. 1214, LEWIS *v.* DIRKS; No. 1215, LEWIS *v.* DYE; No. 1216, LEWIS *v.* BONER; and No. 1217, LEWIS *v.* BONER, all brought up by writs of error to the Circuit Court of the United States for the Northern District of Illinois. The opinion of the court is entitled in all the cases.

order and of the proceedings admitting the will to probate. The widow died in 1888, not having married again, and leaving no issue. Up to that time no one of the several purchasers, nor any one claiming under them had actual notice that R. L. had been seized of these lands through a patent from the United States, or of his will, or of its provisions, nor any constructive notice thereof other than is to be implied from the public records of the United States and of the county. On the death of the widow the direct descendants of the brothers of R. L., being his only heirs at law, brought these actions of ejectment against the several persons occupying and claiming title to said several tracts of land, to recover possession of the same, maintaining that the tenancy of the widow and of all claiming under her was a life estate for the term of her life, and that the statute of limitations did not begin to run against the remaindermen until the expiration of the life estate. *Held*,

(1) That the sheriff's deed for the land sold for taxes, being regular on its face, and purporting to convey the title to the land described in it, was sufficient color of title to meet the requirements of the statute of limitations of the State of Illinois, without proof of a judgment for the taxes;

2) That the book of land-entries in the county clerk's office furnished by the auditor to the county clerk for the purposes of taxation was not constructive notice of the issue of the patent for the public lands to R. L.;

(3) That the will of R. L. was not authenticated and certified by the officers of the probate court in Ohio in a manner to entitle it to record under the statutes of Illinois, and that the record of it there, without proper proof of its probate in Ohio, was not constructive notice of it and of its contents;

(4) That the recital in the deed from J. N. L. to M. in 1853 was at most notice of the facts recited in it to the grantee and those claiming under him;

(5) That, by the law of Illinois, the actual possession of the several defendants, for more than seven successive years prior to the commencement of these actions, of the lands in controversy, under claim and color of title made in good faith, that is, under deeds purporting to convey the title to them in fee, and the payment of all taxes legally assessed on them, without notice, actual or constructive, during that period, of any title to or interest in the lands upon the part of others that was inconsistent with an absolute fee in their immediate grantors, and in those under whom such grantors claimed, entitled them to be adjudged the legal owners of such lands according to their respective paper titles, even as against those, if any, who may have been entitled by the will of R. L. to take the fee after the death of his widow without heirs of her body.

(6) That, in view of the foregoing, it was unnecessary to pass upon the nature of the estate devised to J. N. L.

Statement of the Case.

EJECTMENT. The court stated the case as follows:

These actions of ejectment were brought in the year 1889. The lands in controversy are parts of a larger tract of sixteen hundred acres in Woodford County, Illinois, entered by Romeo Lewis, in the year 1838 at the Land Office in Springfield, in that State, and of which he was seized in fee, by a patent from the United States, at the date of his will, January 8, 1842, as well as when he died, at his residence in Oxford, Butler County, Ohio, on the 24th day of June, 1843.

The parties, in writing, waived a jury, and the cases were severally tried by the court, which made a special finding of facts on which judgment was rendered for the respective defendants. Each action was held to be barred by the statute of limitations of Illinois protecting the actual possession, continued for seven successive years, of land or tenements, under claim and color of title made in good faith, and accompanied by the payment, during that period, of all taxes legally assessed on them. The principal contention of the plaintiffs in error, who were the plaintiffs below, upon this point, is, that limitation did not commence to run against them until shortly before these actions were instituted, and, consequently, the statute has no application.

In case 1211, *Lewis* v. *Barnhart*, the facts upon which the judgment was based were, substantially, as follows:

By his will, which was admitted to probate and recorded in the county of his residence in Ohio, the testator directed his interest in lands in the Territory of Florida, and in the States of Arkansas and Mississippi, to be sold, and the proceeds, together with moneys that might be derived from other sources, applied to the payment of his just debts. After making certain bequests of money to his mother, nieces, and others, the will proceeds: "I further give and devise to my dearly beloved wife, Jane N. Lewis, and to the heirs of her body, my houses and lots in the town of Oxford, Butler County, Ohio, and all the residue of my lands in the States of Indiana and Illinois, and all the rest, residue, and remainder of my personal estate, goods and chattels of every kind and description whatsoever

to be equally divided between them, to share and share alike. And lastly, I hereby appoint my said beloved wife, Jane N. Lewis, sole executrix of this my last will and testament, hereby revoking all my former wills by me made. And I do hereby ratify and confirm this and no other to be my last will and testament."

The testator left no issue surviving him. Three children died prior to the date of the will. The fourth, born April 15, 1843, lived only a few days. He had no sisters. But he had four brothers, three of whom died before he did, while the fourth survived him. His wife was only thirty-four years old at the date of the will. She remained a widow, and died in July, 1888, aged eighty years, leaving no issue.

The plaintiffs are the direct descendants of the testator's brothers, and his only heirs at law.

The widow qualified, in the proper court of Ohio, as executrix, and, in open court, September 25, 1843, elected to take under the will.

The lands in controversy were assessed for taxation in Woodford County for the years 1844 and 1845 in the name of Romeo Lewis as patentee and owner. They were then "wild lands," uncultivated, of little value, and in a new and sparsely settled country. On the 13th of October, 1846, they were sold for the taxes of 1845, Guernsey Y. Roots, the husband of a sister of Jane N. Lewis, becoming the purchaser. He knew, at the time, of the existence and probate of the will of Romeo Lewis, as well as of the appointment of Jane N. Lewis as executrix, and of her election to take under the will. But the relationship of Roots to Mrs. Lewis was not known to the defendants or to any one under whom they claim.

The records of the Circuit Court and recorder's office in Woodford County as they existed at the time of the trial, did not show any judgment entered against the lands for the taxes of 1845. Nevertheless, the sheriff, by deed of May 16, 1849, conveyed them to Jane N. Lewis, as assignee of Roots's certificate of purchase, the deed reciting that, "at the September term, 1846, of the Circuit Court of Woodford County, a judgment was obtained in favor of the State" for the taxes, inter-

est and costs assessed upon the lands for the year 1845, and that the sheriff, on the 13th of October, 1846, by virtue of a precipe issued September 20, 1846, exposed them for sale, in conformity with the requirements of the statute, "for the satisfaction of the judgment so rendered as aforesaid." This deed was duly acknowledged and recorded on the day it bears date.

By power of attorney given May 7, 1856, and duly recorded July 24, 1856, Harry Lewis, of Ohio, the surviving brother of the testator, was constituted by Mrs. Lewis her attorney to sell and convey in fee simple, by deed of general warranty, these and other lands in Woodford County, Illinois. In virtue of this power of attorney, Lewis executed to Absalum Doherty a bond, dated June 21, 1856, for a conveyance by deed of general warranty, the consideration recited being $5600, for which Doherty gave his note. This bond was recorded July 7, 1856. In that year Doherty went into possession and improved the lands, claiming them under the above contract and bond. Within two years after taking possession he enclosed them with fences, built two houses upon them, and put a large part of them in cultivation.

On the 15th day of August, 1866, what purports to be a copy of the will of Romeo Lewis was recorded in one of the books containing the record of deeds in the recorder's office of Woodford County.

Mrs. Lewis, in execution of the contract with Doherty, made to him, August 31, 1866, a warranty deed. He resided upon the lands continuously, until his death on the 15th of September, 1876. He left a widow and a son as his sole heir, who remained in possession until the 4th day of February, 1881, when they united in a conveyance to Lawrence Gasner. The latter held possession under that conveyance until November 1, 1881, when he conveyed by warranty deed to the defendant Gish, who has continued in possession under that deed. The defendant Barnhart is only a tenant of Gish.

In 1858 Doherty paid the taxes on the lands for the year 1857, and he and those claiming under him paid all the taxes assessed against them up to the commencement of this action.

Statement of the Case.

It was stipulated between the parties, and the court found, that neither the defendant Gish, nor his grantor, nor any one under whom he claims, (except Jane N. Lewis,) had, prior to September 1, 1889, any notice that Romeo Lewis was seized of these lands, at the time of his death, by patent from the United States, other than such as may have been conveyed, constructively, at the date of the above bond and deeds, by the Book of Land Entries in the office of the county clerk of Woodford County, Illinois, furnished by the auditor to the county clerk for purposes of taxation; or by the fact that the lands were assessed for taxation in 1845 in the name of Romeo Lewis, and were sold for the nonpayment of taxes in 1846; or by the record of a deed from Jane N. Lewis to John G. Mohr, dated February 8, 1853, and recorded in that county, which described the land thereby conveyed (what particular lands the record does not show) as "said tract of land having been held by Romeo Lewis, the deceased husband of the grantor, and to her devised in the last will and testament of said Romeo Lewis." Nor did the defendant, or any of the persons through whom he claims title, (except Jane N. Lewis,) have any knowledge whatever of the existence or probate of the will of Romeo Lewis prior to the time when what purported to be a copy of it was recorded, as above stated, in Woodford County, unless notice was to be imputed to them by the record of the above deed from Jane N. Lewis to Mohr, or by the record and probate of the will in 1843 in Butler County, Ohio.

It was further stipulated and found that "the defendants have a complete chain of title, properly recorded at the date of said deeds or bonds for deeds, to the lands described in the declaration in this case, under deeds with full covenants of warranty, from Jane Lewis to themselves, which deeds were also properly recorded at the dates of the execution thereof, and that said lands have been actually occupied and resided upon by the defendants and their grantors from the date of the purchase thereof, as shown by said deeds from Jane N. Lewis, and that they have severally paid all taxes assessed on said lands from the date of said deeds to the present time."

Argument for Plaintiffs in Error.

The other cases named in the beginning of this opinion depend upon facts similar to those above set forth. The defendants, in each case, hold under bonds and deeds, or under deeds only, from Jane N. Lewis, which were duly recorded, and, prior to the commencement of these actions, they had been in actual possession, paying all taxes assessed on the lands occupied by them, respectively, for periods ranging from twenty-nine to thirty-three years.

Mr. Sabin D. Puterbaugh, *Mr. Thomas Millikin*, *Mr. Palmer W. Smith* and *Mr. Leslie D. Puterbaugh*, for plaintiffs in error, submitted on their brief. Touching the Illinois statutes of limitations, the only point considered in the opinion of this court, they said:

The defendants in error claim under the statute of limitations: *First*, — Under section 1, adverse title and possession, without notice, for over twenty years; *Second*, — Under section 6, claim and color of title, made in good faith, actual possession and payment of taxes for the period of seven years.

The plaintiffs in error claim that the statute of limitations cannot run as against them during the lifetime of Mrs. Lewis, because during that period they had no right of entry or action.

No disseisin of the tenant of a particular estate and occupation under it, however long continued, will affect the right of the reversioner. And the doctrine may be laid down as universal, that no possession can be held to be adverse as to one who has no right of entry and possession during its continuance. *Deryer* v. *Schaeffer*, 55 N. Y. 446. The latter may enter whenever the particular estate shall determine by its limitation. *Miller* v. *Ewing*, 6 Cush. 34; *Jackson* v. *Schoonmaker*, 4 Johns. 390; *Salmons* v. *Davis*, 29 Missouri, 176. The statute does not run against a reversioner till the death of the tenant for life, when the latter has conveyed the estate in fee, *Gernet* v. *Lynn*, 31 Penn. St. 94; *Melvin* v. *Merrimack Locks and Canals*, 16 Pick. 137; *S. C.* 17 Pick. 255; *Raymond* v. *Holden*, 2 Cush. 269. And where a husband and wife were disseized, and the disseisor held adverse possession

for the period of limitation, which possession would bar the right of the husband, if living, at his death, she, or her representatives might claim the land. *Gregg* v. *Tesson*, 1 Black, 150.

If the possession was taken under a title not originally hostile to the true owner it will be intended that his possession was not adverse. *Jackson* v. *Thomas*, 16 Johns. 293; *Smith* v. *Burtis*, 9 Johns. 174; *Jackson* v. *Johnson*, 5 Cowen, 74; *S. C.* 15 Am. Dec. 433. And the purchaser of an estate for life holds in subordination to the reversioner; and an adverse possession against the reversioner cannot be predicated on it. *Jackson* v. *Graham*, 3 Caines, 188; *Jackson* v. *Town*, 4 Cowen, 599; *S. C.* 15 Am. Dec. 405; *Jackson* v. *Parker*, 9 Cowen, 73. And this is the law although he supposed his deed gave him the fee. *Learned* v. *Tallmadge*, 26 Barb. 443; *Barrett* v. *Stradl*, 73 Wisconsin, 385. The statute of limitations does not run against reversioners. Angel on Limitations, Sec. 370.

The possession of a tenant for life is never deemed to be adverse to his reversioner. *Grout* v. *Townsend*, 2 Hill, 554; *Austin* v. *Stevens*, 24 Maine, 520; *Varney* v. *Stevens*, 22 Maine, 331. Nor if he be disseized are the rights of the reversioner thereby affected; and he may enter or sue in an action to recover possession within twenty years after the death of the tenant for life, without regard to the lapse of time during which the disseisor may have held the premises. *Jackson* v. *Mancius*, 2 Wend. 357; *McCorry* v. *King*, 3 Humph. (Tenn.) 267; *S. C.* 39 Am. Dec. 165; *Jackson* v. *Schoonmaker*, 4 Johns. 390; *Foster* v. *Marshall*, 2 Foster, 491; *Guion* v. *Anderson*, 8 Humph. (Tenn.) 325. And if one who enters upon land under an agreement with a tenant for life continues to hold possession after her death he becomes as to the reversioner a mere trespasser. *Williams* v. *Caston*, 1 Strobhart, 130.

It has been further held that if the tenant for life do any act with the property which works a forfeiture of the same it only affects his interest, but not that of the reversioner. *Archer* v. *Jones*, 26 Mississippi, 583, 589. So if the tenant does an act by which he incurs a forfeiture of the estate the reversioner is not bound to treat the estate as merged in his

own and enter immediately; he may have his action after the death of the tenant for life without being affected by the previous possession. Nor can a tenant for life who creates an estate by grant or otherwise defeat his grant by surrender to his landlord or reversioner. *Moore* v. *Luce*, 29 Penn. St. 263; *S. C.* 72 Am. Dec. 629.

It is no matter how many estates are carved out of the owner's entire estate, a reversion will be left, provided these do not amount in quantity to his original estate. Thus the owner of a fee may grant twenty or more successive life estates and still retain his fee simple of the land, though his right of possession will be suspended till these life estates shall have been exhausted.

It was upon this principle that, after the statute *de donis*, there was always held to be a reversion in the grantor of an estate tail, upon the idea that the succession of life estates which the successive tenants in tail were to enjoy, might at some time cease, and no one have a right to claim the estate under the original limitation.

It is settled law in Illinois that the statute of limitations may run, and the bar become complete against an estate for life or for a term of years; but that in such cases when the particular estate is spent, the bar falls with that estate, and the right of entry then accrues to the remainder-man or reversioner, and then, and not till then, the statute begins to run against him, and he must have the same period within which to assert his title, as was had by the owner of the particular estate. *Higgins* v. *Crosby*, 40 Illinois, 260; *Steele* v. *Gelletly*, 41 Illinois, 39; *Dugan* v. *Follett*, 100 Illinois, 581; *Whiting* v. *Nicholl*, 46 Illinois, 230; *S. C.* 92 Am. Dec. 248; *Rohn* v. *Harris*, 130 Illinois, 525; *Mettler* v. *Miller*, 129 Illinois, 630.

The statute would work great injustice if it were held to affect the rights of reversioners or remainder-men during the continuance of the particular estate or the estate for life. To so hold would in effect deprive the reversioner or remainder-man of his rights without ever having a day in court. And if the statute of Illinois relating to limitations should bear this construction it would be transcending the power of the

legislature, and as to such reversioner or remainder-man would be unconstitutional and void.

The plaintiffs in error are guilty of no laches. They do not claim under the will of Romeo Lewis, but by descent as his heirs at law. Until Mrs. Lewis's death in 1888 without heirs of her body, it was not known and could not be known that the plaintiffs would have an interest in the property. As they do not claim under the will and had no vested interest until the death of Mrs. Lewis without issue, no duty devolved upon them to record the will in Woodford County or elsewhere, or to give notice to the defendants of their contingent expectations or to do any act to protect the land.

Until the rights of the plaintiffs vested, they had no power to appear in court to defend or protect the title, to make an entry or assert any rights with respect to the property, or to in any way stop the running of the statute of limitations. *Mettler* v. *Miller*, 129 Illinois, 630, 642.

We submit that up to the time of Mrs. Lewis's death, in 1888, the estate of the heirs at law of Romeo Lewis, deceased, was simply a possibility of reversion. See the distinction drawn in *Heath* v. *Barmore*, 50 N. Y. 302; *Nicoll* v. *Erie Railroad*, 2 Kernan, 121. In 4th Kent, 370, it is said that the grantor of an estate upon condition has only a possibility of reverter, and no reversion; and in the note to page 11, he says: There is only the possibility of a reverter left in the grantor, and not an actual estate. See *Martin* v. *Strachan*, 5 T. R. 107 n. For examples illustrating the distinctions between a naked possibility and a possibility coupled with interest, see *Jackson* v. *Waldron*, 13 Wend. 178.

Romeo Lewis devised his entire estate in fee tail to his wife, and until her death the heirs of the testator had simply a possibility of reverter but no vested estate. This being conceded, they had no more right to interpose by injunction or the appointment of a receiver than a son has with reference to his father's estate during the life of the father.

We further submit that Mrs. Lewis, at the dates of the bonds for deeds and conveyances from her under which the defendants respectively claim title, was clothed with no color of

title in fee by her tax deed of 1849. Before she could be held and adjudged to be the legal owner of the lands under section 6 of the limitation laws it must appear that she was in the actual possession under claim and color of title, made in good faith; that she continued in such possession for the period of seven years, and during said time paid all taxes on such lands. She had a bare tax deed, without any judgment to support it. Her pretended color of title was not made in good faith, but was fraudulently procured to defeat the heirs of her deceased husband, who in the future might possibly become reversioners. It is not shown or admitted that she ever paid any taxes except in 1846, and then only by purchasing at the tax sale. The lands being wild and uncultivated, she was never in the actual possession. Every element required to entitle her to be held and adjudged to be the legal owner of the lands is wanting in order to clothe her with color of title made in good faith.

The records of Woodford County were notice to the defendants that there was no judgment against the lands for taxes; and they were bound to know that the tax deed was void for want of a judgment to support it. The lands being vacant, wild and uncultivated, with no person in the actual possession, the statute of limitations could not have run during the period of seven years prior to the purchases from Mrs. Lewis, and she was not clothed with color of title in fee by the tax deed of 1849.

The color of title under which the defendants claim is the conveyances from Mrs. Lewis, and these would be sufficient if the plaintiffs had been in a position where they could have asserted title; but the defendants could acquire no color of title or other rights during Mrs. Lewis's lifetime to the prejudice of the plaintiffs as reversioners in expectancy.

The plaintiffs offered the will in evidence for the sole and limited purpose of showing that Mrs. Lewis had a life estate, and, therefore, could take nothing by her tax deed, and that limitation did not run against them. They also showed that the persons who under the will were to take the remainder were not in existence, and that, therefore, for want of such

persons the estate at the death of Mrs. Lewis, in 1888, went to the plaintiffs by way of reversion.

The defendants, by acquiring title from Mrs. Lewis, obtained no greater interest than she possessed. They stand in her shoes; and neither they nor Mrs. Lewis could commit any act, or omit to perform any duty which would defeat the estate of remainder or reversion.

The defendants introduced the tax deed of Mrs. Lewis simply as a claim or color of title, in order to furnish a basis for occupancy, payment of taxes and thereby a title under the statute of limitations. This being the case, they would be required to show that the color of title is an honest one; and in addition thereto that it was in fact something more than the life estate of Mrs. Lewis. If she had only a life estate how could she convey to the defendants a greater estate? And the fact that she attempted to convey a greater estate by giving a warranty deed purporting to convey the fee does not in any manner affect the remainder-men or reversioners. This is expressly held in *Barrett* v. *Stradl*, 73 Wisconsin, 385, and cited and approved in *Mettler* v. *Miller*, 129 Illinois, 630.

The fact that the defendants and those under whom they claim may have believed that they were acquiring a good title is wholly immaterial. The plaintiffs in error, whose hands were tied, being unable to assert title during the life of Mrs. Lewis, are not responsible for or to be prejudiced by the mistakes or neglects of the life tenant or those claiming under her. During the existence of the life estate Mrs. Lewis and her grantees had a right to use the lands as they saw fit, and in doing so they in no manner interfered with or affected the rights of the plaintiffs in error, whose contingent interests could not become vested until the expiration of the life estate at the decease of Mrs. Lewis without issue of her body.

The possession of Mrs. Lewis, or of the defendants in error, her grantees, was never during her life hostile, but was exactly in accordance with the testator's will.

The defendants in error knew that the United States were the source of the title, and that a patent had issued to some one. They knew there was an outstanding title in some one,

and it was their duty to ascertain the name of the patentee, or the holder of the outstanding title. They knew that the records disclosed these facts. They knew that Jane N. Lewis did not derive title from the government, and they were put upon inquiry as to the source of her title. It would be absurd to claim that they did not know that Romeo Lewis was the patentee, and that Mrs. Lewis claimed under him.

Mr. Robert E. Williams, *Mr. W. G. Randall*, *Mr. W. S. Gibson* and *Mr. C. L. Capen* for defendants in error submitted on their brief.

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

By the statutes of Illinois in force when the will of Romeo Lewis was made and took effect, it was provided that "in cases where, by the common law, any person or persons might hereafter become seized in fee tail of any lands, tenements, or hereditaments, by virtue of any devise, gift, grant, or other conveyance, hereafter to be made, or by any other means whatsoever, such person or persons, instead of being or becoming seized thereof in fee tail, shall be deemed and adjudged to be and become seized thereof, for his or her natural life only, and the remainder shall pass in fee simple absolute, to the person or persons to whom the estate tail would, on the death of the first grantee, devisee or donee in tail, first pass, according to the course of the common law, by virtue of such devise, grant or conveyance." Act of January 31, 1827, Rev. Laws Ill. 1833, § 6, pp. 127, 131; Rev. Stats. 1845, c. 24, § 6; Rev. Stats. 1874, c. 30, § 6. The court below held (43 Fed. Rep. 854) that Mrs. Lewis, under the will of her husband, would have taken, at common law, only an estate in fee tail, that is, an estate "confined in its descent to the posterity of some individual so as to cease upon failure of such posterity" — citing Burton on Real Property, 4. After observing, in the words of the same author, that upon a devise to a person and his issue or children the construction varies according to the circumstances, and that,

if the party have issue or children at the time when the devise is made, they will take estates for their lives jointly with their parent, but if he had no issue at that time he takes an estate tail, the court said that under the above statute Mrs. Lewis took only an estate for her natural life, and at her death, in default of heirs of her body, the heirs at law of the testator took the estate in fee. But, in view of the admitted facts, it was held that the defendants were protected by the statute of Illinois, prescribing the periods within which actions for the recovery of lands may be brought.

Much of the elaborate argument submitted by counsel is devoted to an inquiry as to the nature of the estate that Mrs. Lewis took under the will of her husband; the plaintiffs insisting that the court below correctly interpreted the will of the testator in connection with the statute. The defendants insist that the devise to Mrs. Lewis and to the heirs of her body was intended to be a devise to her and to the children of herself and the testator as a class of persons to take at the death of the testator, and that she as the only survivor at his death, of that class, took the whole estate absolutely. The defendants further insist that, even if the estate did not wholly vest at the death of the testator in Mrs. Lewis as the survivor of the class of persons who were the declared objects of his bounty, the fee did not remain in abeyance until her death, but vested at his death in those who were then his heirs at law, although such estate was liable to be divested on the birth of an heir to the body of the life tenant.

These questions have been discussed by counsel with marked ability. But it will not be necessary to pass upon them, if, as is contended, these actions, under any construction of the will, are barred by the statute of limitations of Illinois. To this question of limitation we will, therefore, direct our attention.

The statute just referred to, as it appears in the Revision of 1845, title Conveyances, provides: "§ 8. Every person in the actual possession of lands or tenements, under claim and color of title made in good faith, and who shall, for seven successive years, continue in such possession, and shall, also, during said time, pay all taxes legally assessed on such lands or tenements,

shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent before said seven years shall have expired, and who shall continue such possession, and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefits of this section." "§ 10. The two preceding sections shall not extend . . . to lands or tenements when there shall be an adverse title to such lands or tenements, and the holder of such adverse title is under the age of twenty-one years, insane, imprisoned, *feme covert*, out of the limits of the United States, and in the employment of the United States or of this State: *Provided*, Such person shall commence an action to recover such lands or tenements so possessed as aforesaid, within three years after the several disabilities herein enumerated shall cease to exist, and shall prosecute such action to judgment, . . ." These provisions first appeared in the act of March 2, 1839, entitled "An act to quiet possessions and confirm titles to land," and are preserved in the act of April 4, 1872, title Limitations. Purple's Real Estate Stat. Ill. p. 426; Rev. Stats. 1845, p. 104, c. 24, § 8; Rev. Stats. 1872, p. 674, c. 83, § 6; 2 Starr & Curtis, p. 1539.

Considering the different objects of sections eight and nine, the Supreme Court of Illinois in *Dunlap* v. *Daugherty*, 20 Illinois, 397, 403, said: "By the eighth section the person must be in possession under claim and color, and may pay taxes, under such claim and color of title for the required period of time; while by the ninth section he is not required to have possession, nor permitted to hold or pay taxes under a person having color, but must himself have the color of title and pay the taxes. This section does not permit a person claiming under color to rely upon the statute. But the eighth section, by its phraseology, does permit the person claiming under the color of title to hold the possession and to pay the taxes for his claim and possession, and the color of title when united make the claim and color of title and the possession required by the statute. . . . Justice would require more protection should

be given to the actual occupant, who expends his money and labor in improving the soil, and pays the taxes for the required period, than to the person who only pays the taxes, without occupation, for the same length of time." See also *Cofield* v. *Furry*, 19 Illinois, 183; *Darst* v. *Marshal*, 20 Illinois, 227; *Newland* v. *Marsh*, 19 Illinois, 376.

Under the stipulations of the parties, and the findings of fact, there can be no doubt as to the nature of the possession of the respective defendants. It was an actual, continuous possession under bonds and conveyances, promptly recorded, accompanied by the payment of all taxes assessed on the lands during the period of such possession. If, within the meaning of the statute, such possession was "under claim and color of title made in good faith," then the cases before us come within the very words of the statute, and the defendants, respectively, are entitled to be adjudged legal owners of the lands according to the purport of their respective paper titles, unless, as contended, limitation did not run against the plaintiffs until after the death of Mrs. Lewis.

That the defendants have been in actual possession for the required time, under claim and color of title made in good faith, is clearly established. It is true that Mrs. Lewis, under whom the several defendants claim, held under a tax deed, and that such a deed, when relied on as evidence of paramount title, must be supported by a valid judgment for the taxes, and a proper precept authorizing the sale. *Holbrook* v. *Dickinson*, 46 Illinois, 285; *Gage* v. *Lightburn*, 93 Illinois, 248, 252; *Pardridge* v. *Village of Hyde Park*, 131 Illinois, 537, 541; *Gage* v. *Bani*, 141 U. S. 344, 351. And it is also true that the records before us do not show any judgment for taxes against these lands, followed by a precept authorizing their sale, and only show a sheriff's deed to Mrs. Lewis, reciting a judgment and precept. But a sheriff's deed for land sold for taxes, regular on its face, and made to one who was under no obligation to pay the taxes, will, as between the grantee and the taxpayer, constitute, without proof of a judgment for the taxes, such color of title as will meet the requirements of the statute of limitations. It has been long settled in Illinois that

any deed or instrument in writing, no matter on what founded, if regular on its face, and purporting to convey the title to land of which a description is given, is sufficient color under the limitation act of 1839, although it might be ineffectual to establish paramount title, apart from possession and payment of taxes for seven successive years. *Holloway* v. *Clark*, 27 Illinois, 483, 486; *Dickenson* v. *Breeden*, 30 Illinois, 279, 326; *McCagg* v. *Heacock*, 34 Illinois, 476, 478; *Stubblefield* v. *Borders*, 92 Illinois, 279, 284; *Brooks* v. *Bruyn*, 35 Illinois, 392; *Fagan* v. *Rosier*, 68 Illinois, 84, 87; *Hardin* v. *Gouverneur*, 69 Illinois, 140, 143; *Lake Shore &c. Railway* v. *Pittsburgh, Fort Wayne, &c. Railway*, 71 Illinois, 38; *Coleman* v. *Billings*, 89 Illinois, 183, 190; *Stumpf* v. *Osterhage*, 111 Illinois, 82, 88; *Baldwin* v. *Ratcliff*, 125 Illinois, 376, 384.

In cases 1211, 1212, 1213, 1214 and 1217, respectively, the purchaser from Mrs. Lewis went into possession under a bond for a deed. These bonds did not purport to convey the title, but were executory agreements entitling the purchaser to a deed. If it be said that possession under a bond for a deed, or under a contract for the purchase of land, neither purporting to convey the title, is not possession "under claim and color of title," within the meaning of the statute, *Rigor* v. *Frye*, 62 Illinois, 507, 509; *Hardin* v. *Crate*, 78 Illinois, 533, 536, 537; *Robbins* v. *Moore*, 129 Illinois, 30, 46; a sufficient answer is that each bond was followed by a deed from Mrs. Lewis, purporting to convey the fee, and that from at least the execution of the latter deed the purchaser was in possession under such claim and color of title as the statute required. And even if we assume that the deed did not have relation back to the date and recording of the bond, so as to give the grantee the benefit of his actual possession under the bond — though the contrary view is asserted on the authority of *Snapp* v. *Peirce*, 24 Illinois, 156, 159; *Russell* v. *Mandell*, 73 Illinois, 136, 138; *Schneider* v. *Botsch*, 90 Illinois, 577, 580 — and that possession under the sheriff's deed by Mrs. Lewis was not adverse to those, if any, in remainder, and excluding therefore the entire period during which *she* held the apparent legal title which that deed conveyed, there was yet more than seven

years' actual possession by the defendants, accompanied by the payment of taxes under subsequent deeds duly recorded and purporting in each instance to convey the fee.

It results that these actions are barred by the statute, unless it be held not only that plaintiffs were reversioners, but that limitation could not run against them during the life of Mrs. Lewis. The general rule in Illinois, as elsewhere, undoubtedly is that limitation does not run against a reversioner or remainder-man, pending the prior estate, because during that time he has no right of entry. Having no right of entry, he is not deemed guilty of laches in failing to assert his rights during the existence of the life estate. *Higgins* v. *Crosby*, 40 Illinois, 260, 262; *Dugan* v. *Follett*, 100 Illinois, 581, 589; *Orthwein* v. *Thomas*, 127 Illinois, 554, 569; *Mettler* v. *Miller*, 129 Illinois, 630, 640; *Rohn* v. *Harris*, 130 Illinois, 525, 581.

But the case of *Dugan* v. *Follett*, just cited, shows that in its application this general rule is not without exceptions in Illinois. In that case it appears that by a decree rendered in a suit in equity brought in one of the courts of Illinois, an administrator was directed to invest certain moneys then in his hands in real estate, (no particular lands being specified,) and to convey the same to the plaintiff, Mrs. Jennings, for her life, with remainder in fee to the named heirs of her late husband. The investment was made, and a deed of that character was executed, November 20, 1850, to Mrs. Jennings. That deed was not put upon record, but the fact of its execution was reported to the court by the administrator, and his report placed among the files of the suit in which the decree, directing the investment, was made. Mrs. Jennings did not die until November 18, 1875. During her lifetime the lands passed into the possession of others under warranty deeds, conveying the title in fee. The dispute was between those parties and the persons in remainder. The evidence showed that those who held under the warranty deeds, and their immediate grantors, were in actual possession, adversely to all the world, without any knowledge that the plaintiffs had any claim as remaindermen to the premises, and paid all taxes assessed on the lands, "thus," the court said, "making out a clear case of possession,

payment of taxes under claim and color of title made in good faith for more than the statutory period." The court also said: "It is clear, therefore, unless there is something in the facts of this case which takes it out of the operation of the statute, the right to maintain the present proceedings is barred by the limitation act of 1839. It is a fundamental principle in the law of limitations that the statute never commences running until the right of entry accrues, and since by the limitations of the deed from Hugh Rhodes to Mrs. Jennings, under which appellees [the remainder-men] claim, their right of entry did not accrue until her death, which occurred less than seven years before the commencement of the present proceedings, it would seem to follow that this proceeding is not barred by the limitation act of 1839, and such undoubtedly would be the case *if* that deed had been properly *recorded*, or if appellants and those under whom they claim had purchased *with notice of appellees' rights*. But that deed was *never recorded*, and, as already stated, there is nothing to show that appellants, or their immediate grantors, *had notice of its existence*."

It was contended, in that case, that the administrator's report, showing the conveyance of the land to Mrs. Jennings for life, with remainder to the named children of her deceased husband, was constructive notice of the rights of those in remainder. To this the court replied that if the object of the suit had been "to compel the administrator to convey these particular lands, then we would have no hesitancy in holding the record of that case constructive notice of the rights of those claiming under the decree in it, whether the deed was placed upon record or not. But such was not the object of that suit. Neither the decree nor the pleadings in that case contain any description of these lands, or even make the slightest reference to them." It was held that purchasers were not bound to look beyond the judgment or decree and the legal effect it might have on the title which was the subject of inquiry, and were not chargeable with constructive notice of every fact that might appear on the files of the case in which such decree was rendered. In reply to the suggestion that the tenant for life, Mrs. Jennings, was bound to pay all taxes, and as the persons,

holding under the warranty deeds, succeeded to that estate, they were bound to pay them, and, therefore, could not avail themselves of the limitation act of 1839, the court said: "Conceding such would have been the case *if the Jennings deed had been put upon record, or if appellants and those under whom they claim had purchased with notice of that deed*, yet appellants claim, as we have already seen, adversely to appellees, and independently of any rights acquired through the Jennings deed, and insist that inasmuch as that deed *was not placed upon record, and they did not otherwise have notice of it, they are not to be affected by its provisions; and in this we think they are right.* The recording and limitation laws are both a part of the law of the State, and of equal force and validity, and the court should so construe and apply them as to effectuate the objects and purposes of the legislature in adopting them. The 30th section of chapter 30 of the Revised Statutes, entitled 'Conveyances,' provides that all deeds, mortgages, etc., shall take effect and be in force from and after the time of filing the same for record and not before, as to all creditors and subsequent purchasers without notice, and all such deeds shall be adjudged void as to all such subsequent purchasers without notice until filed for record. To hold that appellants under the facts in this case are to be affected in any manner by the Jennings deed, would be to simply disregard this plain provision of the statute, which we are not permitted or inclined to do. In construing and giving effect to the limitation laws, courts must do so in such manner as to also give effect to this plain provision of the statute making all deeds void as against subsequent purchasers without notice until filed for record. *Kennedy* v. *Northup*, 15 Illinois, 148; *Holbrook* v. *Dickenson*, 56 Illinois, 497." That the title asserted by the remainder-men in that case was by deed, and not under a will, does not affect the principle upon which the decision rested.

So far as we are aware, the rule announced in *Dugan* v. *Follett* has not been disturbed or modified by any subsequent case. On the contrary, it was recognized in *Safford* v. *Stubbs*, 117 Illinois, 389, 394. The subsequent cases of *Mettler* v.

Miller, 129 Illinois, 630, 642, and *Rohn* v. *Harris*, 130 Illinois, 525, upon which the plaintiffs confidently rely, are not at all in conflict with *Dugan* v. *Follett*. In the first of those cases, *Mettler* v. *Miller*, the court affirmed the general rule announced in the previous cases, that "the possession of land by a tenant for life cannot be adverse to the remainder-man or reversioner; and if he conveys to a third person, by words purporting to pass the absolute property, the possession of the purchaser is not and cannot be, during the continuance of the life estate, adverse to the remainder-man or reversioner, so as to set the statute of limitations running against such remainder-man or reversioner; but after a life estate falls in, the possession will be adverse as to a remainder-man or reversioner." But it is evident from the whole opinion that this rule was applied strictly against the parties who sought to take shelter under the statute of limitations, because the title *traced to them* and *under which they entered*, and *as it appeared of record*, showed that they had notice of the rights of the remainder-men when they took possession. That the court regarded the state of the title, as shown by the public records, to be important in determining whether the rights of the remainder-man could be affected by the actual possession, during the life estate, of one claiming under a deed conveying the fee, is clear from its reference to the case of *Safford* v. *Stubbs*. It said: "Nor can *Safford* v. *Stubbs et al.* avail appellee. Neither Berkey nor Reiner, his immediate grantor, *had notice* that the interest of Weiser in the premises was merely that of a life tenant, and *the records did not show it*." So, in *Rohn* v. *Harris*, above cited, where the parties held possession under color of title, and paid all taxes for more than seven years, the defence, based upon the statute of limitations, was overruled upon the ground, in part, that the various deeds and wills under which the parties held "were *upon the record, so that each purchaser had notice of the title under which he occupied the property*." See, also, *Dean* v. *Long*, 122 Illinois, 447, 460.

At the trial below the plaintiffs introduced in evidence "a certified copy of the will of Romeo Lewis from the recorder's

office of Woodford County, Illinois." To the copy of the will so recorded were appended the affidavits of the subscribing witnesses, made in the court of common pleas of Butler County, Ohio, at its June term, 1843, proving the execution of the will, a certificate by the judge and *ex officio* clerk of the probate court of that county, under date of August 2, 1866, to the effect that the foregoing was "a true and correct copy of the last will and testament of Romeo Lewis, late of said county, aforesaid, and of the affidavit of the subscribing witness thereto, and of the order and proceedings of said court admitting the same to probate, the said copies of said will, affidavit, order and proceedings having been taken from the originals on file and record in said court." These copies were, on August 15, 1866, filed for record and recorded in one of the deed records in the office of the circuit court clerk and *ex officio* recorder for Woodford County, Illinois. But the copies, so filed and recorded, did not, in fact, include copies of the order and proceedings of the probate court in Ohio admitting the original will to probate. The defendants objected to the admission of the above paper as evidence, because it did not show any order of the Ohio court admitting the will to probate, and was not properly certified. The paper was admitted in evidence subject to objection.

Was the record thus made in Illinois, August 15, 1866, in respect to the will of Romeo Lewis, notice from that date that Jane N. Lewis acquired, under the will of Romeo Lewis, a life estate only in his lands in that State? By the statutes of Illinois in force when that will took effect it was provided that "every will, testament or codicil, when thus proven to the satisfaction of the court of probate, shall be recorded by the judge thereof in a book to be provided by him for that purpose, and shall be good and available in law for the granting, conveying and assuring the lands, tenements and hereditaments, annuities, rents, goods and chattels therein, and thereby given, granted and bequeathed." The same statute contained this section: "Sec. 7. All wills, testaments and codicils, or authenticated copies thereof, proven according to the laws of any of the United States, or the territories thereof, or of any

country out of the limits of the United States, and touching or concerning estates within this State, accompanied with a certificate of the proper officer or officers that said will, testament, codicil or copy thereof was duly executed and proven, agreeably to the laws and usages of that State or country in which the same was executed, shall be recorded as aforesaid, and shall be good and available in law in like manner as wills made and executed in this State." Rev. Stat. Ill. 1833, pp. 612, 614, §§ 2 and 7. These provisions were retained in the acts of March 3, 1845, and March 20, 1872. Rev. Stat. 1845, c. 99, § 8, p. 538; Rev. Stat. 1874, c. 148, § 9. By the second section of the act of February 14, 1857, relating to conveyances, it was provided: "§ 33. All original wills, or copies thereof, duly certified according to law, or exemplifications from the record in pursuance of the law of Congress in relation to records in foreign states, may be recorded in the same office where deeds and other instruments concerning real estate may be required to be recorded; and the same shall be notice from the date of filing the same for record as in other cases." Laws Ill. 1857, p. 39; Gross's Stat. Ill. 1868, p. 108, § 35. This section was slightly modified by the Conveyance Act of March 29, 1872, but not so as to affect the question before us. Rev. Stat. 1874, p. 279, c. 30, § 33; 1 Starr & Curtis's Ill. Ann. Stat. 597.

It is clear from these statutes that the will of Romeo Lewis, or an authenticated copy thereof, proven according to the laws of Ohio, if accompanied with a certificate of the proper officers that the will was duly executed and proven, agreeably to the laws and usages of that State, could, at any time after it took effect, have been recorded in Illinois, and thereby become good and available in that State in like manner as wills there made and executed; and that from at least the passage of the act of 1857 it would have become, after the filing of the same for record, and in respect to the real estate devised by it, notice as in the cases of deeds conveying real estate. But it is equally clear that the copy of the testator's will filed and recorded in 1866, in the office of the recorder of Woodford County, was not authenticated or certified so as to entitle it to

record under the above statutes in Illinois. It was not certified to have been executed and proven according to the laws and usages of the State of Ohio, where it was made. Besides, while the certificate of the judge and clerk of the probate court, in Ohio, refers to the order and proceedings of that court admitting the will to probate, no copies of such order and proceedings were, in fact, attached to the certified copy of the will filed for record. If the certified copy of the will filed for record had been accompanied by a duly certified copy of the proceedings in the Ohio probate court, relating to the probate of the will, and if that would have been a compliance with the statute, entitling the copy of the will to be recorded in Illinois, it is certain that without certified copies of such proceedings, or without a certificate by the proper officer, showing that the will had been executed and proven agreeably to the laws of Ohio, the copy of the will filed with the recorder of Woodford County could not be recorded in Illinois, so as to make that record notice as in cases of deeds or other written instruments concerning real estate. *Baldwin* v. *Ratcliff*, 125 Illinois, 376, 384. It results that the recording in Illinois, in 1866, of what purported to be the will of Romeo Lewis was without legal effect, and was not, in law, notice that the lands in dispute were part of those referred to in that will.

The contention of the plaintiffs is that even if the will was not properly recorded in Illinois, it was, nevertheless, evidence as to the title to the lands. *Shephard* v. *Carriel*, 19 Illinois, 313; *Newman* v. *Willetts*, 52 Illinois, 98; *Safford* v. *Stubbs*, 117 Illinois, 389. But this view does not meet the question before us as to whether the record of the will in Woodford County, from and after it was made, was itself notice to those who purchased from Mrs. Lewis. A duly certified copy of the will may be competent evidence upon the issue as to paramount title, but it could not operate as constructive notice of its contents from the date of the insufficient record of it made in 1866 in Woodford County.

It is said that the Book of Land Entries kept in the office of the county clerk of Woodford County, and furnished by the auditor to that officer for the purposes of taxation, furnished

evidence of the fact that Romeo Lewis was seized of these lands by patent from the United States, and that they were thus put upon inquiry as to the nature of the estate which Mrs. Lewis took. But this fact would only have proved the ownership of the lands, at one time, by Romeo Lewis, not that he had made a will, which was recorded in Ohio, and which gave his wife only a life estate in his Illinois lands. Besides, in *Betser* v. *Rankin*, 77 Illinois, 289, it was held that knowledge of the facts appearing in the Book of Land Entries must be brought home to purchasers. "They are facts," the court said, "which, in order to affect a purchaser, he must have actual notice of; there is no constructive notice of such facts. At that time reports of the entries of public lands were certified by the auditor to the several county clerks in the State, and the list of entries so furnished by the auditor was copied by the clerk into his Book of 'Land Entries;' but all this was for the purposes of taxation, not of notice of the entries. No such effect of notice has been given by law to such report or Book of Land Entries. Such entries, books and papers, in the office of the county clerk are not constructive notice of their subject matter to subsequent purchasers." See, also, *Bourland* v. *Peoria County*, 16 Illinois, 538; *Anthony* v. *Wheeler*, 130 Illinois, 128, 136.

Some reliance is placed upon the fact that the recitals in a deed for certain lands, made by Mrs. Lewis to one Mohr in 1853, indicated that they were devised to her by the will of her husband. It is scarcely necessary to say that those recitals were not notice to those who purchased other lands from Mrs. Lewis of the existence of such a will or of its provisions, there being no valid record of it in Illinois.

It is proper, also, to say that no claim is made that this case is affected, in anywise, by the proviso in the statute of limitations saving the rights of persons laboring under certain named disabilities at the time the cause of action accrued. "The tax sale," the Supreme Court of Illinois has said, "although it may have been defective, and the title acquired under it, when relied upon alone as a title, might not have been regarded as valid, yet the deed which the defendant

obtained, which, upon its face, purported to convey the land, was color of title. A title of this character, obtained in good faith, followed by the payment of all taxes legally assessed for seven successive years, while the land is vacant, and possession then taken, has been uniformly held by this court to be a valid title as against all persons, except such as may be under the disability named in the statute." *Whitney* v. *Stevens*, 77 Illinois, 585, 587. And in *McDuffee* v. *Sinnott*, 119 Illinois, 449, 452, it was held that when the bar of the statute becomes absolute, "the occupant thereby acquires such a title as he may successfully assert against all the world, including the paramount owner himself, except such as are laboring under disabilities." So clearly is this the case, the learned counsel for the plaintiffs in error frankly concedes, as he must have done, that these actions are barred by the statute, if limitation ran against them during the life of Mrs. Lewis, before or after she conveyed.

We are of opinion that, by the law of Illinois, the actual possession of the several defendants, for more than seven successive years prior to the commencement of these actions, of the lands in controversy, under claim and color of title made in good faith, that is, under deeds purporting to convey the title to them in fee, and the payment of all taxes legally assessed on them, without notice, actual or constructive, during that period, of any title to or interest in the lands upon the part of others that was inconsistent with an absolute fee in their immediate grantors, and in those under whom such grantors claimed, entitled them to be adjudged the legal owners of such lands according to their respective paper titles, even as against those, if any, who may have been entitled by the will of Romeo Lewis to take the fee after the death of Mrs. Lewis without heirs of her body. If that will only gave a life estate to Mrs. Lewis, and the plaintiffs, as reversioners or possible reversioners, had no right of entry pending the life estate, and, therefore, were not chargeable with *laches;* and if, as is contended, Mrs. Lewis, as life tenant, was under a legal obligation to pay the taxes for which the land was sold, and could not, by permitting them to be sold for taxes and

becoming the purchaser, acquire the fee and thereby despoil those in remainder; it was, nevertheless, in the power of the plaintiffs and those under whom they claim — long before the defendants became the owners of the lands by possession and payment of taxes, under claim and color of title made in good faith — to have placed the will of Romeo Lewis, duly proved, upon record in Illinois, and, in that mode, to have given notice of their interest in the lands.

The judgment in each of the above cases is affirmed.

QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY *v.* HUMPHREYS.

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

No. 223. Argued March 23, 1892. — Decided April 25, 1892.

A receiver appointed by order of a court of chancery is obliged to take possession of a leasehold estate, if it be included within the order of the court; but he does not thereby become the assignee of the term, or liable for the rent, but holds the property as the hand of the court, and is entitled to a reasonable time to ascertain its value, before he can be held to have accepted it as lessee.

The Wabash Company controlled 3600 miles of road, made up by the consolidation and leasing of many different railroads, upon nearly every one of which there existed one or more mortgages. Among them was the Quincy road, 77 miles in length, which was leased by the Wabash in August, 1879, for a term of 99 years, with privilege of renewal, acquiring with the lease a majority of the stock. The Quincy road at the time of the lease had issued mortgage bonds to the amount of $2,000,000, on which there was a large amount of interest in arrear. To provide for this and other floating debts, and to extend the road, a new issue of mortgage bonds was provided for as part of the arrangement, which were issued, and the road was completed, and entered into and formed part of the Wabash system. In May, 1884, the Wabash company filed a bill in equity, alleging that it was insolvent and could not procure the means to pay its floating debts and interest due, and praying the court to take possession of its property and administer it as a whole. Receivers were thereupon appointed, who took possession. They were

directed to pay out of the income which should come into their hands rental which had accrued or which might accrue upon all the company's leased lines, but to keep accounts showing the source of income and revenue with reference to expenditure. In June, 1884, the trustees under a general mortgage, which the Wabash company had made of its whole system, filed a cross bill praying for the foreclosure of their mortgage and the appointment of receivers; but the court declined to appoint receivers other than those already appointed. On the 26th of January, 1884, the receivers informed the court of their inability to pay interest falling due on certain classes of bonds and interest on certain stocks, and made a statement in regard to several of the consolidated and leased roads from which it appeared that the earnings of the Quincy road had at no time since its acquisition been sufficient to pay its operating expenses, the cost of its maintenance and the interest upon its mortgage bonds. The receivers further petitioned the court for its advice, and they were thereupon ordered to keep separate accounts of the earnings, incomes, operating expenses, cost of maintenance, taxes, etc., of each of such lines, and to make quarterly reports thereof. These reports, when made, showed, as to the Quincy Company, that in May, 1885, there was a deficit of $20,251.09 in nine months' working. The court thereupon made a general order, as to all the properties, which provided in substance that where there was no income, rental claims were not to be paid by the receivers. On the 15th of July, 1885, the trustees of the Quincy mortgage petitioned the court to direct the receivers to transfer that road and its rolling stock to them, and an order was made to that effect. No possession was taken under that order, but the leased property was retransferred before the sale under the foreclosure of the general mortgage of the Wabash Company. The proceedings under the cross bill resulted in a decree for such foreclosure on the 6th of January, 1886. No surplus was realized from the sale under that decree. The receivers' accounts on surrendering the property showed the net earnings to be $3,304,633.61 less than the amount of the preferred debts with whose payment they were charged. On the 8th of December, 1885, the intervening trustees of the Quincy mortgage filed a petition praying the court to order the receivers to pay arrears of interest, taxes, cost of repairs and rental, aggregating $114,380, and to decree them to be liens superior and paramount to all mortgages on all the property of the Wabash Company. On the 19th of March, 1888, the court denied this prayer and dismissed this petition from which decree the Quincy Company and the trustees took this appeal. *Held,*

(1) That the occupation of the Quincy road by the receivers under the order of court created no relation which obliged them to pay rent therefor under the lease;

(2) That no equities existed which called upon the court to divert the proceeds of the sale or the net earnings of the property while in the receivers' hands, and apply them to the payments prayed for by the intervenors;

Statement of the Case.

(3) That the action of the court in appointing receivers on the application of the mortgagor could not be successfully challenged in this appeal.

THE court stated the case as follows:

The Quincy, Missouri and Pacific Railroad Company of Missouri owned in 1879 about seventy-seven miles of road extending westward from West Quincy towards the Missouri River; had issued mortgage bonds to the amount of two million dollars; and owed, in addition to the principal of said bonds, a large amount of overdue interest accrued thereon. By an indenture made August 21, 1879, the railroad of this company was leased to the Wabash Railway Company for a period of ninety-nine years, with the option to the lessee to renew the same perpetually. By the terms of this contract a majority of the common stock of the Quincy Company was to be transferred to the Wabash Company, so as to give the latter control of the former, and a majority of directors in its board was to be elected in the interest of the Wabash Company. The Wabash Company was to supply $125,000 to the Quincy Company to enable it to complete the construction of its road to Milan, to a connection with the line of the Burlington and Southwestern Railroad, and was itself authorized to extend the road from Milan to its contemplated terminus at Brownville, on the Nebraska state line. A new mortgage was to be made, covering all the property of the Quincy Company, and securing bonds at the rate of $9000 per mile, which was to be used in retiring the bonds then outstanding and providing for future construction. Preferred stock of the Quincy Company was also to be issued and used in connection with the new bonds to liquidate its outstanding indebtedness, then estimated to be about $600,000.

The Wabash Company agreed to set aside certain percentages of the gross earnings derived from the operation of the Quincy Company's road and to apply these percentages, first, to the payment of interest on the new bonds, and, second, of dividends on the stock. The company guaranteed to pay interest on the bonds in the event that the said percentage of

gross earnings should be insufficient for that purpose; to maintain and operate the railroad of the Quincy Company, keeping the same in good condition and repair for the full term of the lease; and to pay all taxes.

It was further provided that if the principal of the bonds secured by the mortgage should become due in consequence of default in the payment of interest, the Quincy Company should have the option to forfeit the lease and reënter without process of law.

Under date of October 1, 1879, a mortgage was made by the Quincy Company, to Humphreys and Browning as trustees, whereby all its property, including leases and leasehold interests, was conveyed to the trustees to secure the payment of bonds to be issued at the rate of $9000 per mile; and the mortgage provided that a default of six months in the payment of interest might be availed of by the bondholders as a cause for declaring all the bonds forthwith due.

November 10, 1879, the Wabash Company was consolidated with other railroad companies, the consolidation forming the Wabash, St. Louis and Pacific Railway Company. This company received possession of the railway of the Quincy Company on July 1, 1880, and by the first of July, 1881, had extended the road from Milan to Trenton, a distance of about thirty-one miles.

On the 27th of May, 1884, the Wabash, St. Louis and Pacific Railway Company filed its bill in equity in the Circuit Court of the United States for the Eastern District of Missouri, stating that it was insolvent; that it had accumulated a floating debt for its maintenance of $4,784,145; that it was about to make default in interest payments; that such default would be ruinous to all parties interested in its maintenance and its revenues; and that the interest of all the creditors and bondholders would be thereby imperilled.

The bill made various persons and corporations parties defendant, having interests in the lines of the Wabash Company, as lessors, mortgagors or trustees under deeds of trust covering the lines or portions thereof, including the Central Trust Company and Cheney, trustees in a general mortgage; the

trustee in a collateral trust mortgage; the Quincy Company, and others; and prayed the court to appoint successors to trustees deceased, or to make such other order with respect thereto as would cause the respective trusts to be properly represented in the matters of the litigation; and to require the defendants to set up their several interests, so that the same might be fully represented.

The bill alleged that by their terms nearly all, if not quite all, the mortgages and trust deeds, whether executed by complainant or other companies on any portions of the line prior to the time when complainant acquired the same, not only embraced the roads and tangible property of the companies executing the instruments, but also the revenues and incomes to be derived from the use of the parts of the roads so mortgaged; that the bondholders had always insisted upon their right to look to the revenues of the sections of the road upon which their mortgages rested as a means of paying and discharging their bonds; that all, or nearly all, of the mortgages embraced all rolling stock to be thereafter acquired by the companies executing the mortgages, but as the lines of the original companies had been absorbed into complainant's system, the rolling stock on the entire system had become so intermingled as to be incapable of division according to the ownership of the several lines of road or according to the several mortgages; and that any attempt to control or dispose of portions of such rolling stock by courts not having jurisdiction of the whole and not competent to deal with the entire property as a unit would produce great confusion and uncertainty and result in great loss to all persons interested in the rolling stock or in complainant's property or securities.

The bill further averred that the complainant's directors and officers had thoroughly considered and already resorted to all proper means for obtaining the funds by which to pay the floating indebtedness of the company and meet the accruing interest falling due at the beginning of the month of June then next, and continuing to mature by instalments at very short intervals, but had wholly failed to provide the means with which to discharge the floating indebtedness and meet

the interest, and the company was powerless to accomplish such purpose, and was practically insolvent, and it was certain that a default would occur in June, and complainant be also without means of meeting the floating indebtedness.

It was further stated that complainant's interest in the road and the interests of all its creditors and bondholders were greatly imperilled by the existing prospect of the disruption of the road on the happening of the default; and that if the lines of railroad were broken up and the fragments thereof placed in the hands of various receivers, and the rolling stock, materials and supplies seized and scattered abroad, the result would produce irreparable injury and damage, not merely to complainant but to all persons having any interest in the road and the securities thereof. Complainant, therefore, "to prevent the breaking up of said lines of road and the scattering abroad of its assets," and "in order to the preservation of the interests of large numbers of persons, stockholders and creditors unknown to orator, and in order to the protection of the interests of all concerned, and to prevent a great multiplicity of suits," prayed the court to appoint one or more receivers, "and empower and direct such receiver or receivers to take possession of said entire property, and to preserve, operate and manage and control the same, collect all indebtedness due or to become due to orator, and otherwise to discharge all the duties ordinarily imposed by courts of equity on the receivers of railroad property by such courts appointed; that on a final hearing of said cause your honors will, under this bill, or under such amendments as may be made thereto, or such supplemental bills as shall be filed herein, or such cross-bills as parties in interest may also file, decree the sale of said entire property, whether such decree shall judicially foreclose said general mortgage or any of the other mortgages aforesaid, or whether such decree shall dispose of said property as a trust fund on general equitable principles; that your honors will cause all the liens upon said property or any part thereof and all rights, claims and equities of all persons interested therein to be ascertained, defined and determined, and that the proceeds arising from the sale of such property or any part

thereof be applied under the orders and decrees of this court, according to the rights, interests and equities of parties or persons interested in said fund;" that all persons and all corporations having possession of complainant's property, or any part of it, be directed to surrender the same to such receiver or receivers as might be appointed, or to hold such property or portions of property under such receiver or receivers, if the latter shall elect to pursue such course; and that such order may be made "as will insure the protection of the interests of orator and its creditors, giving an opportunity to all the defendants not served with notice to be heard hereafter; and orator avers that no injury can arise to any creditor or person in interest from the appointment of the said receivers with or without notice, as such receivers' possession will inure to the benefit of all the persons concerned."

Upon the filing of the bill an order was thereupon made on the same day appointing Solon Humphreys and Thomas E. Tutt receivers of the railroads and property of the company; and it was ordered "that the said receivers, out of the income that shall come into their hands from the operation of said railroad or otherwise, proceed to pay all balances due to other railroads or transportation companies, or balances growing out of the exchange of traffic accruing during six months prior hereto; that said receivers also in like manner pay all rental accrued or which may hereafter accrue upon all leased lines of said complainant, and for the use of all terminals or track facilities, and all such rentals or instalments as may fall due from said complainant for the use of any portion of road or roads or terminal facilities of any other company or companies, and also for all rentals due or to become due upon rolling stock heretofore sold to complainant and partially paid for; that said receivers also pay in like manner out of any incomes or other available revenues which may come into their hands all just claims and accounts for labor, supplies, professional services, salaries of officers and employés that had been earned or have matured within six months before the making of this order; . . . that such receivers keep such accounts as may be necessary to show the source from which all such

income and revenues shall be derived with reference to the interest of all parties herein and the expenditures by them made."

The receivers qualified on May 29, 1884, and took possession of all lines of railroad which at that date were held or operated by the Wabash Company. On June 9, 1884, the trustees in the general mortgage appeared and filed their cross-bill, in which they prayed for the foreclosure of their mortgage and for the sale of the property, and also asked for the appointment of receivers; but the court refused to make such appointment. These trustees afterwards filed an amended cross-bill, and at a still later date an original bill in one of the state courts of Missouri, which was removed to the United States court, and consolidated with the original suit. These bills contained prayers for the foreclosure of the mortgage and the appointment of receivers.

June 26, 1884, the receivers petitioned the court for advice, stating that, from the incoming rents and profits of the property, they were unable to pay on the first day of June, 1884, the interest falling due on certain classes of bonds and dividends on certain specified stock. And they further stated, in respect of twenty-eight other classes of bonds enumerated in the petition, that the earnings of the lines upon which these bonds were secured had until this been sufficient to meet the operating expenses, cost of maintenance and interest payments, but in respect to ten other classes of bonds, of which the bonds of the Quincy Company constituted one, "that the earnings of none of the lines or divisions last above described have at any time since their acquisition been sufficient to pay their operating expenses, the cost of their maintenance, and interest on the several series of bonds and other obligations above described, and secured upon each of them respectively by mortgage or deeds of trust."

The petition was referred to a master, who reported thereon June 28, 1884, and recommended the entry of an order directing the receivers "from the incoming rents, and profits of said property, after meeting such other obligations as they have been directed to discharge by the former orders of this court,

to pay from whatever balance may remain in their hands the interest, as the same shall from time to time mature, upon the following bonds or other obligations secured by mortgage on the several lines or divisions" enumerated, whose earnings had been sufficient to pay the interest. The order further provided "that the receivers herein, until otherwise directed, keep the accounts of all the earnings and incomes from, as well as the accounts of all the operating expenses, cost of maintenance, and taxes upon, the following lines or divisions of said property separately, to wit," and here follow the lines which had not earned interest, including the Quincy Company; "and that said receivers make quarterly reports thereof, showing not only the income and expenses of each of the lines aforesaid, but also the methods by which the incomes and expenses of said lines were respectively ascertained;" and this report was confirmed.

On September 20, 1884, the receivers filed a petition for instructions as to interest due on bonds of the Havana division; and on October 15, 1884, the court stated, upon the matter being again brought up, that money that belonged to the underlying mortgages would not be taken to pay interest on non-earning branches.

December 16, 1884, the Quincy Company filed an intervening petition in which it set forth that interest on its bonds was in default and "that it has no means, property, or moneys aside from what is covered by said mortgage, and that it is without any means of paying said overdue and defaulted interest;" that it believed that, if default in the payment of interest should continue, the bondholders would require the sale of the mortgaged property under the terms of the mortgage; that it had applied to the president of the Wabash Company and others of its officers for information, but had been unable to obtain any, of an intention on the part of the company, or any one for it, to make such payment; and it prayed that the company or defendants, or some one of them, should pay the interest on the bonds in default July 1, 1884, or that such interest be paid out of the funds of the Wabash Company in the charge or under the control of the court or

the receivers, or that the court order that the lease between the petitioner and the Wabash Company be transferred to the St. Joseph and Quincy Railroad Company, which latter company would pay the interest coupons in arrears, and would either pay or give security to pay the interest coupons about to mature January 1, 1885, and would assume any and all liabilities resting upon the Wabash Company or to which it was subject by reason of the existence of or under said lease. This petition was answered by the receivers and the Central Trust Company and Cheney, trustee, and April 16, 1885, it was ordered that whenever within sixty days from that date the St. Joseph and Quincy Railroad Company should pay to the trustees on the first mortgage an amount equal to the coupons on the first mortgage of the Quincy Company due July 1, 1884, and January 1, 1885, in payment of said coupons, and should assume by proper agreement in writing the liabilities and obligations to be performed by the lessee under said lease, then said lease should become assigned and vested in the St. Joseph Company, freed from any liens or rights of the Wabash Company or the trustees under the general mortgage.

On January 8, 1885, the receivers reported the incomes and earnings from, as well as the operating expenses, cost of maintenance and taxes of, the Quincy Company, from May 29 to September 30, 1884, showing a deficit of $1416.78; and on the second of March, 1885, made a similar report showing a deficit of $9021.82 from October 1 to December 31, 1884; and on May 15, 1885, a report showing a total deficit up to February 28, 1885, for nine months, of $20,251.09. On March 20, 1885, the receivers filed a petition setting forth in detail the earnings and operating expenses of all the branch and leased lines of the Wabash Company from May 29 to November 30, 1884, and prayed orders with respect to the future operation of the lines, and concerning the payment of the respective rentals which the Wabash Company had agreed to pay. Upon this petition the court made an order, April 16, 1885, which was entitled: "In the matter of the application of the receivers for the cancellation of certain leases." By this order the

court directed: (1) "That subdivisional accounts must be paid separately." (2) "Where any subdivision earns a surplus over expenses, the rental or subdivisional interest will be paid to the extent of the surplus and only to the extent of the surplus." (3) "Where a subdivision earns no surplus, simply pays operating expenses, no rent or subdivisional interest will be paid. If the lessor or the subdivisional mortgagee desires possession or foreclosure, he may proceed at once to assert his rights. While the court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee whose rent or interest is unpaid to insist upon possession or foreclosure will be promptly recognized." (4) "Where a subdivision not only earns no surplus, but fails to pay operating expenses, as in the St. Joseph and St. Louis branch, the operation of the subdivision will be continued, but the extent of that operation will be reduced with an unsparing though a discriminating hand; that is, if a subdivision does not earn operating expenses, and receivers are running two trains a day, then lop one of them off; if they are running one train a day and still it does not pay, then run one train in two days. While the court will endeavor to keep that subdivision in operation, it will make the burden of it to the consolidated corporation, and to all the other interests put into that consolidated corporation, a minimum."

These directions were given in an opinion which was ordered to stand as the order of the court in respect to the matters therein referred to. 23 Fed. Rep. 863. July 15, 1885, Gilman and Bull, trustees under the mortgage of the Quincy Company, petitioned for the possession of its property. The petition was granted by the court and the receivers were ordered to surrender and transfer said property to the trustees on or before August 1, 1885, which was done.

On July 1, 1884, an instalment of interest on the bonds of the Quincy Company, for $36,120, became due and was not paid. On January 1, 1885, another like instalment became due and was not paid. On July 1, 1885, another like instalment became due and was not paid. The rent due for the month of July amounted to $6020, and was not paid. The

foregoing instalments aggregated $114,380. The taxes on the railroad of the Quincy Company for the year 1884 amounted to $16,000, and were not paid by the Wabash Company or the receivers, but by the trustees for the Quincy Company, who also made repairs upon said railroad at an expense of $15,000.

December 8, 1885, the trustees Gilman and Bull filed a petition, in which application the Quincy Company united June 12, 1886, by a separate petition. These petitions prayed that the court would order the receivers to pay to the Quincy Company or the trustees, for the bondholders, the sum of $114,380 for interest, $16,000 for taxes and $15,000 for necessary repairs, "being the rental due on account of the said lease of the property" of the company; and that the court would decree that said sums "are liens superior and paramount to all mortgages on all the property of the said Wabash, St. Louis & Pacific Railway Company." The prayer of the trustee's petition was confined to the sum of $114,380.

January 6, 1886, a decree was entered foreclosing the mortgages, upon the property of the Wabash Company, known as the general mortgage and the collateral trust mortgage. The court found due upon the general mortgage the principal sum of $17,000,000, and for interest $2,132,753.40, up to December 1, 1885; and upon the collateral trust mortgage the principal sum of $10,000,000 and $1,109,268.80 interest. In default of payment of these sums the court directed the sale of the mortgaged property, excluding, however, the property of the Quincy Company. The court decreed that the sale and conveyance of the mortgaged property should not have the effect of discharging any part of said property from the payment of claims that had been or might be charged against the same or the receivers by the court making the decree or any other Circuit Court exercising ancillary jurisdiction, or by any other court to which any of the parties to said decree had been remitted, and that the property should be subject to be retaken, and if necessary, resold, if the sums so charged or to be charged against it or said receivers should not be paid within a reasonable time after being required by order of court. The

mortgaged property was thereupon sold, but no surplus realized.

The net earnings of the Wabash system from the time the receivers took possession to the time when they surrendered the road of the Quincy Company were $1,012,857.39, which was $3,304,633.61 less than the amount of preferred debt existing when the receivers took possession. The petitions of the trustees Gilman and Bull and of the Quincy Company were referred to a master who reported against the claims therein set forth. Exceptions were argued before the Circuit Court and overruled, the report confirmed and the petitions dismissed, whereupon the petitioners brought the case by appeal to this court. The opinions of Brewer, Circuit Judge, and Thayer, District Judge, will be found reported in 34 Fed. Rep. 259.

Mr. D. H. Chamberlain and *Mr. Everett W. Pattison* for appellants.

The receivers of the Wabash, St. Louis and Pacific Railway Company, having taken possession of and operated the railroad of the Quincy, Missouri and Pacific Railroad Company, from May 27, 1884, to August 1, 1885, must be held to have adopted the lease under which said railroad was held at the time of their appointment, and to have made themselves and the property in their hands liable to the lessor company according to the terms of such lease. *Thomas* v. *Pemberton*, 7 Taunt. 206; *Hanson* v. *Stevenson*, 1 B. & Ald. 303; *In re Oak Pits Colliery Co.*, 21 Ch. D. 322, 330, and cases there cited; *In re Lundy Granite Co.*, L. R. 6 Ch. 462; *In re South Kensington Coöperative Stores*, 17 Ch. D. 161; *In re Silkstone & Dodworth Coal & Iron Co.*, 17 Ch. D. 158; *In re Brown, Bailey & Dixon*, 18 Ch. D. 649; *In re Bridgewater Engineering Co.*, 12 Ch. D. 181; *Martin* v. *Black*, 9 Paige, 641; *S. C.* 38 Am. Dec. 574; *In re Brown*, 3 Edwd. Ch. 384; *Hoyt* v. *Stoddard*, 2 Allen, 442; *Boyce* v. *Bakewell*, 37 Missouri, 492; *Commonwealth* v. *Franklin Ins. Co.*, 115 Mass. 278; *Woodruff* v. *Erie Railway Co.*, 93 N. Y. 609; *Miltenberger* v.

Logansport Railway, 106 U. S. 286; *Vermont & Canada Railroad* v. *Vermont Central Railroad*, 50 Vermont, 500; *Langdon* v. *Vermont & Canada Railroad*, 53 Vermont, 230; *S. C.* 54 Vermont, 593; *Ex parte Faxon*, 1 Lowell, 404; *Fosdick* v. *Schall*, 99 U. S. 235; *Union Trust Co.* v. *Illinois Midland Railway*, 117 U. S. 434; *Ellis* v. *Boston, Hartford & Erie Railroad*, 107 Mass. 1; *In re New Jersey & New York Railway Co.*, 29 N. J. Eq. 67.

There are no circumstances in this case which should except it from this general rule.

Mr. Edward W. Sheldon filed a brief for appellants.

Mr. James Thomson, by leave of court, filed a brief for appellants.

Mr. Wells H. Blodgett and *Mr. Thomas H. Hubbard* for appellees.

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

When the receivers were appointed, the Wabash Company consisted of a system controlling some thirty-six hundred miles of road, made up by the consolidation and leasing of many different railroads, upon nearly every one of which there existed one or more mortgages. The company was insolvent, its preferential indebtedness amounted to nearly four and one-half millions, its credit was gone, and many parts of the property were in a wretched condition. The bill was obviously framed upon the theory that an insolvent railroad corporation has a standing in a court of equity to surrender its property into the custody of the court, to be preserved and disposed of according to the rights of its various creditors, and, in the meantime, operated in the public interest. The relief sought was predicated upon the view that those rights were not changed by the application, and that the proceeding was in the interest of each and all of them as such interest might appear. The bill is characterized by one of the counsel as "without precedent." We are not called upon to inquire as

to how that may be, but we readily agree that the concession to a mortgagor company of the power through its own act to displace vested liens by unsecured claims is dangerous in the extreme. But no such concession was made here. On the contrary, from the beginning, the court, by repeated directions and orders, fully recognized the fact that none of the numerous defendants had consented that their rights, whatever they might be, should be subordinated to those of others to which they were superior, and that no defendant should be subjected to loss of priority because necessarily brought into association with others by the bill.

In the order of appointment, the receivers were directed to pay out of the income that should come into their hands rental which had accrued or which might accrue upon all complainant's leased lines, but to keep accounts showing the source of income and revenue with reference to expenditure. Immediately, and within a month thereafter, the receivers called the attention of the court to the fact that the earnings of ten enumerated lines or divisions had not at any time since their acquisition been sufficient to pay their operating expenses, the cost of their maintenance and interest on the bonds and other obligations secured upon each of them, while certain others had; and by the confirmation of the master's report, which was made on the 28th of June, 1884, the court, adopting its recommendations, directed that the receivers should pay interest on the bonds or obligations secured on the several paying enumerated lines or divisions, from whatever balance of income might remain in their hands after meeting other obligations; and that an account should be kept of the earnings and incomes from, as well as the accounts of all the operating expenses, cost of maintenance and taxes upon, certain other enumerated lines or divisions, including that of the petitioner. This was followed by the declaration of the court that the earnings of the branches which earned their interest were not to be taken to pay interest on non-earning branches, but that the concerns which had not earned running expenses would be permitted to collapse. Then came the intervening petition of the appellant company for a transfer of the lease,

which petition was granted; but the order of court was not availed of or acted upon by petitioner.

The order of April 16, 1885, reiterated the position taken by the court, and specifically pointed out that where there was no income, rental claims would not be paid.

The petitioners, however, after taking possession of their road, asked the court to decree, not the allowance of their rental claims, and those for repairs, and taxes paid, as unsecured indebtedness, but a lien in their favor for those amounts superior and paramount to the mortgages on the property of the Wabash Company. They sought, in other words, to have these claims charged upon the corpus of the property in preference to subsisting contract liens. And they based this contention upon the proposition that the receivers had adopted the lease and made themselves, and the property in their hands, liable according to its terms.

It is not asserted that these receivers became the assignees of the unexpired term of the leasehold estate with the right to dispose of it, but it is claimed that because they took possession of the railroad of the Quincy Company and held and operated it until August 1, 1885, they became liable to the extent of the rental up to that time. But the receivers were not statutory receivers, nor did they occupy identically the same position as assignees in bankruptcy or insolvency, and the like. They were ministerial officers appointed by the Court of Chancery to take possession of and preserve *pendente lite* the fund or property in litigation; mere custodians, coming within the rule stated in *Chicago Union Bank* v. *Kansas City Bank*, 136 U. S. 223, 236, where this court said: "A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession in the property."

As observed in relation to such a receiver, by the Supreme

Court of Maryland, in *Gaither* v. *Stockbridge*, 67 Maryland, 222, 224, cited by counsel for appellee: "It is manifest that the scope of his duties and powers are very much more restricted than those of an assignee in bankruptcy or insolvency. In the case of an assignee in bankruptcy, the law casts upon such assignee the legal title to the unexpired term of the lease, and he thus becomes assignee of the term by operation of law, unless, from prudential considerations, he elects to reject the term as being without benefit to the creditors. But not so in the case of receivers, unless it be, as in New York, and some of the other States, where, by statute, a certain class of receivers are invested with the insolvent's estate, and with powers very similar to those vested in an assignee in bankruptcy. *Booth* v. *Clark*, 17 How. 331. The ordinary chancery receiver, such as we have in this case, is clothed with no estate in the property, but is a mere custodian of it for the court; and, by special authority, may become an officer of the court to effect a sale of the property, if that be deemed necessary for the benefit of the parties concerned. If the order of the court, under which the receiver acts, embraces the leasehold estate, it becomes his duty, of course, to take possession of it. But he does not, by taking such possession, become assignee of the term, in any proper sense of the word. He holds that, as he would hold any other personal property involved, for and as the hand of the court, and not as assignee of the term."

But appellants insist that without regard to privity of estate or privity of contract, receivers in chancery are liable, not for a reasonable rental value during the occupancy of leased property committed to their charge by order of court, but for rental according to the covenants of the leases whenever there are unequivocal acts of use and control of such property; and that they thus adopt the leases and become bound by their terms so long as such use and control continue. It is said that this is settled doctrine, and that whether receivers take as statutory or common law or *quasi* or equitable assignees; whether the title is in them, or the estate, or the whole estate, has vested in them, or whether they hold as

mere custodians for the court, is immaterial; that they are put to an election to assume or to reject the leases, and if they elect to avail themselves of them, they are bound to respond according to their terms. This position ignores any distinction between those who take by operation of law and those who do not, but inasmuch as it confessedly requires the application of the same rule as in the case of statutory receivers, assignees, and liquidators, this branch of the controversy may be disposed of on appellants' own ground.

That rule is thus stated in Mr. Platt's work on Leases, (vol. 2, p. 435,) in reference to assignees in bankruptcy: "A reasonable time was allowed the assignees to ascertain the value of the lease before they made their election; for which purpose they might have it valued, or put up for sale, without danger of such act being deemed an acceptance. If, however, they accepted a bidding, or dealt with the estate as their own, or used it in a manner injurious to the persons otherwise entitled, they were not within this protection." The principle that such assignees shall not be held, unless by their consent, to take what will charge the estate with a burden, has been often applied by this court; *Glenny* v. *Langdon*, 98 U. S. 20; *American File Co.* v. *Garrett*, 110 U. S. 288; *Sparhawk* v. *Yerkes*, 142 U. S. 1; and also by the state courts, as in *Martin* v. *Black*, 9 Paige, 641, by Chancellor Walworth; in *Commonwealth* v. *Franklin Insurance Co.*, 115 Mass. 278, by Judge Endicott; in *Berry* v. *Gillis*, 17 N. H. 9, by Chief Justice Parker; and in many other cases.

It is thus expounded in respect of official liquidators under the English "Companies Act," by Lord Justice Lindley, in *In re Oak Pits Colliery Co.*, 21 Ch. D. 322, 330:

"(1) If the liquidator has retained possession for the purposes of the winding up, or if he has used the property for carrying on the company's business, or has kept the property in order to sell it or to do the best he can with it, the landlord will be allowed to distrain for rent which has become due since the winding up. . . . (2) But if he has kept possession by arrangement with the landlord and for his benefit as well as for the benefit of the company, and there is no agree-

ment with the liquidator that he shall pay rent, the landlord is not allowed to distrain. . . . When the liquidator retains the property for the purpose of advantageously disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt contracted for the purpose of winding up the company, and ought to be paid in full like any other debt or expense properly incurred by the liquidator for the same purpose, and in such a case it appears to us that the rent for the whole period during which the property is so retained or used ought to be paid in full without reference to the amount which could be realized by a distress. . . . But no authority has yet gone the length of deciding that a landlord is entitled to distrain for or be paid in full rent accruing since the commencement of the winding up, where the liquidator has done nothing except abstain from trying to get rid of the property which the company holds as lessee. If the landlord had endeavored to reënter and the liquidator had objected, the case might be different, but having regard to the provisions of the Companies Act of 1862, we are of opinion that in the case now supposed the landlord must rely on his right, if any, to reënter and prove for the arrears due to him, and that he is not entitled to anything more."

In *Sunflower Oil Company* v. *Wilson*, 142 U. S. 313, 322, where an oil company contracted with a railway company to purchase certain rolling stock and lease the same to the railway company at a specified rental, the latter agreeing to purchase and pay for it in cash on or before a given date, or if it should be unable to do so to turn it over to the oil company at the expiration of the contract in good order and condition, and the railway company became insolvent and its mortgage bondholders instituted proceedings to foreclose and had a receiver appointed, it was said: "The receiver did not simply by virtue of his appointment become liable upon the covenants and agreements of the railway company. High on Receivers, § 273; *Hoyt* v. *Stoddard*, 2 Allen, 442. Upon taking possession of the property, he was entitled to a reasonable time to elect whether he would adopt this contract and make it his own, or whether he would insist upon the inability

of the company to pay, and return the property in good order and condition, paying, of course, the stipulated rental for it so long as he used it." As between the mortgagees invoking the interposition of the court and the oil company, the agreed rental was held to be the proper payment to be made for the use of the rolling stock under the particular contract in question.

Tested by this rule, we are of opinion that these receivers did not become bound by an election or by reason of any act of their own or by any order of the court.

The court did not bind itself or its receivers *eo instanti* by the mere act of taking possession. Reasonable time had necessarily to be taken to ascertain the situation of affairs. The Quincy Company, as a *quasi* public corporation, operating a public highway, was under a public duty to keep up and maintain its railroad as a going concern, as was the Wabash Company under the contract between them, but the latter had become unable to perform the public service for which it had been endowed with its faculties and franchises, and which it had assumed to discharge as between it and the other company. Its operation could only be continued under the receivers, whose action in that respect cannot be adjudged to have been dictated by the idea of keeping the property in order to sell it, or using it to the advantage of the creditors, or doing otherwise than "abstain from trying to get rid of the property." Clearly this was no case of the employment of the property of another for one's own benefit. Within a month the receivers applied to the court for instructions, distinctly setting forth that there was no income wherewith to pay the rental in question, and the order of court, entered at once, proceeded upon the theory that they were not to be bound by the rental prescribed.

Nor was there any resistance by the receivers or impediment interposed by them to the reëntry of the Quincy Company. The receivers did not so remain in possession, nor were they authorized by the court to so remain, as to render the lessor unable itself to resume possession. The lease gave the Quincy Company the option to reënter, and put an end to it, upon de-

fault in payment of rental continued for thirty days. Default in fact did not occur until July 1, 1884, but upon the face of the bill the utter inability of the Wabash Company to pay rent appeared, and under the circumstances it is unreasonable to suppose that if appellants had applied to the Circuit Court for possession of the property earlier than they did, the court, in view of the state of case disclosed by the record, would have declined to hand it over. Such application was made December 16, 1884, and an order granted accordingly, but not availed of by the Quincy Company. Subsequently, on a renewed application, the company retook its road, freed from any liability for the enormous preferential indebtedness of the Wabash Company, and with its public duty discharged up to that time by the receivers at a loss of more than $20,000. The lease had not theretofore been cancelled by the court, doubtless because it was considered that that ought not to be done without the assent of the lessor, but the court said: "The right of a lessor or mortgagee, whose rent or interest is unpaid, to insist upon possession or foreclosure will be promptly recognized." This was as late as April 16, 1885, but it was consistent with the order of June 28, 1884, and the position of the court throughout. Indeed, there can be no pretence that the Quincy Company or its trustees were encouraged to remain inactive in reliance on payment of rental under order of court unless the earnings of their road justified it.

Our conclusion is that the receivers, as such, did not become so committed to the terms of the lease as by reason thereof to be subjected to an obligation requiring the rental to be paid out of the property of the Wabash Company in preference to the payment of the mortgagees of that property. Whether that rental might be preferred in payment to the unsecured debts if there had been any equity in the mortgaged premises, is a question not arising for decision.

If the receivers were not bound as having become virtually assignees of the lease or by reason of any acts of their own or orders of the court, were the petitioners entitled to the relief they prayed upon any ground heretofore recognized as justify-

ing such imposition upon the corpus of the property in priority to the claims of lien creditors?

In *Morgan's Company* v. *Texas Central Railway*, 137 U. S. 171, 197, we said that the doctrine of *Fosdick* v. *Schall*, 99 U. S. 235, is: "That a court of equity may make it a condition of the issue of an order for the appointment of a receiver, that certain outstanding debts of the company shall be paid from the income that may be collected by the receiver or from the proceeds of sales; that the property being in the hands of the court for administration as a trust fund for the payment of incumbrances, the court, in putting it in condition for sale, may, if needed, recognize the claims of material men and laborers, and some few others of similar nature, accruing for a brief period prior to its intervention, where current earnings have been used by the company to pay mortgage debt or improve the property, instead of to pay current expenses, under circumstances raising an equity for their restoration; as for instance where the company being insolvent and in default is allowed by the mortgage bondholders to remain in possession and operate the road long after that default has become notorious, or where the company has been suddenly deprived of the control of its property, and the pursuit of any other course might lead to cessation of operation. *Miltenberger* v. *Logansport Railway Co.*, 106 U. S. 286, 311, 312. If the officers of the company, remarked Mr. Chief Justice Waite, in *Fosdick* v. *Schall*, 'give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. . . . Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion there can be no restoration; and that the amount of restoration shall be made to depend upon the amount of diversion.' *Burnham* v. *Bowen*, 111 U. S. 776; *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434."

The immense floating debt for supplies and other prefer

ential claims here precludes the inference that there was any such diversion of earnings applicable to the payment of rental, and the priority asked cannot be rested on that ground.

In *Wallace* v. *Loomis*, 97 U. S. 146, 162, it was said by Mr. Justice Bradley, speaking for the court: "The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot, at this day, be seriously disputed. It is a part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution; and, if possible, with the consent or acquiescence of the parties interested in the fund."

But here this rental was certainly not an expense originated in the process of administration by the court, and the road was surrendered as soon as the lessor would take it. Nor did the mortgagees consent to have the claim charged upon the corpus of the property in preference to their mortgages. The case does not come within *Kneeland* v. *American Loan and Trust Co.*, 136 U. S. 89; *Miltenberger* v. *Logansport Railway Co.*, 106 U. S. 286, 313; or any other of the authorities cited.

We do not discover any equitable ground upon which appellants are entitled to a preference in the distribution of the proceeds of the sale of the mortgaged property. The cost of the maintenance of the Quincy road by the receivers exceeded its total earnings; and the net earnings of the whole Wabash system, before the Quincy Company retook its road, did not amount to one-quarter of the amount of preferred debt existing when the receivers were appointed. The property was surrendered to it freed from any charge for that debt, to the payment of which it contributed nothing. The action of the court in making the appointment of receivers on the application of the mortgagor cannot be successfully challenged

upon this appeal. The theory of the bill and the action of the court and its officers left all the creditors with their rights existing as they existed before the appointment was made; and we find no legal or equitable grounds upon which the prior liens of the mortgagees can be displaced.

The decree of the Circuit Court dismissing these petitions was right, and it is

Affirmed.

ST. JOSEPH AND ST. LOUIS RAILROAD COMPANY *v.* HUMPHREYS.

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

No. 287. Argued and submitted April 12, 1892. — Decided April 25, 1892.

Following *Quincy, Missouri & Pacific Railroad Co.* v. *Humphreys*, *ante*, 82, it is, with regard to the lease of the St. Joseph and St. Louis Railroad Company by the Wabash Company, now *Held*,

(1) That, the circumstances in the latter case being similar to those in the former, the receivers were entitled to a reasonable time to ascertain the situation of the leased railroad before they could be held to have assumed the lease;

(2) That the time taken by them in deciding not to assume it was a reasonable time;

(3) That the course pursued by the court below towards the various independent roads which made up the Wabash system was equitable and just and will not be disturbed in this case.

THE court stated the case as follows:

June 1, 1874, the St. Joseph and St. Louis Railroad Company leased its road to the St. Louis, Kansas City and Northern Railroad Company for the full term of ninety-nine years. The lessee agreed to pay the lessor on the first days of March and September in each year, as a rental, thirty per cent of the gross earnings of said line, and it also agreed that such percentage should not be in any one year less than $20,000; and agreed to pay all taxes, and put the road in good running

order and keep it in good condition during the whole of said term. The lease also contained the following provision:

"But in case default shall be made by the party of the second part in the payment of the rents herein reserved and the same or any part thereof shall remain unpaid for the space of thirty days from and after the day when the same shall become due and payable, or if said party of the second part shall fail to comply with its covenants to pay taxes aforesaid or in all things keep and observe all and every the covenants, stipulations, and agreements herein contained and on its part to be observed and kept, then it shall be lawful for the said party of the first part to enter upon and take possession of all the property hereby leased, together with all the improvements thereon constructed, and to have again, repossess and enjoy the same as in the first instance, and upon such default in the payments of rent or taxes or the breach of any such covenants as aforesaid this lease shall cease, terminate, and be forfeited, at the option of the party of the first part."

The St. Louis Company took possession of the leased line and operated it until November, 1879, at which time that company consolidated with the Wabash Railway Company, the consolidated company taking the name of the Wabash, St. Louis and Pacific Railway Company. On the first of June, 1880, the Wabash Company executed to the Central Trust Company of New York and James Cheney a mortgage on its entire system to secure what were known as its general mortgage bonds, of which seventeen millions of dollars were issued, and subsequently a mortgage to the Iron Mountain Company to indemnify that company for certain advances; and also a collateral trust mortgage. On May 27, 1884, the Wabash Company filed in the Circuit Court of the United States for the Eastern District of Missouri its bill of complaint, which has already been sufficiently set forth in the preceding case, No. 223, *Quincy &c. Railroad* v. *Humphreys*, *ante*, 82, and upon the filing of which receivers were appointed as therein detailed.

On June 15, 1884, the Wabash Company filed by leave of court an amended bill of complaint, setting forth with greater

particularity the various lines of railway belonging to its system; the liens and incumbrances thereon; and the financial condition of the company; and stating the lease between the St. Joseph Company and the St. Louis, Kansas City and Northern Railway Company; and the consolidation between the latter company and the Wabash Company.

On June 26, 1884, the receivers asked instructions from the court, but the St. Joseph Company is not mentioned in their petition of that date, nor in the master's report thereon. The petition states, however, that the Wabash Railway Company and the St. Louis, Kansas City and Northern were possessed of certain valuable lines of railroad, which were subject to mortgages and deeds of trust, and gives a list of them, not including the St. Joseph, and after excluding certain lines or divisions whose earnings had not theretofore been sufficient to pay operating expenses, cost of maintenance and interest, says that from the incoming rents and profits of the property now in their possession under the court's former order they believe they can, until otherwise directed, pay the expenses, cost and interest on bonds or other obligations secured by mortgages or deeds of trust on the lines or divisions that were owned or possessed either by the Wabash or by the St. Louis, Kansas City and Northern before their consolidation, which lines they thought would continue to yield sufficient to make such payments.

The order of appointment directed, among other things, that the receivers should pay rental on all leased lines, "out of the income that shall come into their hands from the operation of said railroad or otherwise," and "keep such accounts as may be necessary to show the source from which all such income and revenues shall be derived, with reference to the interests of all parties herein and the expenditures by them made." By its confirmation of the master's report June 28, 1884, the court ordered the receivers to keep the accounts of the earnings and incomes from, as well as the accounts of, all the operating expenses, cost of maintenance and taxes of certain enumerated lines, not including the St. Joseph Company, separately, and report quarterly in respect thereto. On Sep-

tember 20, 1884, the court announced, upon an application for instructions with respect to payment of interest on that branch line of the Wabash system known as the Havana division, that the earnings belonging to other branches in the consolidated system would not be taken to support concerns that did not pay running expenses.

November 25, 1884, the St. Joseph Company filed its intervening petition, asking for the payment to it of rentals claimed to be due from the receivers, from March 1, 1884, to August 31, 1884, together with a penalty of one-tenth of one per cent a day as provided by the terms of the lease, and on January 2, 1885, filed its amended intervening petition, setting up the lease, the general mortgage and the indemnity mortgage, and charging violations by the Wabash Company of its covenants in respect of payment of taxes, keeping up repairs, etc., etc.

The petition further averred the filing of the bill and the appointment of the receivers, and that "said receivers are now using and operating said road and have recognized and adopted said lease and have elected to enter thereunder upon the premises therein demised and to avail themselves of the powers, privileges, and rights therein conferred on said lessee."

Petitioner further stated that on the first day of September, 1884, there was due to it for rent $27,420.79, of which $11,441.14 had accrued during the time the receivers had been operating the road; and that the taxes for 1884 were unpaid. It was alleged upon belief that its road was "absolutely necessary to the proper and profitable operation of the said Wabash, St. Louis and Pacific Railway," and that it was "a most valuable feeder to the main line of the Wabash Company."

And, after various other averments, petitioner prayed that the court direct the receivers to pay the rent then accrued and unpaid, forthwith, together with the penalty, and the taxes for 1884; and that they immediately proceed to put the leased property in thorough repair; and for general relief.

On the 11th of February, 1885, the receivers filed a demur-

rer and amended answer to the intervening petition, and, the demurrer being overruled, further answered February 21, denying that they had recognized or adopted the lease or elected to enter thereunder upon the demised property. They denied that the St. Joseph road was in anywise necessary to the profitable operation of the Wabash railway, or was a valuable feeder to its main line. They asserted that from May 29, 1884, to November 30, 1884, inclusive, the deficit and loss occasioned by the operation of the St. Joseph road amounted to $51,180.09, and averred that it would be manifestly unjust and inequitable to require them to take the earnings and profits of other branches of the system and pay the same in discharge of the rents accruing to petitioner. They further alleged that the net benefit from the business derived from petitioner's road accruing to the other lines operated by the receivers was far less than the outlay, and prayed the advice of the court whether they should any longer continue in the occupation and operation of the road or adopt the lease or deliver the road over to the petitioner, and, in the event that the petitioner should refuse to receive it, whether they should abandon the road. On March 20, 1885, the receivers applied to the court for instructions with respect to the cancellation of the St. Joseph lease, and on that day the receivers filed a report which showed that for the period between May 29 and November 30, 1884, the expenses of the line, not including any charge for rental, had exceeded its earnings $52,118.83, and they gave notice to the St. Joseph road that on April 13, 1885, they would apply to the court for instructions concerning the cancellation of the lease and the surrender of the leased property.

On April 16, 1885, the court delivered the opinion which it directed to stand as an order, which has been set forth and referred to in the preceding case, No. 223. On April 27, 1885, the master to whom the petition of the St. Joseph Company had been referred reported that he found from the evidence that the operation of the St. Joseph road had been a burden to the rest of the property in charge of the receivers since their appointment, without reference to the rental charged, and that in all reasonable probability it would con-

tinue to be a burden if operated as theretofore for an indefinite period; that the road owned no rolling stock at the date of the lease; and that the court had not adopted the lease in its entirety, and was not bound to continue to operate the road and pay the rental. Exceptions having been filed, the master modified his report by adding thereto, as findings of fact: That the Wabash Company had, prior to the time the receivers took possession of it, failed and neglected to keep the St. Joseph road in repair according to the terms of the lease; that the outlays made by the receivers were extraordinary, and were caused in part by the failure of the lessee to keep the road in repair; that extraordinary outlays for many months and perhaps years would be required from the same cause; that part of the expenses incurred by the receivers was for repairs and betterments; that the necessity for these arose from the failure of the lessee to put and keep the road in the condition in which it was to be kept by the covenants of the lease; and there still existed from the same cause a necessity for further repairs and betterments. He further found that the gross earnings of petitioner's road had been decreased by reason of the failure of the lessee to keep and carry out the covenants; but that the evidence did not satisfy him that a compliance with the terms of the lease by the lessee and its successors, or the receivers, would at any time since the date of the lease have resulted in any profit from the operation of the road. And further, that from May 29, 1884, to January 31, 1885, the operating expenses of the road, without reference to the rental charges, were $177,612.01; that the gross earnings for the same period were $116,851.10; that from the evidence before him he was unable to say that the probable necessary expenses for operating the road and affording the same facilities for business would in the future be less than they were during the period named for the same months in the year; that the petitioner's road had been of no benefit to the entire system in the hands of the receivers; that the profits on the carriage of goods delivered to the main line by the petitioner's road had not equalled the losses incurred by the receivers in operating that road; and that the road was

neither necessary nor valuable to the Wabash system as a feeder.

A supplemental intervening petition was filed July 1, 1885, and the master made an additional report. From the evidence he found that for the six months ending March 1, 1885, the operating expenses of the road exceeded its gross earnings by more than $42,000; and that the gross earnings of the rest of the system under the charge of the receivers realized from business originating on petitioner's road for the period above named were the sum of $94,646.01, of which, after deducting sixty per cent as the cost to the system of doing the business, there remained as net earnings realized from the system from business originating on that road, $37,858.40, or between four and five thousand dollars less than the direct loss incurred by the receivers in operating petitioner's road for the six months ending March 1, 1885. The master saw no ground, therefore, for changing his report by reason of the supplemental petition and the evidence introduced thereunder further than to add that there became due petitioner from the Wabash Company, on account of rental for the six months ending March 1, 1885, the sum of $28,572.37, which, in his opinion, should be allowed as a general, unsecured claim against the Wabash Company, with interest.

It appeared in evidence before the master that when the receivers took possession it was impossible, as the operating expenses of the St. Joseph line had never been kept separately, to form anything like an approximate estimate as to those expenses; that it was not until the end of August that it could be known what the earnings of this branch were in May; that, shortly after the first month's earnings and operating expenses were arrived at, parties connected with the St. Joseph road were notified that it was doubtful whether the road was making its operating expenses, and when the results of another month were arrived at, official notice was given that the rental would not be paid; and that this was in October, 1884. Exceptions were duly filed to this report.

April 9, 1886, the St. Joseph Company applied to the court for the possession of its road, and the court, at its instance,

thereupon made an order terminating the lease, and directing the receivers to surrender the road to that company, which order was complied with April 24, 1886.

The trustees in the general mortgage filed their cross-bill in the cause June 7, 1884, and, October 14, 1884, an amended cross-bill, praying for a foreclosure, and in January, 1885, an original bill in the state court, in which they prayed for substantially the same relief as in the cross-bills, which bill was removed into the Circuit Court and consolidated with the original suit. On April 16, 1885, the trustees moved for the appointment of receivers under the cross-bill, which application was denied. January 9, 1886, a decree of foreclosure and sale was entered, and the property covered by the decree was sold April 26, 1886, and the sale confirmed June 15. May 10, 1886, petitioner filed a second supplemental intervening petition, and in August and September, 1886, an application and amended application for payment of rentals down to April 24, 1886, out of the proceeds of the foreclosure sale. The amended application declared "that the said claim of your petitioner for the rent found by the master to be due to it under said lease constitutes, and in equity ought to constitute, a demand and lien against the proceeds of the sale of said Wabash, St. Louis and Pacific Railway Company under foreclosure; and, furthermore, that said claim is a lien prior in equity to any claim or lien of the complainants in this case or of any bondholders or mortgagees or other lessors or creditors of any kind or nature whatsoever." The receivers answered this second supplemental petition as follows:

"That it is not true that they, as receivers of the property of the Wabash, St. Louis and Pacific Railway Company, by any act of theirs or any order of the court by which they were appointed, adopted in whole or in part the covenants and obligations of the lease made by the said St. Joseph and St. Louis Railroad Company to the St. Louis, Kansas City and Northern Railway Company on or about the first day of June, 1874.

"These receivers, further answering, say that they did, pursuant to the order of this honorable court in that behalf duly entered, take charge of and operate the said St. Joseph and St.

Louis Railroad from and after the 29th day of May, 1884, until the 24th day of April, 1886, for the purpose of preserving said property and preventing a forfeiture of the charter thereof.

"Said receivers aver that at all times after they took charge of and commenced operating said St. Joseph and St. Louis Railroad they were compelled to expend large sums of money in the maintenance and operation thereof in excess of the earnings received therefrom.

"Said receivers, further answering, say that the said St. Joseph and St. Louis Railroad Company might at any time after the said property had been placed in their charge for the purposes aforesaid have obtained the possession thereof."

The preferred debt of the Wabash Company when the receivers were appointed was shown to have been $4,417,491; and the net earnings of the system from that date to April 24, 1886, to have been $2,819,131.40, leaving $1,598,359.60 outstanding. The master again reported a large deficit April 24, 1886, found the rentals due, and recommended their allowance as general, unsecured claims, with interest. The petitions, applications, reports and exceptions were heard, the exceptions overruled, and the petitions dismissed, and the petitioners appealed to this court.

Mr. Everett W. Pattison for appellant.

Mr. Wells H. Blodgett and *Mr. Thomas H. Hubbard* filed briefs for the appellees, and were present at the argument; but the court declined to hear them.

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

We have already seen that the theory of this bill was that an insolvent railroad corporation may in the public interest, and for the benefit of all its various creditors, surrender its property to a court of equity, to be preserved and kept in operation until it can be disposed of according to the several private rights concerned. Under such circumstances, before receivers can be held to have adopted outstanding leases,

reasonable time is required to ascertain the situation, in order that the court may determine intelligently the proper course to be pursued. In this case as to many of the lines involved, it was presently known that they were not self-supporting and that fact was brought to the attention of the court, which announced that such roads could not share in the earnings of those which had a surplus, but that they might apply for possession. But as to the St. Joseph road, a somewhat longer time was necessarily taken to arrive at results in that regard. The court, however, from the first had permitted no doubt to be entertained as to its position in the premises. The order of appointment directed payment out of income only and required accounts to be kept of the source of income with reference to expenditure. The receivers, after ascertaining the earnings, expenses and cost of running the St. Joseph road, so as to be enabled to form a sufficiently correct judgment upon the matter, gave that company official notice that rental would not be paid. A loss was incurred by the operation of the road from May 29 to November 30, 1884, of more than $50,000. The master found that its operation was a burden to the rest of the property; that its expenses exceeded its earnings; that it was of no benefit to the system, and neither necessary nor valuable to it as a feeder; that the deficit June 30, 1885, was $71,207.36; and that the deficit continued until the road was surrendered by the receivers. This being so, the court was not bound to direct the receivers to adopt the lease and inflict a loss on the other roads, out of whose money or property alone these rentals could be paid.

We think the notice given by the receivers that they could not pay, if any notice were required, was given within a reasonable time; and that the St. Joseph Company has little cause to complain of any action taken in the premises. The Wabash Company was insolvent, and the St. Joseph could not get its rental because of that insolvency, but we are unable to perceive why that business loss should be made good to that company out of property in which others had superior rights. This is what in different forms constitutes petitioner's claim, namely, that either upon the ground of an election to adopt;

or of equitable lien; or that the rentals were part of the receiver's expenses; petitioner should be given a preference upon the corpus of the property.

We are of opinion in this case, as in No. 223, (*Quincy &c. Railroad Co.* v. *Humphreys*, *ante*, 82,) that these receivers did not become bound upon this lease by an election or because of any act of their own or of any order of court. We find here as there no reason to doubt that if petitioner had applied for the possession of this property earlier than it did, it would have obtained it. We do not agree to the view that the St. Joseph Company could lie idly by while the Wabash system was in the throes of dissolution, utterly insolvent and hopeless of recovery, and say that its inactivity was in reliance on an expectation held out by the receivers that the rental would be paid no matter what became of the rights of other parties. What fund was there, what assets were there, from which this rental could be paid? There was a preferential debt of more than four and a half millions, and at the time the St. Joseph Company retook its road the entire net earnings of the whole Wabash system, from May 29, 1884, to April 24, 1886, had not sufficed to extinguish that indebtedness by a million and a half, while the mortgaged property brought far less than the incumbrances.

What the court did was to allow lessors and mortgagees to get what they could out of their own property; and we find no assent by the mortgagees to the allowance of this claim as against them. It is true that in the answer of the Central Trust Company and James Cheney, trustees, to one of the intervening petitions, it is said that the receivers took possession of the property demised, and that "they have since that time held, used and operated said road in and by said lease demised, and under and by virtue thereof," but the action of the receivers or the orders of the court do not justify the conclusion, as we have said, that the lease was adopted, but the contrary. It is also true that some days after the receivers were appointed the Iron Mountain road appeared and assented to the appointment; but we do not regard that as materially affecting the situation.

Without more, what we have said in the preceding case is sufficient to dispose of this, and the decree of the Circuit Court is

Affirmed.

WILLARD *v.* WILLARD.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 318. Argued April 18, 1892. — Decided May 2, 1892.

Under the act of August 15, 1876, c. 297, relating to partition of real estate in the District of Columbia, a tenant in common in fee, whose title is clear, may have partition, as of right, but by division or sale, at the discretion of the court.

A pending lease for years is no obstacle to partition between owners of the fee.

A bill in equity, under the act of August 15, 1876, c. 297, need set forth no more than the titles of the parties, and the plaintiff's desire to have partition by division of the land, or, if in the opinion of the court this cannot be done without injury to the parties, then by sale of the land and division of the proceeds.

THIS was a bill in equity filed January 3, 1888, by Henry K. Willard against Joseph C. Willard, under the act of August 15, 1876, c. 297, (which is copied in the margin,[1]) for partition

[1] An act relating to partition of real estate in the District of Columbia.

SEC. 1. All tenants in common and coparceners of any estate in lands, tenements or hereditaments, equitable as well as legal, within the District of Columbia, may, in the discretion of the court, be compelled in any court of competent jurisdiction to make or suffer partition of such estate or estates. In proceedings for partition all persons in interest shall be made parties in the same manner as in cases of equity jurisdiction. And in proceedings for partition under this act, the court may, in addition to the powers herein conferred, exercise such powers as are or may be conferred by virtue of the general equity jurisdiction of the court.

SEC. 2. The court, in all cases, in decreeing partition, may, if it satisfactorily appears that said lands and tenements, or any estate or interest therein, cannot be divided without loss or injury to the parties interested, decree a sale thereof, and a division of the money arising from such sale among the parties, according to their respective rights and interests.

of land in the city of Washington, bounded on Pennsylvania Avenue on the south, Fourteenth street on the east, and F street on the north, containing more than 33,000 square feet, and with the building thereon known as Willard's Hotel.

The allegations of the bill were that the plaintiff and the defendant were the owners of the land in fee simple, as tenants in common, and each the owner of an undivided half; that the plaintiff became and was the owner of his half under a deed from Henry A. Willard, dated December 1, 1887, and duly recorded; and that the plaintiff desired to have partition of the land, and to have his share thereof set apart to him in severalty; or, if in the opinion of the court the land could not be specifically divided between the parties without loss and injury to them and to the purposes for which the land was used, that for the purposes of partition it might be sold, and the proceeds divided between him and the defendant; and he prayed for partition accordingly.

The answer, filed March 6, 1888, alleged that the plaintiff's father, Henry A. Willard, and the defendant were the owners in fee simple, as tenants in common, of the land; and that it was of great value, and for the past twenty-five years and upwards had been leased by Henry A. Willard and the defendant to different persons for hotel purposes, and was now under lease and used as a hotel at a remunerative rental; that the defendant had no knowledge of the conveyance to the plaintiff, and required proof thereof; and denied that the defendant should be compelled to make or suffer partition of the land, or that it was within the power of the court to deprive him, against his will and without his consent, of his interest and estate in the whole land, either by a partition in severalty or by a sale thereof.

SEC. 3. In all such sales, unless the court shall by special order direct or require, on good cause shown, that the sale be made for cash, the purchase money shall be payable one third on day of sale, one third in one year, and one third in two years thereafter, with interest, the deferred payments to be secured to the parties, according to their respective interests, by good and sufficient mortgage upon the premises so sold, which shall be subject to the approval of the court. 19 Stat. 202.

Argument for Appellant.

A general replication was filed, and proofs taken, which showed the following facts: The defendant and Henry A. Willard made a lease of the land for five years and four months from January 1, 1884, at an annual rent of $20,500, to Phœbe D. Cook, which was afterwards assigned, with the lessors' consent, to Orrin G. Staples. On December 1, 1887, Henry A. Willard conveyed to the plaintiff an undivided half of the land, in fee simple, by deed duly recorded. The property was peculiarly adapted to hotel purposes, and was worth in its present condition more than $600,000, and could not be divided without serious loss.

The court in special term, on July 7, 1888, ordered a sale in accordance with the provisions of the act of Congress, and appointed trustees to make a sale and conveyance, and to pay the proceeds into court. The decree was affirmed in general term, on October 22, 1888. 6 Mackey, 559.

The defendant appealed to this court, and assigned the following errors in the decree:

"1st. The property was under lease for a term of years at the time the bill was filed, and the plaintiff not entitled to possession.

"2d. Under the act of Congress of August 15, 1876, a tenant in common has not an absolute right to partition, but it is discretionary with the court, and something besides the existence of the tenancy must be averred and shown in order to call such discretion into exercise, which was not done in this case."

Mr. William F. Mattingly for appellant.

At common law coparceners alone had the right to demand partition. By the Stat. 31 H. VIII, this right was extended to joint tenants and tenants in common of estates of inheritance, and by 32 H. VIII to estates for life or years and estates in a different manner and by different tenants. The proceeding was at law, and was a partition of the property in kind. The right to a sale depends altogether upon statute, and will only be directed when the facts and circumstances required by

statute to authorize it are affirmatively made to appear. The onus is always on him who seeks the sale.

Prior to the passage of the act of Congress under which this bill is filed, there were two acts of the Assembly of the State of Maryland, in force in this District, under which real estate could be sold for purposes of partition; the act of 1785, c. 72, § 12, and the act of November, 1786, c. 45, § 8; both of which will be found in 2 Kilty's Laws of Maryland.

Referring to these two acts the Court of Appeals of that State in *Mewshaw* v. *Mewshaw*, 2 Maryland Ch. 12, decided that to give the court jurisdiction under these acts the bill should allege that a sale would be for the advantage of the parties, and the allegation must be established by admission if the parties are of age, or by evidence if not of age, and if so established the court has power to decree a sale. Prior to the act of 1876, under which this action is brought, it was never claimed in this jurisdiction that, where the parties were all adults, the court could decree a sale. The question, if it was one, was early decided. *Hastings* v. *Granberry*, 3 Cranch C. C. 332.

The property at the time this bill was filed being in the possession of a tenant under a lease for years, the complainant had only a reversionary interest, and, not being entitled to the possession, had no right to demand partition. *Hunnewell* v. *Taylor*, 6 Cush. 472; *Baldwin* v. *Aldrich*, 34 Vermont, 526; *S. C.* 80 Am. Dec. 695; *Hubbard* v. *Ricart*, 3 Vermont, 207; *S. C.* 23 Am. Dec. 198.

Under the act of Congress, partition is not a matter of right, but in express terms is made discretionary with the court; and the simple averment of a tenancy in common is not sufficient to justify a decree.

A complainant can only recover according to his averments and proofs, and unless under this statute every tenant in common has an absolute right to a partition, no matter what the circumstances may be, then the complainant must aver facts in his bill which would justify the court in the exercise of a judicial discretion, to decree partition. He must, under all the authorities, bring his case within the provisions of the

statute on the face of his bill; and, if the statute, notwithstanding the tenancy in common, gives the court a discretion to partition or not, then facts must be averred and proved which will afford the court information upon which it can exercise its discretion. If no such facts appear, then there is nothing upon which the court can be called upon to act. We respectfully submit that this is the only safe and proper rule of construction, and the one intended by Congress in making the relief sought permissive, (not mandatory,) and discretionary with the court.

We further submit that it is a serious matter to a man advanced in years, having a fortune invested in a piece of real estate, yielding a fair income and increasing in value, for a court, at the demand of a coöwner who comes in as a mere volunteer, to say, we will sell this property, convert your real estate into money, or promises secured by mortgage on the property, whether you wish it or not.

If Congress had intended such to be the law it would have said "all tenants in common and coparceners in lands *shall be compelled* to make or suffer partition," and not "may in the discretion of the Court" be so compelled.

Mr. Martin F. Morris, (with whom was *Mr. G. E. Hamilton* on the brief,) for appellee.

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

In a court having general jurisdiction in equity to grant partition, as in a court of law, a tenant in common, whose title in an undivided share of the land is clear, is entitled to partition, as a matter of right, so that he may hold and enjoy his property in severalty. Story Eq. Jur. §§ 653, 656; *Parker* v. *Gerard*, Ambler, 236; *Calmady* v. *Calmady*, 2 Ves. Jr. 568; *Wiseley* v. *Findlay*, 3 Rand. 361; *Smith* v. *Smith*, Hoffman Ch. 506, and 10 Paige, 470; *Donnell* v. *Mateer*, 7 Iredell Eq. 94; *Campbell* v. *Lowe*, 9 Maryland, 500.

Under the English statutes of 31 H. VIII, c. 1, and 32 H. VIII, c. 32, in force in the State of Maryland before 1801, and

therefore in the District of Columbia, any tenant in common in fee might compel partition at law by division of the estate held in common. Alexander's British Statutes in Maryland, 311, 312, 332; *Lloyd* v. *Gordon*, 2 Har. & McH. 254; Rev. Stat. D. C. § 92. It is unnecessary to consider how far the Supreme Court of the District of Columbia had equity jurisdiction in cases of partition before the act of Congress of August 15, 1876, c. 297, because this act expressly empowers the court, exercising general jurisdiction in equity, in its discretion, to compel all tenants in common of any estate, legal or equitable, to make or suffer partition, either by division of the estate, or, if it satisfactorily appears that the estate cannot be divided without loss or injury to the parties interested, then by sale of the estate and division of the proceeds among the parties, according to their respective rights and interests. 19 Stat. 202. This statute, while it authorizes the court to compel a partition by division or by sale, at its discretion, as the facts appearing at the hearing may require, does not affect the general rule, governing every court of law or equity having jurisdiction to grant partition, that partition is of right, and not to be defeated by the mere unwillingness of one party to have each enjoy his own in severalty.

In equity, as at law, a pending lease for years is no obstacle to partition between owners of the fee. Co. Lit. 46a, 167a; Com. Dig. Parcener, C. 6; *Wilkinson* v. *Joberns*, L. R. 16 Eq. 14; *Hunt* v. *Hazelton*, 5 N. H. 216; *Woodworth* v. *Campbell*, 5 Paige, 518; *Thruston* v. *Minke*, 32 Maryland, 571; *Cook* v. *Webb*, 19 Minnesota, 167. The decision in *Hunnewell* v. *Taylor*, 6 Cush. 472, cited by the appellant, was governed by an express statute of Massachusetts authorizing a petition for partition "by any person who has an estate in possession, but not by one who has only a remainder or reversion," which was presently modified by an enactment that partition might be had notwithstanding the existence of a lease of a whole or part of the estate. Mass. Stat. 1853, c. 410, § 1; Gen. Stat. c. 136, §§ 3, 67; Pub. Stat. c. 178, §§ 3, 68. In *Moore* v. *Shannon*, 6 Mackey, 157, there was an outstanding life estate, so that the plaintiff was not in possession of the freehold, and

was therefore denied partition. See Co. Lit. and Com. Dig. *ubi supra; Evans* v. *Bagshaw*, L. R. 8 Eq. 469, and L. R. 5 Ch. 340; *Brown* v. *Brown*, 8 N. H. 93.

The present bill, after setting forth the titles in fee of the parties, alleges that the plaintiff desires to have partition of the land and his share set apart to him in severalty, or, if in the opinion of the court this cannot be done without injury to the parties and to the purposes for which the land is used, then by sale of the land and division of the proceeds, and prays for partition accordingly. The bill, following the statute, and seeking partition in either mode, as the court in its discretion might think fit, is in proper and sufficient form. Any allegation of special reasons for partition, or for having it made in one way or in the other, would have been unusual and superfluous. The decisions in Maryland, cited by the appellant, were made under statutes authorizing partition only when it would be for the interest and advantage of the parties that the land should be sold, and therefore held that it must be so alleged in the petition. *Tomlinson* v. *McKaig*, 5 Gill, 256; *Mewshaw* v. *Mewshaw*, 2 Maryland Ch. 12.

This disposes of the only errors assigned or argued. It is not denied, and could not be, upon the proofs, that, if the plaintiff was entitled to partition, it was rightly ordered to be made by sale, and not by division of the estate.

Decree affirmed.

Mr. Justice Brewer was not present at the argument, and took no part in the decision.

NEW ENGLAND MORTGAGE SECURITY COMPANY *v.* GAY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 221. Argued March 22, 1892. — Decided May 2, 1892.

When the jurisdiction of this court depends upon the amount in controversy, it is to be determined by the amount involved in the particular case, and not by any contingent loss which may be sustained by either one of the parties through the probative effect of the judgment, however certain it may be that such loss will occur.

The plaintiff made a loan to the defendant upon his promissory notes to the amount of $8500, secured by a mortgage of real estate in Georgia of the value of over $20,000. In assumpsit to recover on the notes the jury found the transaction to have been usurious and gave judgment for the sum actually received by the debtor, which was $1700 less than the amount claimed, and for interest and costs. The effect of that judgment, if not reversed, is, under the laws of Georgia, to invalidate the mortgage given as security, in proceedings to enforce it. *Held*, that, notwithstanding such indirect effect, this court has no jurisdiction, the amount directly in dispute in this action being only the usurious sum.

This was an action of assumpsit by the plaintiff in error against Jacob M. Gay upon four promissory notes, made by Gay, amounting to $8500, with interest at eight per cent, payable annually, with all costs of collection, including ten per cent attorney fees. These notes were made payable to Charles L. Flint or order, at the office of the Corbin Banking Company, New York City, and as to each of them the defendant waived his right to the benefit of the exemption provided for by the constitution and laws of Georgia. To secure these notes a deed was given by Gay with the consent of his wife to said Flint, of land in Schley County, Georgia, with release of homestead and dower. At the same time a bond for a reconveyance on payment of the notes was given by Flint to Gay, according to the usual course of business in Georgia, where such deed and bond stand in the place of a mortgage.

Flint took the notes and deed in behalf of the plaintiff, and afterwards endorsed the notes to the plaintiff.

The defendant pleaded four pleas, two of which were stricken out by the court; and the case was tried upon the first, which was an ordinary plea of *nil debet*, and upon the second, wherein the defendant alleged that the consideration of these notes was a loan of money by the plaintiff to the defendant of the sum of $6463, and that all of said sum and notes sued on in excess of said sum was contrary to law, and defendant was only liable for the sum received by him and lawful interest thereon from the dates of the notes, which amount he averred his willingness to pay. Upon the trial, the defendant relied solely upon the defence of usury, and the court charged the jury that the defendant admitted an indebtedness of $6463, with interest, etc., and instructed them in any event to return a verdict for that amount. In this connection he further charged that, if they believed the defendant received $6800, they were then directed to return a verdict for that sum, with interest and attorney fees, etc. The jury returned a verdict for $6800 principal, $2041.51 interest, and $884.15 attorney fees, making a total amount of $9725.66, for which a judgment was entered with costs.

Plaintiff thereupon secured the settlement of a bill of exceptions and sued out a writ of error from this court.

Mr. N. J. Hammond, (with whom were *Mr. Simeon E. Baldwin* and *Mr. W. E. Simmons* on the brief,) for plaintiff in error, said on the question of jurisdiction:

Our action is a statutory method of enforcing a security, and the test of jurisdiction is the value of the security, which is an absolute title, or of the debt. The debt secured was $8500, beside interest and attorney's fees, and the property to which title was given as security is worth $22,500.

The Georgia statutes on which our rights depend are printed in the margin.[1]

[1] "SEC. 1969. Whenever any person in this State conveys any real property by deed to secure any debt to any person loaning or advancing said

Argument for Plaintiff in Error.

Our declaration set forth the mortgage, and prayed that the defendant might be required to answer it. This was not a prayer for a monetary judgment, but that he answer to all the allegations. Under the Code of Georgia (Sec. 3082), equitable remedies, such as the establishment of liens, can be given in an action at law.

The great thing we sued for was to get a judgment establishing our right to levy on the lands conveyed by the deed.

In bringing this action we were pursuing the first stage in the proceeding. We could not realize on our security without first getting a personal judgment on the notes; and the levy of final process, whereby we should realize on our security,

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vender any money, or to secure any other debt, and shall take a bond for titles back to said vender upon the payment of such debt or debts, or shall in like manner convey any personal property by bill of sale, and take an obligation binding the person to whom said property was conveyed to reconvey said property upon the payment of said debt or debts, such conveyance of real or personal property shall pass the title of said property to the vendee, (provided that the consent of the wife has been first obtained,) till the debt or debts which said conveyance was made to secure shall be fully paid, and shall be held by the courts of this State to be an absolute conveyance with the right reserved by the vender to have said property reconveyed to him upon the payment of the debt or debts intended to be secured, agreeable to the terms of the contract, and not a mortgage.

"SEC. 1970. When any judgment shall be rendered in any of the courts of this State upon any note or other evidence of debt, which such conveyance of realty was made and intended to secure, it shall and may be lawful for the vendee to make and file and have recorded in the clerk's office of the superior court of the county wherein the land lies, a good and sufficient deed of conveyance to the defendant for said land; and if the said obligor be dead, then his executor or administrator may, in like manner, make and file such deed without obtaining an order of the court for that purpose, whereupon the same may be levied on and sold under said judgment as in other cases: *Provided*, that the said judgment shall take lien upon the land prior to any other judgment or encumbrance against the defendant.

"SEC. 1971. The vender's rights to a reconveyance of the property upon his complying with the contract, shall not be affected by any liens, encumbrances or rights which would otherwise attach to the property by virtue of the title being in the vendee; but the right of the vender to a reconveyance shall be absolute and permanent upon his complying with his contract with the vendee according to the terms."

"SEC. 2057, *f*. All titles to property made as a part of an usurious contract, or to evade the laws against usury, are void."

was the last stage of the action. Had this been an ordinary action of assumpsit the averments as to the real estate would have been impertinent. As it was they were material, if not vital. *Napier* v. *Saulsbury*, 63 Georgia, 477, 480.

The plea of usury attacked not only our right to recover judgment for the full sum we demanded, but our right to levy final process on the judgment, upon the land conveyed to secure the debt. The verdict for the defendant upon this plea, in other words, not only reduced our debt by $2300, which of itself might not have authorized proceedings in error, but prevented our availing ourselves of a security worth $22,500, which we claimed for the entire debt, which debt, in any point of view, exceeded $5000. Usury did not avoid the notes, but it did altogether avoid the deed, and therefore this remedy upon it by final process, by the express provisions of the code. *McLaren* v. *Clark*, 80 Georgia, 423; *Small* v. *Hicks*, 81 Georgia, 691. It also avoids the waiver of the homestead exemption, contained in the notes. *Cleghorn* v. *Greeson*, 77 Georgia, 343.

In view of the statutory provisions governing this action, it seems to us evident that it is one "where the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars," because the matter in dispute was our right to a judgment, on which to found a levy on certain described lands worth $22,500, to collect a debt exceeding $5000.

The case does not belong in the class of *Elgin* v. *Marshall*, 106 U. S. 578, and *The Sydney*, 139 U. S. 331. It is not one where the judgment is complained of because in some other case it will have a probative force against us. Here the matter directly in dispute between the parties was whether we were entitled to a judgment carrying a specific lien on specified real estate described in the declaration, and enforceable on final process, in this very suit, to be executed by a sale of that real estate agreeably to that lien.

A case somewhat analogous is that of *Stinson* v. *Dousman*, 20 How. 461, from Minnesota Territory. There a suit was brought for rent by way of damages for breach of a contract of sale where possession had been given and afterwards the

contract had, as the plaintiff claimed, been terminated. The defendant's answer denied any breach of contract, and asked for a judgment affirming the continuing validity of the contract. Judgment was rendered for the plaintiff to recover less than $1000. At that time $1000 was the limit of jurisdiction on writs of error to territorial courts, and the question of jurisdiction was thus disposed of in this court.

"The defendant in error objected that the matter in dispute was not of the value of one thousand dollars, and therefore this court had no jurisdiction of the cause. The objection might well be founded, if this was to be regarded merely as an action at common law. But the equitable as well as the legal considerations involved in the cause are to be considered. The effect of the judgment is to adjust the legal and equitable claims of the parties to the subject of the suit. The subject of the suit is not merely the amount of rent claimed, but the title of the respective parties to the land under the contract. The contract shows that the matter in dispute was valued by the parties at eight thousand dollars." *Stinson* v. *Dousman*, 20 How. 461, 466. This case was referred to with approval in *Elgin* v. *Marshall*, 106 U. S. on page 581.

The title under our deed, or the right which we claimed to sell the land embraced in our deed to satisfy such judgment as we might recover, was in legal effect denied by the plea of usury; and the judgment rendered on that plea necessarily operates "in denial of the right claimed by the company which is of far greater value than the sum which, by the act of Congress, is the limit below which an appeal is not allowable." *Market Co.* v. *Hoffman*, 101 U. S. 112, 113.

No appearance for the defendant in error.

Mr. Justice Brown delivered the opinion of the court.

From the above statement of facts it is clear that, while the plaintiff sued to recover $8500 and interest, he actually recovered $6800 and interest and attorney fees, amounting in all to $9725.66, so that the amount actually in dispute between

the parties in this court is the difference between the amount claimed and the amount of the verdict. Computing interest at eight per cent upon the entire amount of the notes and adding an attorney fee of ten per cent, the amount due according to the plaintiff's theory was approximately $12,155, or $2429.34 more than the amount recovered. This is the proper method of ascertaining the amount in dispute in this court. *Tintsman* v. *National Bank*, 100 U. S. 6; *Jenness* v. *Citizens' National Bank of Rome*, 110 U. S. 52; *Wabash, St. Louis &c. Railway* v. *Knox*, 110 U. S. 304; *Hilton* v. *Dickinson*, 108 U. S. 165.

It is true that, under the Code of Georgia, section 2057, subdivision *f*, "all titles to property made as a part of an usurious contract, or to evade the laws against usury, are void." The Supreme Court of Georgia has construed this as rendering a deed infected with usury void as title, and depriving the holder of the right of recovery of the land against the maker. *Carswell* v. *Hartridge*, 55 Georgia, 412; *Johnson* v. *Griffin Banking Co.*, 55 Georgia, 691. It was said in *Broach* v. *Smith*, 75 Georgia, 159, that usury not only destroys the legal title, but prevents the deed from ever being treated as an equitable mortgage. It appears in this case that the value of the property conveyed as security is $22,500, and under the laws of Georgia it may be that the finding of usury may have the effect of invalidating the deed given as security for the loan.

Assuming this to be true, however, it is not the immediate result of the judgment in this case. The provisions of the Georgia code with respect to real estate security for loans are somewhat peculiar. The practice is for the person receiving the loan to convey the real property by deed to the person loaning or advancing the money, and to take a bond for title back to the vendor upon the payment of the debt, and by section 1969 "such conveyance of real or personal property shall pass the title of said property to the vendee . . . till the debt or debts which said conveyance was made to secure shall be fully paid," etc. By section 1970, "when any judgment shall be rendered in any of the courts of this State upon any note or other evidence of debt which said conveyance of realty was

made and intended to secure, it shall and may be lawful for the vendee to make and file and have recorded in the clerk's office of the Superior Court of the county wherein the land lies a good and sufficient deed of conveyance to the defendant for said land; . . . whereupon the same may be levied on and sold under said judgment as in other cases: *Provided*, That the said judgment shall take lien upon the land prior to any other judgment or encumbrance against the defendant."

The substance of this is, that upon taking judgment upon the note or bond given for the loan, the lender may reconvey the property to the debtor, and immediately levy upon and sell it by virtue of his judgment and execution. In such case it would seem that, if he buys the land at the sale, he would recover possession of it by an action of ejectment upon his sheriff's deed.

In this connection it was held by the Supreme Court of Georgia in *Carswell* v. *Hartridge*, 55 Georgia, 412, 414, that the proceeding under this statute was optional, and that a recovery in ejectment might be had upon the original deed made to secure the debt, so long as the title remained in the creditor, and the debt was unpaid. "That the next section of the code," said the court, "gives a remedy for collecting the money by proceeding to judgment, filing a deed, levying upon the land and selling it, does not negative the former remedy. The creditor may either assert his title or part with it to the debtor, at his option. He may possess himself of the land and hold it till he is satisfied, or he may enforce satisfaction in the manner pointed out by section 1970. In this respect, his position is like that of an ordinary vendor of land who retains the title as security, giving a bond to reconvey upon payment of the purchase money." That the creditor may also have the land sold by the sheriff, and bring ejectment upon the sheriff's deed, is evident from the case of *Johnson* v. *Griffin Banking and Trust Company*, 55 Georgia, 691.

In either case, however, the effect of the seizure upon the title of the creditor to the property can only be judicially determined in an action of ejectment, either upon the original deed or upon the sheriff's deed given in pursuance of the

statute, or by a bill in equity to enjoin the creditor and sheriff from making sale under the levy. *Johnson* v. *Griffin Banking and Trust Company*, 55 Georgia, 691. The effect of the judgment *in this case*, then, is not to avoid the title of the plaintiff to this property, but to establish the existence of usury, which, in another action, may be pleaded as avoiding such title. It is true that the plaintiff set forth in its declaration that the defendant gave a deed of certain lots, describing them, to secure the payment of the notes; but it claimed nothing by virtue of this allegation in its prayer for relief, demanding only a money recovery. Upon the trial the deed and bond were offered in evidence, but were ruled out, and the judgment was simply for the amount of the notes and interest less the alleged usury.

It is well settled in this court that when our jurisdiction depends upon the amount in controversy, it is determined by the amount involved in the particular case, and not by any contingent loss either one of the parties may sustain by the probative effect of the judgment, however certain it may be that such loss will occur. Thus in *Grant* v. *McKee*, 1 Pet. 248, it was held, that the court would not take jurisdiction of a case where the title to a piece of land of less value than the jurisdictional sum was directly involved, although the whole property claimed by the lessor of the plaintiff under a patent, and which was recovered in ejectment in the court below, exceeded that sum. In *Farmers' Bank of Alexandria* v. *Hoof*, 7 Pet. 168, a bill was filed for the purpose of foreclosing a deed of trust given to secure a sum of money less than $1000. It appeared that the property covered by the deed exceeded that sum in value, but the court held the real matter in controversy to be the debt claimed in the bill, "and, though the title of the lot may be inquired into incidentally, it does not constitute the object of the suit." A similar ruling was made in *Ross* v. *Prentiss*, 3 How. 771, where a bill was filed to enjoin the marshal from levying an execution of less than $2000 upon certain property, the value of which was more than $2000. In this case as in the other, the argument was made that the defendant might lose the whole benefit of

his property by the forced sale under the execution, but the court held that it did not depend upon the amount of any contingent loss, and dismissed the bill. In *Troy* v. *Evans*, 97 U. S. 1, action was brought to recover certain instalments upon bonds, the aggregate of which bonds exceeded $5000, but the judgment was for less. The case was dismissed, although it appeared that the judgment would be conclusive in another action upon future instalments upon the same bonds. A like ruling was made in *Elgin* v. *Marshall*, 106 U. S. 578, where a judgment was rendered for $1660.75, against a town, on interest coupons detached from bonds which it had issued under a statute claimed to be unconstitutional. The case was dismissed in an elaborate opinion by Mr. Justice Matthews, although it appeared that the judgment might be conclusive as an estoppel in any subsequent action upon other coupons, or upon the bonds themselves. So in *New Jersey Zinc Co.* v. *Trotter*, 108 U. S. 564 — an action of trespass wherein the plaintiff recovered judgment for less than $5000 — the case was dismissed, although the court indicated that the jury were compelled to find the plaintiff had title to the land, and "that in this way the verdict and judgment may estop the parties in another suit, but that will be a collateral, not the direct, effect of the judgment." See also *Opelika City* v. *Daniel*, 109 U. S. 108. In *Bruce* v. *Manchester & Keene Railroad*, 117 U. S. 514, suit was brought to collect interest due on certain railroad bonds by the foreclosure of a mortgage made to trustees to secure a series of bonds amounting to $500,000. As the suit was brought only to recover the interest on the bonds, which was less than $5000, the appeal was dismissed.

Most of the authorities on the subject are collated and reviewed in *Gibson* v. *Shufeldt*, 122 U. S. 27, and a conclusion reached in consonance with the view expressed in the prior cases.

The case of *Stinson* v. *Dousman*, 20 How. 461, is not in conflict with these authorities. The action in that case was for rent amounting to less than $500, but the case itself involved the question whether a certain contract for the sale of

real property, valued at $8000, had been annulled, and the answer of the defendant was framed not only to present a legal defence against the claim for rent, but also to obtain a decree affirming the continued validity of the contract of sale. It was held that the effect of the judgment in that particular case was an adjustment of the legal and equitable claims of the parties to the subject of the suit, which was the title to the land under the contract.

Upon the whole, it appears to us that we have no jurisdiction of this case, and that the writ of error should be dismissed, and it is so ordered.

Mr. Justice Lamar and Mr. Justice Brewer dissented.

FURRER *v.* FERRIS.

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

No. 296. Argued April 13, 1892. — Decided May 2, 1892.

The findings of a master in chancery, concurred in by the court, are to be taken as presumptively correct, and will be permitted to stand unless some obvious error has intervened in the application of the law or some important mistake has been made in the evidence, neither of which has taken place in this case.

Crawford v. *Neal*, 144 U. S. 585, affirmed and applied.

The court stated the case as follows:

In 1887, appellee was in possession of the property of the Toledo, Columbus and Southern Railway Company, as receiver, having been duly appointed such receiver by the Circuit Court of the United States for the Northern District of Ohio, in a foreclosure suit brought by the American Loan and Trust Company. On October 15, William Furrer, a young man of about twenty-one years of age, driving a load of wood

along the public highway, crossed the railroad track, and while making the crossing was thrown from the wagon, struck by the wheels and instantly killed. On December 15, appellant, the administrator of William Furrer, filed his intervening petition in said Circuit Court, seeking to recover ten thousand dollars damages, on the ground that the death of his intestate occurred through the negligence of the receiver in failing to keep the crossing in good repair. The matter was referred to a master, who took testimony and reported it to the court, together with his conclusion that there was no negligence in respect to such crossing, and, therefore, no liability on the part of the receiver. This report was confirmed by the Circuit Court, and the intervening petition dismissed. From that decision petitioner appealed to this court.

Mr. Orville S. Brumback for appellant.

Appellant's case was heard below before a special master, and is one of those too numerous instances where a party is substantially denied a jury trial by reason of the personal injuries complained of being inflicted while a railroad is being operated by a receiver.

The system of watered stocks and excessive bonded indebtedness employed in railroad manipulation, has resulted in the Federal courts being called upon to frequently operate railroads through receivers, for whose carelessness the remedy to be had is only through the favorable attitude of a special master.

That the Federal Constitution as well as those of the several States intend to guarantee to every citizen a fair and impartial trial by jury is unquestionable. And the fact that the equity jurisdiction of the Federal courts has substantially abridged that right in requiring cases like appellant's to be heard by a special master rather than a jury is none the less reprehensible because it is founded upon the implied authority of the judiciary.

The injustice that has resulted all over the country by reason of this practice undoubtedly led to the enactment of the late

statute, authorizing receivers to be sued and a trial before a jury had without the permission of court; but it does not go far enough to remedy all the evil, by *requiring* the receivers' court to submit all questions arising upon cross-complaints (such as appellant's) to a jury for determination. *Jones* v. *East Tenn. Va. & Ga. Railroad*, 128 U. S. 443.

Mr. A. W. Scott for appellee.

Mr. Justice Brewer delivered the opinion of the court.

As this intervening petition was filed nearly a year after the passage of the act of March 3, 1887, (24 Stat. 554,) authorizing suits against receivers without leave of the court appointing them, it is evident that the petitioner preferred to not exercise his right to a common law action and a trial by a jury, but rather to come into a court of equity and have his rights there determined according to the rules and practice of such courts. In view of such election, we fail to appreciate his counsel's complaint of the law in not driving him to a forum which he so carefully avoided.

The gist of this controversy was the alleged negligence of the receiver in failing to maintain a reasonably safe crossing. This presented mainly a question of fact. Upon the testimony, both the master and the Circuit Court found that there was no negligence, and, while such determination is not conclusive, it is very persuasive in this court. In *Crawford* v. *Neal*, 144 U. S. 585, 596, it was said:

"The cause was referred to a master to take testimony therein, 'and to report to this court his findings of fact and his conclusions of law thereon.' This he did, and the court, after a review of the evidence, concurred in his finding and conclusions. Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. *Tilghman* v. *Proctor*, 125 U. S. 136; *Kimberly* v. *Arms*, 129 U. S. 512; *Evans* v. *State Bank*, 141 U. S. 107."

That rule compels an affirmance of the decree in this case. It appears that the railroad track was raised above the level of the highway; but the rise was slight, and the slope gradual. According to the testimony of the surveyor who measured the crossing, (and the other witnesses who simply gave estimates substantially corroborated him,) the rise on the one side was 1.4 feet in 30 feet, and on the other 1.3 in 15, and 1.9 in 30 feet — a rise but a trifle greater than that from the gutter to the centre of the street in many cities. That certainly carries with it no evidence of negligence. It appears also that the receiver had ballasted the track at the crossing, and it was claimed that some of the stones within the rails, and on the highway just outside of the rails, were unreasonably large; but the master found that "the stones were broken to a fair size," and that although one or two pieces of unreasonable size were produced on the hearing, yet "the weight of the testimony was that the stones in the roadway were of fair size and not dangerous to travel." Photographs of the crossing were presented to the master, to the Circuit Court, and also to us. Those photographs make it clear that the ascent on either side was gradual; that the total rise was slight, and but a few stones on either side of the track in the roadway. They put an end to any suspicion of negligence in the crossing, unless it were in the size of the stones; and the testimony leaves that matter in such condition that we are not justified in disturbing the finding of the master, approved as it was by the Circuit Court.

The decree is therefore *Affirmed.*

BARNETT *v.* DENISON.

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

No. 297. Submitted April 13, 1892. — Decided May 2, 1892.

When the charter of a municipal corporation requires that bonds issued by it shall specify for what purpose they are issued, a bond which purports

on its face to be issued by virtue of an ordinance, the date of which is given, but not its title or its contents, does not so far satisfy the requirements of the charter as to protect an innocent holder for value from defences which might otherwise be made.

THE court stated the case as follows:

This was an action to recover the amount of certain coupons cut from bonds issued by the city of Denison "for the reduction of and cancellation of the outstanding city scrip, and for the improvement of streets," etc.

The charter of the city, adopted March 7, 1873, conferred upon it power (sec. 27) "To borrow money on the credit of the city, and issue bonds therefor to an amount not to exceed $50,000. To make a loan exceeding $50,000 the question must be submitted to the qualified voters of the city, and if sustained by a majority of the votes polled, such loan shall be lawful. All bonds shall specify for what purpose they were issued, and not be invalid if sold for less than their par value. And when any bonds are issued by the city a fund shall be provided," etc. Sec. 28: "To issue bonds in aid of any corporation or enterprise, either manufacturing, railroad, or for other purposes, calculated to advance the interests of the said city, and to borrow money for that purpose, and to take stock therein, or in any of them, provided," etc.

Pursuant to this charter the city council, on August 9, 1873, adopted the following ordinance:

"Sec. 1. Be it ordained by the city council of the city of Denison, that there shall be issued by the city of Denison bonds to the extent of $20,000, and shall be known as 'Denison City Bonds.' Said bonds shall mature in ten years from the date of their issuance, and such bonds, or the proceeds thereof, shall be used for the purpose of redeeming the outstanding city scrip or other indebtedness, and the improvement of the streets, as may be directed by the city council; and said bonds shall bear an annual interest of ten per centum, payable semi-annually, expressed by coupons thereto attached, and shall be payable at the office of the Importers' and Traders' National Bank of New York City."

Argument for Plaintiff in Error.

No reference was made in the bonds to the purpose for which they were issued, but they contained the following paragraph: "These bonds are issued by virtue of an ordinance passed by the board of aldermen of said city, on the 9th day of August, and approved by the mayor on the 9th day of August, 1873."

It was stipulated upon the trial that "if the failure to state the purpose for which the bonds were issued more specifically than is contained in said bonds was such a defect as deprived them of the quality of negotiable paper and visited all purchasers for value with notice, then the city of Denison had a good defence to the suit; but if not such a defect, then plaintiff ought to recover as prayed for in his petition."

The court charged the jury that, by the charter, notice was imputed to all persons purchasing bonds that the purpose for which they were issued should be stated, and instructed them to return a verdict for the defendant, which was done. The plaintiff thereupon took out a writ of error from this court.

Mr. H. Chilton for plaintiff in error submitted on his brief.

I. When a municipal corporation has power under any circumstances to issue negotiable securities the *bona fide* purchaser has a right to presume that they were issued under circumstances and for a purpose which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a purchaser than any other commercial paper. *Supervisors* v. *Schenck*, 5 Wall. 772, 784; *Merchants' Bank* v. *State Bank*, 10 Wall. 604; *St. Joseph Township* v. *Rogers*, 16 Wall. 644; *Chambers County* v. *Clews*, 21 Wall. 317; *San Antonio* v. *Lane*, 32 Texas, 405.

II. Where, as in this case, the holder of municipal bonds purchased them before their maturity, and without notice of any defence, and they recite that they were issued under a certain ordinance, a reference to which shows a legal and proper purpose, for the use and benefit of the city, the purchaser is thereby assured of the validity of the bonds, and it would be

tolerating a fraud to permit the city to show that the bonds were not in fact issued for such purpose. The city is estopped from denying the truth of the recitals in its bonds. *County of Moultrie* v. *Savings Bank*, 92 U. S. 631; *Town of Coloma* v. *Eaves*, 92 U. S. 484; *San Antonio* v. *Mehaffey*, 96 U. S. 312; *Nauvoo* v. *Ritter*, 97 U. S. 389; *Hackett* v. *Ottawa*, 99 U. S. 86; *Walnut* v. *Wade*, 103 U. S. 683; *County of Clay* v. *Society for Savings*, 104 U. S. 579; *Ottawa* v. *National Bank*, 105 U. S. 342.

The bonds themselves on their face recited the ordinance by date under which they were issued. The ordinance recites that the bonds were authorized for the redemption of city scrip and other indebtedness, and for the improvement of the streets. Failure of consideration was the defence under which the court instructed the jury that the plaintiff could not recover. Which we submit was error.

The concession that plaintiff made out his case and was entitled to recover as an innocent holder for value before maturity, unless the failure to state the purpose for which the bonds were issued more particularly than is contained in the said bonds, deprived him of his right as an innocent holder, in effect concedes the correctness of the two foregoing propositions.

III. The material proposition in the case then is, that where, as in this case, a bond or other instrument has been issued by virtue of a certain ordinance referred to, but not copied or described, such recital is notice of the contents of the ordinance; and as such ordinance recites the purpose for which the bonds are authorized, the bonds thereby in effect specify the purpose for which they were issued. *Kansas* v. *School District No. 3*, 34 Kansas, 237; *Lewis* v. *Bourbon County*, 12 Kansas, 186; *Hackett* v. *Ottawa*, 99 U. S. 95; *Ottawa* v. *National Bank*, 105 U. S. 143.

IV. The provision of section 27 of the charter of the city of Denison prescribing that bonds issued under that section shall specify for what purpose they were issued, is merely directory, and the absence of such recital from the bonds will not affect the rights of a *bona fide* holder for value. *Young* v. *Camden County*, 19 Missouri, 309.

No appearance for defendant in error.

Mr. Justice Brown delivered the opinion of the court.

This case involves the single question whether a requirement of a charter that the bonds issued by a municipal corporation shall specify for what purpose they are issued, is so far satisfied by a bond which purports on its face to be issued by virtue of an ordinance, the date of which is given, but not its title or its contents, as to cut off defences which might otherwise be made.

We are of the opinion that it is not. It is the settled doctrine of this court that municipal corporations are merely agents of the state government for local purposes, and possess only such powers as are expressly given, or implied, because essential to carry into effect such as are expressly granted; 1 Dill. Mun. Corp. section 89; *Ottawa* v. *Carey*, 108 U. S. 110; that the bonds of such corporations are void unless there be express or implied authority to issue them; *Wells* v. *Supervisors*, 102 U. S. 625; *Claiborne County* v. *Brooks*, 111 U. S. 400; *Concord* v. *Robinson*, 121 U. S. 165; *Kelley* v. *Milan*, 127 U. S. 139; that the provisions of the statute authorizing them must be strictly pursued; and that the purchaser or holder of such bonds is chargeable with notice of the requirements of the law under which they are issued. *Ogden* v. *County of Daviess*, 102 U. S. 634; *Marsh* v. *Fulton County*, 10 Wall. 676; *South Ottawa* v. *Perkins*, 94 U. S. 260; *Northern Bank* v. *Porter Township*, 110 U. S. 608; *Hayes* v. *Holly Springs*, 114 U. S. 120; *Merchants' Bank* v. *Bergen County*, 115 U. S. 384; *Harshman* v. *Knox County*, 122 U. S. 306; *Coler* v. *Cleburne*, 131 U. S. 162; *Lake County* v. *Graham*, 130 U. S. 674.

It is certainly a reasonable requirement that the bonds issued shall express upon their face the purpose for which they were issued. In any event, it was a requirement of which the purchaser was bound to take notice, and if it appeared upon their face that they were issued for an illegal purpose they would be void. If they were issued without any purpose appearing

at all upon their face, the purchaser took the risk of their being issued for an illegal purpose, and, if that proved to be the case, they are as void in his hands as if he had received them with express notice of their illegality. Ordinarily the recital of the fact that the bonds were issued in pursuance of a certain ordinance would be notice that they were issued for a purpose specified in such ordinance, *Hackett* v. *Ottawa*, 99 U. S. 86, and the city would be estopped to show the fact to be otherwise. *Ottawa* v. *National Bank*, 105 U. S. 342. But where the statute requires such purpose to be stated upon the face of the bonds it is no answer to say that the ordinance authorized them for a legal purpose, if in fact they were issued without consideration, and for a different purpose.

In this case, the bonds were not only issued for a purpose not named in the ordinance, viz.: in aid of the Texas and Atlantic Refrigerator Car Company, which had agreed to erect at Denison slaughter-houses, tanks, machinery and other material of the value of $15,000, but upon a consideration which had wholly failed, the company having failed to comply with the terms of the contract; and the bonds, so far as they were known to exist, were cancelled.

In *Kansas* v. *School District No. 3*, 34 Kansas, 237, relied upon by the plaintiff, the State sued a school district upon certain school district bonds and their coupons. Upon the trial, the defendant objected to the introduction of any evidence upon the petition, upon the ground that the same did not state facts sufficient to constitute a cause of action, and the court sustained the objection and dismissed the action. One of the objections urged by the defendant against the petition was that the bonds did not state, as required by statute, the purpose for which they were issued. The court held that the bonds were not void for that reason, because under the allegations of the petition they must be considered as issued in good faith; "that the school district received ample consideration for them; and that the State of Kansas is an innocent and *bona fide* purchaser of them; for nothing appears to the contrary in the petition, and all the allegations of the petition would tend to indicate this." This ruling,

however, is not inconsistent with the idea that if they had been issued for an illegal purpose, the purchaser would have been chargeable with notice of such illegality, by reason of the omission to state on the face of the bonds the purpose for which they were issued.

In *Young* v. *Camden County*, 19 Missouri, 309, the act required that county warrants should be written or printed in Roman letters without ornament, in order to prevent the issuing of paper by county courts which could be used as a circulating medium. This was held to be merely directory; but the case, though cited by the plaintiff here, is not in point. The court held expressly that all the words prescribed by the statute were in the warrants, and that the introduction of other words did not vitiate them.

In view of the circumstances under which these bonds were issued the instruction to return a verdict for the defendant was proper, and the judgment of the court below is, therefore,

Affirmed.

Mr. Justice Brewer dissented.

GOODE *v.* GAINES.

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

No. 227. Argued April 18, 1892. — Decided May 2, 1892.[1]

The court again adheres to its decision in *Rector* v. *Gibbon*, 111 U. S. 276, touching titles in the Hot Springs Reservation, and holds that there are no facts in these cases which take them out of the operation of that decision; but, in view of the delay in commencing these suits, and the previous acquiescence of the plaintiffs in the possession by the defendants, it limits the right of an account in equity of the rents of the premises to the date of the filing of the bills.

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[1] With this case were argued at the same time No. 302, Smith *v.* Gaines; No. 303, Dugan *v.* Gaines; No. 304, Cohn *v.* Gaines; No. 305, Allen *v.* Gaines; No. 306, Madison *v.* Gaines; No. 307, Rugg *v.* Gaines; No. 308,

Statement of the Case.

THE court stated the case as follows:

These were bills in equity filed by William H. Gaines and wife, on the 23d of May, 1884, against the appellants, respectively, in the Circuit Court of the United States for the Eastern District of Arkansas, all seeking the same relief, and couched, *mutatis mutandis*, in substantially the same language.

The bill in No. 302, *Smith* v. *Gaines*, was as follows:

"William H. Gaines and Maria Gaines his wife, bring this suit against John Kubler and George H. Smith, and for cause of action allege that in the year 1851, in pursuance of the instruction of the Secretary of the Interior, plaintiff Maria Gaines, Albert Belding, Henry Belding and George Belding, heirs and legal representatives of Ludovicus Belding, entered, under the preëmption laws of the United States, the southwest quarter of section thirty-three, in township two (2) south, range nineteen (19) west, for which they paid the United States government two hundred dollars, which was advanced by plaintiff Wm. H. Gaines, and which money the United States still retains. At the time of said entry a small portion of said land was occupied by Mrs. Lydia Belding, widow of Ludovicus Belding, and the portion of said land for which this suit is brought was occupied by —— ——, and in — Wm. H. Gaines, Maria Gaines, Albert Belding, Henry Belding, and George Belding, under the supervision and control of Wm. H. Gaines, brought suit in the Hot Springs Circuit Court against —— —— and recovered judgment for the possession of said land, which judgment was afterwards affirmed by the Supreme Court of the State of Arkansas and by the Supreme Court of the United States, and on the — day of ——, 1856, Wm. H. Gaines was, by the sheriff of Hot Springs County, put into the possession of said property by virtue of a writ of possession issued upon the judgment of said Hot Springs Circuit Court in

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GARNETT *v.* GAINES; No. 309, GARNETT *v.* GAINES; No. 310, RUGG *v.* GAINES; No. 311, GRANGER *v.* GAINES; No. 312, NEUBERT *v.* GAINES; No. 313, SUMPTER *v.* GAINES; No. 314, LATTA *v.* GAINES; No. 315, LATTA *v.* GAINES; all Appeals from the Circuit Court of the United States for the Eastern District of Arkansas. The opinion of the court is entitled in all the cases.

obedience to the mandates of said Supreme Courts, both of the State and of the United States, and said plaintiffs, Wm. H. Gaines and Maria Gaines, his wife, remained in peaceable and quiet possession of said property until the 1st day of June, 1876, when they were dispossessed of said property by a receiver appointed by the Court of Claims of the United States, under an act of Congress entitled 'An act in relation to the Hot Springs reservation, in Arkansas, approved June 11th, 1870.

"Plaintiffs entered into possession by virtue of said entry and by virtue of the decisions of said State and United States Supreme Courts and the writs of possession issued in pursuance of said judgments, and continued in possession for a period of about twenty years, until the Supreme Court of the United States, in a suit to determine to whom the patent should issue, decided that said lands were not subject to pre-emption or entry, and that no claimant was entitled to a patent, but the same was still the property of the United States, which decision was rendered April 24th, 1876. Plaintiff during said twenty years paid taxes on said property and fenced and built houses on the same and otherwise improved the same.

"On the 1st day of October, 1870, plaintiff Wm. H. Gaines leased a lot of ground, which has since been laid off into lots and blocks by the Hot Springs Commission in pursuance of an act of Congress and is now known as lot (2) two, in block seventy-seven (77), to John Kubler, which lease was for the term of one year, to be renewed at the election of the lessee from year to year until the title to the Hot Springs quarter section of land was settled, for an annual rent of —, payable in monthly instalments of —.

"Said lease also provides that all buildings and improvements erected on said lot by the lessee might be removed therefrom during the continuance of the lease or within thirty days thereafter, but that no buildings or improvements erected could be removed while said rent or any part thereof remained due and unpaid. It also provides that the lessor should have a lien on all buildings and improvements to secure the rent, a

copy of which is hereto attached in Exhibit 'A' and made a part thereof.

"Said lessee took possession of said land under and by virtue of said lease only, and in no other way whatever, and he and — assigns occupied the same under said lease until the 1st day of June, 1876.

"That on the 24th day of April, —, said lessee and his assigns owed the lessor for rent the sum of three hundred and eleven dollars and eighty-five cents ($311.85). Said lessee and his assigns failed to remove said buildings and improvements erected by them at any time during or within thirty days after the expiration of the lease, and by virtue of the provisions of the lease said buildings and improvements erected by said lessee and his assigns became the buildings and improvements of Wm. H. Gaines.

"That on the 12th day of September, 1876, said lessee, John Kubler, sold and transferred to George H. Smith all his right, title, and claim to said premises, he, George H. Smith, well knowing before said transfer all the terms and conditions of said lease, which transfer was made without the knowledge or consent of the plaintiff.

"Plaintiffs, by arrangement with George, Henry and Albert Belding, having become the owners of said claim, aver that in less than six calendar months after the first sitting of the Hot Springs Commission, under the act of Congress of the United States entitled 'An act in relation to the Hot Springs reservation, in the State of Arkansas,' approved March 3rd, 1877, they filed their claim before said commission to purchase said lot, and that George H. Smith filed a like claim, and upon the hearing of said claims they were consolidated by said commission for the purpose of hearing the testimony; and said petitions filed and the testimony taken before said commission clearly showed that George H. Smith had acquired his possession in no other way but by said lease made by plaintiff Wm. H. Gaines to said John Kubler, as will more fully appear from a complete copy of the petition, testimony and record entries in said claim, filed herewith and marked Exhibit 'A,' and made part hereof; and notwithstanding that said peti-

tion and testimony showed that defendant George H. Smith acquired possession only by virtue of said lease, and that, too, after the 24th day of April, 1876, to wit, September 12th, 1876, still said commission misconstrued the law applicable to that state of facts and awarded the right to purchase said lot to defendant George H. Smith, and since said award said defendant has purchased said lot from the United States and received a patent therefor, and on account of said misconstruction of the law as applied to the facts before said commission the right to purchase said lot, which in law, equity and good conscience should have been awarded to plaintiffs, was by said misconstruction of the law illegally and wrongfully awarded to defendant George H. Smith by said Hot Springs Commission.

"Plaintiffs aver that as defendants have never had any right or title to said lot or to the possession thereof than that which they derived from said lease and under covenants to restore possession to plaintiff Wm. H. Gaines, that said defendants should be held to hold said lots as trustees for the use and benefit of plaintiffs.

"Plaintiffs offer to pay any sum of money that may be found due to the defendants or either of them by reason of any money paid to the United States for the purchase of said lots, and to do all other acts which may be found to be just and equitable. Plaintiffs aver the property herein sued for is worth more than five hundred dollars, and that this cause of action arises wholly under the law of the United States.

"Plaintiffs ask that defendants be required to answer this bill, but not under oath.

"And they pray that an account may be taken of the state of accounts between themselves or either of them and said defendants severally; that they may be allowed reasonable rents for the occupancy of the said premises; that defendants may be decreed to hold said lots as trustees for the plaintiffs and to convey the same to the plaintiffs, and that they may have such other relief as may be equitable."

Answers and replications having been filed, proofs were made sustaining complainants' allegations, and the Circuit

Court entered decrees in complainants' favor as to the title to the lots severally involved, and sent the cases to a special master for an accounting. Reports were subsequently made, stating an account charging defendants with rent or rental value from the date of the awards to the date of the filing of the bills with interest, and with rental value from the date of filing the bills to the date of the decree with interest, and with rent on improvements to the date of the reports; and crediting defendants with the present value of the improvements; taxes, etc., paid; and the amount paid the government for the lots, with interest. Decrees were entered in accordance with the reports and the cases brought on appeal to this court.

Mr. John McClure for appellants in Nos. 302 to 315 inclusive.

The matters in controversy in these cases grow out of, and are founded on the act of March 3, 1877, which provides for the survey and sale of what is known as the Hot Springs reservation, in the State of Arkansas, 19 Stat. 377, c. 108, and the act of June 16, 1880, entitled, "An act for the establishment of titles in Hot Springs, and for other purposes." 21 Stat. 288, c. 246. The question of those titles was before this court in *The Hot Springs Cases*, 92 U. S. 698; *Rector* v. *Gibbon*, 111 U. S. 276; and *Lawrence* v. *Rector*, 137 U. S. 179. I contend *Rector* v. *Gibbon* does not furnish a rule of decision for these cases.

At the threshold, I am willing to admit, if the court had the power to decide anything in the Rector-Gibbon case at all, it is decided correctly. While I admit the case was decided correctly, I do not assent to the proposition that this or any other court could divest title out of one in whose favor the award was made, and vest it in another, even if the decision of the commission was wrong. That case turned on the construction of a lease, and it no more follows that one lease is to be construed like another, than that one contract means what another does.

The lease in the Rector-Gibbon case stipulates that at the

end of the term the lessor should have the right to take the improvements by paying two-thirds of their first cost; that if the lessor should not pay this amount at the end of the term, the lease should be extended on the same conditions, until he should make the payments, giving ninety days' notice of his intention to terminate the lease.

The proof was, that Rector gave the notice, that he was ready and willing to pay, but he could never get the lessees to give or name the amount.

The leases, in the cases at bar, declare that they may "be renewed, from year to year, until the title to the Hot Springs quarter section is settled, . . . and that all buildings and improvements that may be erected on said lots by the lessees, may be removed therefrom by the lessees, at any time within thirty days after the expiration of the same."

In the Rector-Gibbon case, the improvement became the property of the lessor by the election and the terms of the contract. In the cases at bar, the buildings were to remain the property of the lessees without any stipulation for purchase by the lessor.

In the Rector-Gibbon case, the court found that Rector was the owner of the improvement and gave him the lot. In the cases at bar, the court finds, as did the commission, that the buildings belong, not to the lessor, but to the lessees. In one case, the right to purchase the lot falls to him who was the rightful owner of the improvement, and in the cases at bar, the person who is found to be the owner of the improvement is declared to be a trustee for one who did not make or own the improvement.

In the one case the lease created a contract whereby the lessee undertook to build a house for the lessor, while in the case now under consideration the contract was that the lessee might build a house for himself.

The questions discussed in the Rector-Gibbon case were as to the nature of the grant contained in the act of 1877; to whom it was made, and whether the decisions of the commissioners were final.

Four of the judges of this court were of the opinion that

the award of the commissioners was final, expressing no opinion as to the nature of the grant, and five were of the opinion that it was not, and that, for errors of law, its decisions might be reviewed.

Congress, during the pendency of the bill, now known as the act of 1877, refused to allow an amendment to be made to the bill, granting the courts jurisdiction to review the awards of the commissioners; and after the awards were made, it was again appealed to, to allow the courts to review the awards, and it again refused. Congress was asked to amend the act of 1877, during its pendency, to make it mean what the court, in *Rector* v. *Gibbon* said it meant, and it refused to allow the words the court placed in the act of 1877 to become a part of it, because it changed the grant from the persons on whom they intended to bestow the bounty, and conferred it on persons who had asserted title, instead of those who had made improvements.

I am not influenced to indulge in this line of argument, from the fact that the personel of the court has changed since the decision in the Rector-Gibbon case, for I shall not indulge in argument that I would not have indulged in, if the personel of the court had remained the same.

I am not here to make a wanton attack on the Rector-Gibbon case, nor to disturb matters set at rest by that decision, but to protect the interests of clients, by calling, in a respectful manner, the attention of the court to some matters that were not called to its attention before, with a feeling of confidence, if they had been, the decision might have been different.

The fact that neither Rector nor Gibbon could acquire title under the act of 1877, and that no claimant at Hot Springs acquired title under the act of 1877, does not seem to have been called to the attention of the court.

The fact that Congress, by the act entitled, "An act for the establishment of titles in Hot Springs, and for other purposes," approved June 16, 1880, by direct enactment, authorized these appellants to purchase the lots in controversy, seems to have been overlooked in the Rector-Gibbon case. The first section of the act to which I allude is as follows:

Argument for Appellants.

"That any person, his heirs or legal representatives, in whose favor the commissioners appointed under the acts of Congress of 1877 and 1878, relative to the Hot Springs of Arkansas, have adjudicated, shall have the sole right to enter and pay for the amount of land the commissioners may have adjudged him entitled to purchase, within eighteen months next after the expiration of the notice required . . . at 40 per centum of the assessed value of said lands as placed thereon by said commissioners."

All titles at Hot Springs are based on the act of June 16, 1880, and not on the act of 1877. The difference between these acts is, that under the act of 1880, the right to purchase the lot comes by a declaration of Congress, and that the persons in whose favor the commissioners have adjudicated shall have the sole right to purchase, while under the other the right to purchase comes from the award of the commissioners.

It is true that the commissioners have adjudicated that certain persons should have the right to purchase the lots in controversy, but it is also true that, after that adjudication, Congress took the whole question of awards under consideration, and by a direct and express enactment declared the appellants should have the sole right to purchase. The question now is, not whether the court can review the awards of the commissioners, but whether it can review and set aside the award of Congress.

If the language of the opinion in the Rector-Gibbon case be read in the light of the facts disclosed by the record, it furnishes no rule of decision for the cases now before the court. But if you take an isolated sentence like this: "Whatever the lessees and those under them did, by way of improvements on the leased premises, inured to the lessor's benefit as absolutely and effectually as though done by himself," and apply it to a case where the improvements, under the lease, were to remain the property of the lessees, you establish a rule of decision that violates the obligation of the contract and takes the property of one man away from him and gives it to another. You turn the act of 1877 into an act of confiscation, instead of that of preëmption.

If the leases, in the cases now under consideration, had a similar provision to that exhibited in the Rector-Gibbon case, there are many expressions of opinion to be found that would apply to the cases at bar, but there is no such lease. I have a right to assume, and shall assume, that the court intended its language to be confined to the case made by the record, and was not attempting to fix a rule of decision in cases not before the court.

It is said in the opinion that, "lessees under a claimant or occupant holding the property for him and bound by their stipulation to surrender it on the termination of their lease, stand in no position to claim an adverse and paramount right to purchase. Their possession is his possession." If this sentence be taken as an interpretation of the act, without reference to the facts disclosed by the record, in which the language was used, the appellees could draw some comfort from it; but confine it to a case where the lease gave the improvements to the lessor, and where the right to purchase the lot followed the ownership of the improvements, it furnishes no rule of decision in a case where one claims the lot and where it is adjudged the improvements do not belong to him.

When the court makes use of the expression, "holding the property for him," the word property is used in its broad sense, covering the improvements as well as the lot. It is not used in its narrower sense and confined to the lot itself.

After the 24th of April, 1876, there was no such thing as holding the property for the old claimant, unless the old claimant was the legal or equitable owner of the improvements on the lot. The relation of landlord and tenant was on that day dissolved by the terms of the contract. The title to the property on that day was in the United States, and it soon thereafter took possession by its receiver; and to say that the old tenants of Gaines "held possession for him," while they were attorning to and paying rent to the United States, is to extend the relation of landlord and tenant beyond the confines of known law. Nor is it true, as a proposition of law, that a former tenant could not acquire title from the new landlord.

Argument for Appellants.

Before the 24th of April, 1876, there were two estates; the fee and the leasehold. On that day the fee was declared to be in the United States. On the leasehold were improvements which the lessees, under their lease, had the right to remove, but being fixtures they could not be removed without the assent of the new landlord. If the buildings on the lots had belonged to the lessor, and the old tenant remained in them, I concede that after the passage of the act of 1877, the commissioners should have treated the occupant in the light of one holding over. Not because the relation of landlord and tenant existed during that period, but because the right to purchase the lots was awarded to the former owner of the improvement. The right to the lot, as well as the improvement, had been lost. Congress granted the improvement to the former owner, regardless of past relations.

In the case where the improvement belonged to the lessor, it conferred on him the right to purchase the ground on which the improvement had been made. But if the improvement belonged to another than the lessor, the right to purchase went to him who owned it on the 24th of April, 1876. The right to purchase flows from and is bottomed on an improvement. No improvement, no lot.

The contention of the appellee is, that the possession which the appellant had, of his own house, was the possession of the appellees; that that possession was under a lease from him, and that whatever a donor should elect to present, of right, must go to the landlord. The bald, naked claim is, that, having accepted a lease the term of which expired, the new landlord could not make a present to his old tenant, or give him a right to purchase the land.

The appellee could not avail himself of an improvement made by another unless he was the owner of it.

To give the lots in controversy to Gaines is to give them to one who, the court finds, as a matter of fact, never made any improvement thereon. To give them to Gaines under such a finding, is to disregard the letter and spirit of the statute. To give them to Gaines, is to take from appellants that which the Congress of the United States, by a solemn act, declared

they should have. To give them to Gaines, is to say that the courts and not Congress have the sole right to dispose of the public domain.

It is apparent, from the language of the act of 1877, that Congress intended that the adjudications of the commissioners should be final, and that this intent is made manifest from following the form of statutes that this court, for more than a quarter of a century, had declared created a board belonging to the political department of the government, and whose adjudications could not be reviewed by the courts.

Mr. Thomas B. Martin and *Mr. George W. Murphy* filed a brief for the appellant in No. 227, claiming that that case differed from the others in some essential features.

Mr. U. M. Rose (with whom was *Mr. G. B. Rose* and *Mr. R. M. Davies* on the brief) for appellees.

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

It is unnecessary to enter upon a history of the "Hot Springs litigation," as detailed in *Rector* v. *United States; Hale* v. *United States; Gaines* v. *United States*, 92 U. S. 698; and *Rector* v. *Gibbon*, 111 U. S. 276.

As to the title of the lots in question, we repeat what was said in *Lawrence* v. *Rector*, 137 U. S. 139, "that nothing was developed in answer or testimony to disturb the conclusions of law heretofore reached by this court." The argument for appellants has been elaborate and exhaustive, but does not convince us that these cases can be taken out of the rule laid down in *Rector* v. *Gibbon*.

The estoppel which prevents a tenant who has acquired possession as such from claiming title adversely to his landlord, does not depend on the validity of his landlord's title. And the assertion in the bills that the right to remove the buildings put upon the lots by the tenants was abandoned, and the fact that, while appellees made improvements upon

the land claimed by them, they were not shown to have made such on the specific lots, do not affect the operation of the estoppel. Belding's heirs claimed under a paper title, and if there had been no tenants, the improvements made by themselves would have given them the "possessory right of occupation" of the tract within the meaning of the act of Congress; and the tenants cannot be allowed to object that the improvements which they made, and which, strictly speaking, they abandoned by their conduct in the premises, gave them rights superior to their landlord.

The decision of this court in 92 U. S. 698 was rendered April 24, 1876, and the receiver was appointed and took possession of the property for the United States in June of that year. The act of March 3, 1877, "in relation to the Hot Springs reservation in the State of Arkansas," (19 Stat. 377,) creating the commission, provided that "no claim shall be considered which has accrued since the twenty-fourth day of April, eighteen hundred and seventy-six," and referred to claims to the land, or parts thereof, then existing, and not to independent claims acquired thereafter. But there is no merit in the suggestion that George, Henry, and Albert Belding could not lawfully assign their interest in the Belding claim to Gaines after that date, for the language of the act relates to claims that had then accrued, and not to the subsequent acquisition of claims so situated. It may be that after the title was adjudged to be in the United States the tenants could not remove the buildings; but the commissioners found that the buildings belonged to them, and the decrees here gave the value of them to appellants. No appeal was prayed by appellees in this regard and no question arises in respect of it. Inasmuch as the tenants set up claims to the lots in hostility to the leases, they cannot complain of decrees in their favor for the value, and whether under some of the leases the buildings were to become the property of the lessor, while in other cases they might have remained the property of the lessees, does not control the principle upon which *Rector* v. *Gibbon* rests. As to the contention that the act of Congress of June 16, 1880, (21 Stat. 288,) was not given due weight because not

referred to in the opinion in *Rector* v. *Gibbon*, it is to be observed that that suit was brought July 12, 1880, argued here March 19, 1884, and decided April 7, 1884. It is not, therefore, to be assumed that the act of 1880 was overlooked at that time, but that the court was of opinion that it did not affect the questions under consideration; and in that view we concur.

We are not satisfied, however, with the directions to the master in the interlocutory decrees, in respect of the accounting, and with the results thereupon finally adjudged. While, by reason of the original leases, appellants must be decreed to hold the several parcels in controversy in trust for appellees, and to surrender possession thereof, yet it is to be borne in mind that they were not knavish or fraudulent possessors, and that they claimed title, in moral good faith, under the awards of the commission. The evidence disclosed that a large number of lots were awarded to appellees; that Gaines expressed himself as contented with the awards, stating that they were just and equitable; and that no steps in further litigation were taken, on appellees' behalf, until after the announcement of the decision of this court in *Rector* v. *Gibbon*, which was on April 7, 1884, when (in May following) these bills were filed. In the meantime appellants had paid the government, and obtained patents, under the awards in their favor, and had remained in possession upon the belief that their title was good, seeking no other location, making no other arrangements, and acting in expenditure as if these lots were their own. While this acquiescence on appellees' part has not taken away their right of action to recover the property, we think it operates upon the right to equitable relief, in the matter of permitting a recovery, by way of accounting, which they have themselves applied for to a court of equity, for the period of time from the date of the awards to the date of the filing of these bills. Appellees permitted appellants to go on in the exercise of ownership over the property, not only unmolested and without question, but with affirmative encouragement to them to do so, and, under the peculiar circumstances which characterize these cases, we do not feel compelled to award a measure of relief,

which, in our judgment, would operate harshly and oppressively upon appellants, even though specific prejudice, because of appellees' laches, may not be clearly made out upon these records.

In seeking equity, appellees must do equity, and as a result has been reached which gives the awards of the commission a direction contrary to that which appellees had accepted as substantially equitable, we think equity requires that they should not be treated as occupying the same position as if they had maintained with vigor and promptness the rights which they found on April 7, 1884, they could assert.

In No. 227, *Goode* v. *Gaines*, considerable stress is laid by counsel upon evidence which it is urged makes out an estoppel against appellees as to the title, but we agree with the Circuit Court that it falls short of doing so, and this case must be disposed of in the same way as the others.

We are of opinion that the accounting between the parties should be stated both as to debit and credit from the 23d of May, 1884, with the exception of the credit for the amounts paid to the government for the lots, of which payments we regard appellees as getting the entire benefit, and that no increased rent should be allowed on account of the improvements, as appellees are only to be held to their value as of the date of the decrees. In other words, appellants should be charged with rental value from the date of the filing of the bills to the rendition of the decrees, with interest, and should be credited with taxes, etc., paid after the date of the filing of the bills, with interest, and also with the amounts paid the government for the different parcels, with interest from the dates of payment, as well as with the value of the improvements, in each instance, at the time of the rendition of the decrees.

The decrees are severally reversed, and the causes remanded to the Circuit Court, with a direction for further proceedings in conformity with this opinion, the costs in this court to be equally divided.

Syllabus.

TOPLIFF *v.* TOPLIFF AND ANOTHER.

TOPLIFF AND ANOTHER *v.* TOPLIFF.

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

Nos. 220, 277. Argued April 5, 1892. — Decided May 2, 1892.

Letters patent No. 108,085, issued October 11, 1870, to John B. Augur for an improvement for gearing in wagons was not anticipated by the invention patented to C. C. Stringfellow and D. W. Surles, by letters patent No. 31,134, dated January 15, 1861, and are valid, so far as that invention is concerned.

It is not sufficient, in order to constitute an anticipation of a patented invention, that the device relied upon might, by modification, be made to accomplish the function performed by that invention, if it were not designed by its maker, nor adapted, nor actually used for the performance of such function.

In view of the extensive use to which the invention secured to John H. Topliff and George H. Ely by letters patent No. 122,079 for an improvement in connected carriage springs, reissued March 28, 1876, No. 7017, the invention secured thereby is held to have patentable novelty, although the question is by no means free from doubt.

The first reissue of that patent, being to correct a palpable and gross mistake, and being made within four months after the date of the original patent, was within the power of the Commissioner of Patents.

The second reissue of that patent is valid, whether it be an enlargement of the original patent or not.

Miller v. *Brass Co.*, 104 U. S. 350, was not intended to settle a principle that under no circumstances would a reissue containing a broader claim than the original be supported.

The power to reissue a patent may be exercised when the original patent is inoperative by reason of the fact that its specification was defective or insufficient, or the claims were narrower than the actual invention of the patentee, provided the error has arisen from inadvertence or mistake, and the patentee is guilty of no fraud or deception; but such reissues are subject to the following qualifications:

(1) That it shall be for the same invention as the original patent, as such invention appears from the specification and claims of such original;

(2) That due diligence must be exercised in discovering the mistake in the original patent, and that, if it be sought for the purpose of enlarging the claim, the lapse of two years will ordinarily, though

not always, be treated as evidence of an abandonment of the new matter to the public to the same extent that a failure by the inventor to apply for a patent within two years from the public use or sale of his invention is regarded by the statute as conclusive evidence of an abandonment of the patent to the public;

(3) That this court will not review the decision of the Commissioner upon the question of inadvertence, accident or mistake, unless the matter is manifest from the record; but that the question whether the application was made within a reasonable time is, in most, if not in all such cases, a question of law for the court.

Objections to a master's report should be taken in the court below; and if not taken there, cannot be taken here for the first time.

The allowance of an increase of damages, under the statute, to the plaintiff in a suit for the infringement of letters patent rests somewhat in the discretion of the court below, and its finding on this point will not be disturbed unless the evidence clearly demands it.

THE court stated the case as follows:

This was a bill in equity for the infringement of three patents, namely: (1) Patent No. 108,085, issued October 11, 1870, to John B. Augur, for an improvement in gearing for wagons. (2) Patent No. 123,937, issued February 20, 1872, to Cyrus W. Saladee, for an improvement in carriage-springs and mode of attachment. (3) Patent No. 122,079, issued December 19, 1871, to John A. Topliff and George H. Ely, for an improvement in connecting carriage-springs; reissued March 28, 1876, No. 7017.

The patent to Augur consisted in a mode of equalizing the pressure upon two carriage-springs by "connecting together by a rigid rod the two pivoted links upon the clips employed on the hind axle, so that when the weight is upon one spring, both springs, by reason of the connecting-rod, shall be caused to work together, thus preventing the roll." The effect of this device is such that if a heavy weight is thrown upon one spring, as for instance by a person getting into a buggy at one side, the pressure is borne equally by both springs. The claims alleged to be infringed were the following:

"1. The herein-described method of equalizing the action of springs of vehicles and distributing the weight of the load.

"2. The combination of the pivoted links with a rod con-

necting the same, the rod compelling both links to move in unison, as and for the purpose described."

The reissued patent to Topliff and Ely, as stated by the patentees, "relates to side half-elliptic spring vehicles, and has for its object suspending the front and rear ends of the springs directly to the rear axle and front bolster of the running gear by means of two separate connecting-rods, the outer ends of which have formed upon them, as a part of the same, and at right angles with the rod, short arms, between which the ends of the springs, respectively, are secured and operated, the connecting-rod receiving the rear ends of the springs being hinged to the rear axle, while the rod receiving the front ends of the springs is, in like manner, connected to the front bolster in such manner that the vibration of the springs will impart a corresponding rotation to the connecting-rods front and back, and so that the depression of either spring will, by the rotary action imparted to the connecting-rod, compel a corresponding depression of the other, and thus compel both springs to vibrate together, and move in unison one with the other, equalizing their action and the weight imposed upon them, as well as *to* prevent side motion to the body of the vehicle."

There were but two claims to this patent, which read as follows:

"1. The combination of two connecting-rods located at the front and rear ends of a wagon-body, and arranged to turn in their bearings, with a pair of half-elliptic springs, whereby the springs are caused to yield in unison with each other, substantially as and for the purpose set forth.

"2. The combination of the connecting-rods BB′ provided with arms at their ends, with the half-elliptic springs AA′, substantially as and for the purpose set forth."

The answer admitted that the defendant had manufactured and sold connecting-rods for carriages substantially like those manufactured by the plaintiffs, and claimed the right so to do, alleging that plaintiffs' patents were both void for want of novelty; and that the reissued patent of Topliff and Ely was not for the same invention as the original; and denied that

his manufacture infringed in any way upon any right which plaintiffs had to the invention.

The case was heard in the court below upon pleadings and proofs, the court holding that the Augur patent and the Topliff and Ely reissue were good and valid; and that the defendant was guilty of infringement. An injunction was allowed and the case was referred to a master to take an account of profits and damages. The master reported the sum of $8480.54 to be due the plaintiffs from the defendant as damages for the infringement, and a final decree was entered for that amount, from which both parties appealed to this court.

Mr. Henry S. Sherman for Topliff and another.

Mr. W. W. Boynton (with whom were *Mr. John C. Hale* and *Mr. M. D. Leggett* on the brief) for Topliff.

Mr. Justice Brown delivered the opinion of the court.

As the court below failed to pass upon the Saladee patent in its decree, and as neither party has assigned this omission as error, it is unnecessary to take it into consideration upon this appeal. There are really but two questions involved in this case: (1) the validity of the Augur patent, in view of the state of the art; (2) the validity of the Topliff and Ely reissue.

(1) In the Augur patent the device described consists of a rod attached to the rear axle of a side-spring buggy or other vehicle, having two links rigidly attached to the rod, one at each end thereof, upon which the rear ends of such side-springs are pivoted. The result is that when one spring is depressed, as by a person stepping into the vehicle on one side, the spring upon the other side is also depressed, through the action of the rod connecting the two, so that the body of the vehicle is kept approximately upon a level.

The patents to Stowe of 1868 and to Sexton of 1868 were also for a method of equalizing the action of side-springs by so connecting, as stated in the Stowe patent, "the two side-springs of a carriage that a weight placed on any portion of the carriage will depress each side equally, and prevent the

strain to the springs occasioned by the frequent wrenching they are subjected to in getting in and out of the carriage." But the means for accomplishing this in both cases are so wholly dissimilar to those described in the patents in suit that a comparison can hardly be made of them.

Indeed, the patent to Stringfellow and Surles of 1861 approximates so much more nearly to the patents in suit that it is the only one worthy of serious consideration. If this patent does not anticipate the Augur patent, none of the others do; if it does anticipate it, it is of no consequence whether the others do or not. This patent is for "a novel improvement in hanging carriage-bodies on springs and from C-shaped jacks or supports, whereby the body is allowed a free and easy vibration longitudinally, and it is relieved from sudden and disagreeable jolts and jerks in travelling on rough roads or from the sudden starting of the horse. The parts are also so braced and strengthened that all liability to twist the carriage-body is effectively prevented. The invention consists of a combination of transverse tie-rods with the side-springs, which are hung by shackle-bars or jointed links from C-shaped supports." The patentee further states: "It will thus be seen that the springs DD are suspended in such a manner from the four supports CCC'C' that the body of the carriage, which is mounted on said springs, will be allowed to have a free, swinging motion backwards or forwards, and in consequence of the springs being hung by the shackle-bars EEEE the springs will also have an upward movement. . . . In uniting the shackle-bars to the ends of the springs DD and the supports CCC'C' two tie-bars, GG, with forked ends, one of which is shown in Fig. 2 of the drawing, are used for the purpose of bracing the supports CC', and also the ends of the springs DD, so as to prevent the swaying of the carriage-body from twisting or bending the supports CC' laterally." The claim was for "the transverse ties GG, arranged and operated substantially as and for the purposes specified."

If there be anything in this patent which anticipates the connecting-rods of the Augur device it is the transverse tie-bars GG, upon which the springs are hung, which the specifi-

cation states are used for bracing the supports CC′ and also the ends of the springs DD, so as to prevent the swaying of the carriage-body from twisting or bending the supports CC′ laterally. An inspection of the models of this patent put in evidence shows at once that the object of these tie-bars is not an equalization of the pressure upon the springs, but to secure an equality in the backward and forward swinging movement in the body of the vehicle. Indeed, this was obviously necessary, as the patentee states, to prevent the body of the carriage and the supports CC′ from being twisted, the entire object of the patent being to secure a free and easy vibration longitudinally. It is true that one of the models of the patent put in evidence (Exhibit M), does, by its peculiar construction in shortening the links and strengthening and stiffening the entire structure, show an equalization of the pressure upon the springs, but it is accomplished by sacrificing the swinging movement backward and forward, which it was the object of the patent to secure. The duplicate of the model from the Patent Office contains no suggestion of this kind, nor do the other models of the same patent offered in evidence. While it is possible that the Stringfellow and Surles patent might, by a slight modification, be made to perform the function of equalizing the springs which it was the object of the Augur patent to secure, that was evidently not in the mind of the patentees, and the patent is inoperative for that purpose. Their device evidently approached very near the idea of an equalizer; but this idea did not apparently dawn upon them, nor was there anything in their patent which would have suggested it to a mechanic of ordinary intelligence, unless he were examining it for that purpose. It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions.

(2) The Topliff and Ely patent is claimed to be fully anticipated by the Augur device. In their specification the patentees admit that the connecting-rods placed at right angles across the front and rear of the running gear of vehicles, and

hinged to the front bolster and rear axle, are an old device. The better to illustrate the distinction between their own invention and all others pertaining to the use of connecting-rods, they cite several patents, among which is that of Augur, of which they state as follows:

"In this patent side-springs are used, the front ends of which are hinged upon fixed and rigid standards secured upon the top of the front bolster, and where the front ends of the spring are firmly held in a central position over said bolster, while the rear ends are hinged to hinges secured to the outer ends of a single connecting-rod placed over the top of the rear axle in such a manner that, as the springs are lengthened by depression, a corresponding rotation is imparted to the connecting-rod. In this case provision for the lengthening of the springs when depressed or in motion is only made for the rear ends of the springs, the front ends being firmly held over the centre of the bolster; and hence, as the load upon the springs is increased, and as only their rear ends, in combination with said links and connecting-rod, are permitted to accommodate their vibration, the rear end of the body is caused to have a backward tipping motion — that is, the back end of the body is thrown lower than the front end, when the springs are depressed to their full capacity — which is an objectionable feature in this device for equalizing the action of springs; besides, as only the rear ends of the springs are allowed to act, that easy and natural motion of the springs which is only had by allowing both ends to act freely is in a great measure lost.

"The radical difference of our invention from each and all the cases above cited is, first, in the construction of the connecting-rod," (which is in reality precisely the same as that employed by Augur;) "and, secondly, in suspending both ends of the springs upon separate connecting-rods, and thus allow both ends of the springs to act freely and in harmony with their vibrating motion, to which is added the other important advantage, viz.: that arrangement of connecting-rods admits of their application to side-spring vehicles of the ordinary kind now in use as readily as to those built expressly for the purpose — an advantage not attained by any other pre-

viously known combination of connecting-rods with the springs or bodies of vehicles."

It is quite evident from an examination of this patent that "the connecting-rods BB′, provided with arms at their ends," are precisely the same in structure, design and operation as "the pivoted links with a rod connecting the same," described in the second claim of the Augur patent; and that the only substantial difference in the construction of the two devices is in the duplication of this rod by applying it to the front bolster as well as to the rear axle, and thereby enabling it to be applied to side-spring vehicles of the ordinary kind, as readily as to those built expressly for the purpose. It is true there are introduced into the claims of the Topliff and Ely patent the half-elliptic springs AA′, which, by means of the connecting-rods, are caused to yield in unison with each other; but the same springs are evidently to be read into the Augur patent, since the whole object of the device, as stated by him, is to equalize the action of the springs by compelling both links to move in unison. If this patent differed from the other merely in duplicating the rod and applying it to the front bolster as well as to the rear axle, it is conceded that it would not, under the cases of *Dunbar* v. *Myers*, 94 U. S. 187, 195, and *Slawson* v. *Grand Street Railroad Co.*, 107 U. S. 649, 653, involve invention.

But there is a further distinction between the two devices which ought not to be overlooked. Under the Augur patent, the front ends of the springs are supported upon standards rising from the bolster, and the rear ends upon the links of the connecting-rod, rising perpendicularly above the rear axle. In other words, the links are turned upward, instead of down. This arrangement would evidently be inoperative if the springs were hung at both ends upon links, so placed, since the body of the vehicle would fall down at once upon the axles. In the Topliff and Ely patent, to obviate this, and to enable the device to be applied at both ends of the springs, the links are turned horizontally, or somewhat dependent, so that the springs can rest upon them at both ends, and thus secure a more perfect equalization. Trifling as this deviation seems to

be, it renders it possible to adapt the Augur device to any side-spring wagon of ordinary construction.

While the question of patentable novelty in this device is by no means free from doubt, we are inclined, in view of the extensive use to which these springs have been put by manufacturers of wagons, to resolve that doubt in favor of the patentees, and sustain the patent.

(3) With regard to the reissue of this patent, the record shows that on April 9, 1872, within four months from the date of the original patent, a reissue was granted, in which the specification was largely reframed, the drawings changed in form, though apparently not in substance, but the claim was changed only by providing that the connecting-rods should be "secured directly to the hind axle and front bolster," instead of "to the front and rear axles," as provided in the claim of the original patent. The claim of the original and first reissue are as follows:

Original.	*First Reissue.*
"The arms CC'C' arranged upon separate *rock*-rods BB' secured directly to the *front and rear axles* to cause both ends of *each spring* to yield simultaneously and in unison with each other, *and also to be laterally braced by said rock-rods*, as described."	"The arms CC'C' arranged upon separate *connecting*-rods, BB' secured directly to the *hind axle* and *front bolster*, to cause both ends of *the side-springs* to yield simultaneously and in unison with each other, *in the manner shown* and described."

The original claim was, in the particular above mentioned, a clear mistake, since affixing the connecting-rod and springs to the front axle would render it impossible to be turned, and in addition to this, the original drawing shows it affixed to the bolster. The correction of a mistake so clear, made within so short time after the issue of the original patent, was undoubtedly within the power of the Commissioner, as defined by Rev. Stat. section 4916. The lateral bracing by the rock-rods mentioned in the claim of the original patent was a merely inci-

dental function to the operation of the rock-rod in securing the axle to the spring, and their omission cannot be considered an enlargement of the claim.

The second reissue was applied for a little more than a month after the first was granted, although the patent was not granted upon this application until March 28, 1876, nearly four years after the application was filed. No change from the first reissue was made in the drawings or specification in this reissue, but the claim was divided and changed so as to read as follows:

"1. The combination of two connecting-rods located at the front and rear ends of a wagon-body, and arranged to turn in their bearings, with a pair of half-elliptic springs, whereby the springs are caused to yield in unison with each other, substantially as and for the purpose set forth.

"2. The combination of the connecting-rods BB′ provided with arms at their ends, with the half-elliptic springs AA′, substantially as and for the purpose set forth."

The first claim of this reissue is not insisted upon in this case, so that the question of its validity need not now be considered. The second claim is to some extent a change of the claim of the first reissue. It omits the requirement that the connecting-rod shall be secured directly to the axle and bolster, so as to cause both ends of the side-springs to yield simultaneously, and introduces the half-elliptic springs AA′ as a new element of the combination. Whether this be an enlargement of the original claim or not, it is for substantially the same invention, and in view of the fact that the reissue was applied for as soon as the mistake was discovered, and before any rights in favor of third parties could be reasonably expected to have attached, or had in fact attached, we think this reissue is not open to the objections which have proved fatal to so many since the case of *Miller* v. *Brass Company*, 104 U. S. 350, was decided.

It is a mistake to suppose that that case was intended to settle the principle that, under no circumstances, would a reissue containing a broader claim than the original be supported. We have no desire to modify in any respect the views ex-

pressed in that and subsequent cases with regard to the validity of reissues. There is no doubt, as was said by this court in *Powder Company* v. *Powder Works*, 98 U. S. 126, 137, 138, that a reissue can only be granted for the same invention which formed the subject of the original patent, of which it is a reissue, since, as was said by the court in that case, the express words of the act are "a new patent for the same invention." "The specification may be amended so as to make it more clear and distinct; the claim may be modified so as to make it more conformable to the exact rights of the patentee, but the invention must be the same. . . . This prohibition is general, relating to all patents; and by 'new matter' we suppose to be meant new substantive matter, such as would have the effect of changing the invention, or of introducing what might be the subject of another application for a patent. The danger to be provided against was the temptation to amend a patent so as to cover improvements which might have come into use, or might have been invented by others, after its issue."

In the case of *Miller* v. *Brass Company*, 104 U. S. 350, 351, a reissue with expanded claims was applied for *fifteen years* after the original patent was granted. It was held to be manifest upon the face of the patent that the suggestion of inadvertence and mistake was a mere pretence, or, if not a pretence, that the mistake was so obvious as to be instantly discernible on the opening of the patent, and the right to have it corrected was abandoned and lost by unreasonable delay. "The only mistake suggested," said Mr. Justice Bradley, "is, that the claim was not as broad as it might have been. This mistake, if it was a mistake, was apparent upon the first inspection of the patent, and if any correction was desired, it should have been applied for immediately." It was intimated in that case, p. 352, although the facts did not call for an adjudication upon the point, that "if two years' public enjoyment of an invention with the consent and allowance of the inventor is evidence of abandonment and a bar to an application for a patent, a public disclaimer in the patent itself should be construed equally favorable to the

public. Nothing but a clear mistake or inadvertence, and a speedy application for its correction, is admissible when it is sought merely to enlarge the claim." It was further said that the section of the Revised Statutes does not in terms authorize a reissue to enable a patentee to expand his claim, and that it was natural to conclude that the reissue of a patent for such purposes was not in the mind of Congress when it passed the laws in question. "At all events," said the court, p. 354, "we think it clear that it was not the special purpose of the legislation on this subject to authorize the surrender of patents for the purpose of reissuing them with broader and more comprehensive claims, although, under the general terms of the law, such a reissue may be made when it clearly appears that an actual mistake has inadvertently been made. . . . Now, whilst, as before stated, we do not deny that a claim may be enlarged in a reissued patent, we are of the opinion that this can only be done when an actual mistake has occurred; not from a mere error of judgment (for that may be rectified by appeal), but a real *bona fide* mistake, inadvertently committed; such as a Court of Chancery, in cases within its ordinary jurisdiction, would correct. . . . The granting of a reissue for such a purpose, after an unreasonable delay, is clearly an abuse of the power to grant reissues, and may justly be declared illegal and void."

So, in the case of *Johnson* v. *Railroad Company*, 105 U. S. 539, 547, the patent was issued in 1857, and at the expiration of the original term of fourteen years an extension of seven years was granted, and a reissue was applied for after a lapse of fifteen years, and it was held, upon the authority of *Miller* v. *Brass Company*, that if the patentee had the right to a reissue if applied for in reasonable time, he had lost it by his unreasonable delay. Said the court, speaking by Mr. Justice Woods: "He has rested supinely until the use of the fish-plate joint has become universal, and then, after a lapse of fifteen years, has attempted by a reissue to extend his patent to cover it. We think it is perfectly clear that the original patent could not be fairly construed to embrace the device used by the appellee, which appellants insist is covered by

their reissue. If the reissued patent covers it, it is broader than the original, and is, therefore, void."

In the case of *Mahn* v. *Harwood*, 112 U. S. 354, 358, a patent reissued nearly four years after the date of the original patent was held to be invalid as to the new claims, upon the ground of unreasonable delay in applying for it, the only object of the reissue being to enlarge the claims. Nothing was changed, but to multiply the claims and make them broader and this was done, not for the benefit of the original patentee, but for that of his assignees. "It was not intended then," said Mr. Justice Bradley, referring to *Miller* v. *Brass Co.*, "and is not now, to question the conclusiveness, in suits for infringements of patents, of the decisions of the Commissioner on questions of fact necessary to be decided before issuing such patents, except as the statute gives specific defences in that regard." He repeated substantially what had been said in *Miller* v. *Brass Co.*, that "a patent for an invention cannot lawfully be reissued for the mere purpose of enlarging the claim, unless there has been a clear mistake inadvertently committed in the wording of the claim, and the application for a reissue is made within a reasonably short period after the original patent was granted. The granting of such reissues after the lapse of long periods of time is an abuse of power, and is founded on a total misconception of the law." It was held that while lapses of time might be of small consequence where the original claim was too broad, and the patentee sought to restrict it, there were substantial reasons why the claim could not be enlarged unless the patentee used due diligence to ascertain his mistake. "The rights of the public here intervene, which are totally inconsistent with such tardy reissues; and the great opportunity and temptation to commit fraud after any considerable lapse of time, when the circumstances of the original application have passed out of mind, and the monopoly has proved to be of great value, make it imperative on the courts, as a dictate of justice and public policy, to hold the patentees strictly to the rule of reasonable diligence in making applications for this kind of reissues." It was further held that while it was for

the Commissioner of Patents to determine the question of inadvertence, accident or mistake, the question of reasonable time was one which the court could determine as one of law, by comparing the patent itself with the original patent, and, if necessary, with the record of its inception.

In speaking of the case of *Miller* v. *Brass Co.*, Mr. Justice Bradley observed: "We suggested that a delay of two years in applying for such correction should be construed equally favorable to the public. But this was a mere suggestion by the way, and was not intended to lay down any general rule. Nevertheless, the analogy is an apposite one, and we think that excuse for any longer delay than that should be made manifest by the special circumstances of the case."

In the large number of cases which have come up to this court since that of *Mahn* v. *Harwood* was decided, in which reissues have been held to be invalid, it will be found that the opinion of the court was put upon the ground, either that the patentee had been guilty of inexcusable laches, usually of from four to sixteen years, or that circumstances had occurred since the granting of the original patent which made the reissue operate harshly or unjustly to the defendant in the case.

Thus, in *Mathews* v. *Machine Co.*, 105 U. S. 54, there was a delay of fourteen years; in *Bantz* v. *Frantz*, 105 U. S. 160, a delay of fourteen years and six months; in *Wing* v. *Anthony*, 106 U. S. 142, of over five years; in *Moffit* v. *Rogers*, 106 U. S. 423, of two years and seven months; in *Gage* v. *Herring*, 107 U. S. 640, of fourteen years; in *Clements* v. *Odorless Apparatus Co.*, 109 U. S. 641, of nearly five years; in *McMurray* v. *Mallory*, 111 U. S. 97, of nine years; in *White* v. *Dunbar*, 119 U. S. 47, of five years. In *Parker & Whipple Co.* v. *Yale Clock Co.*, 123 U. S. 87, there was a delay of one year and eight months, but it appeared that the improvements not covered by the original patent had been brought into use by others than the patentee before the reissue was applied for. In *Coon* v. *Wilson*, 113 U. S. 268, a reissue was applied for only a little over three months after the original patent was granted; but the patentee waited until the defendants produced their

device and then applied for such enlarged claims as to embrace this device, which was not covered by the claim of the original patent, and it was apparent from a comparison of the two patents that the application for a reissue was made merely to enlarge the scope of the original. In *Wollensak* v. *Reiher*, 115 U. S. 96, 101, there was a delay of more than five years, Mr. Justice Matthews observing that "the settled rule of decision is, that if it appears, in cases where the claim is merely expanded, that the delay has been for two years, or more, it is adjudged to invalidate the reissue, unless the delay is accounted for and excused by special circumstances, which show it to have been not unreasonable." In the very latest case decided by this court, viz.: *Electric-Gas Lighting Co.* v. *Boston Electric Co.*, 139 U. S. 481, there was a delay of eight and one-half years, and the sole object of the reissue was to expand the claims. In *Newton* v. *Furst and Bradley Co.*, 119 U. S. 373, there was a delay of more than thirteen years, and the defendant had begun in the meantime to make machines of the pattern complained of. In *Ives* v. *Sargent*, 119 U. S. 652, there was a delay of three years, and in the meantime the patent was infringed by a construction manufactured and sold without infringing the patent as originally granted. In *Worden* v. *Searls*, 121 U. S. 14, there was a delay of six years; and in *Matthews* v. *Ironclad Manufacturing Co.*, 124 U. S. 347, one of seven years.

From this summary of the authorities it may be regarded as the settled rule of this court that the power to reissue may be exercised when the patent is inoperative by reason of the fact that the specification as originally drawn was defective or insufficient, or the claims were narrower than the actual invention of the patentee, provided the error has arisen from inadvertence or mistake, and the patentee is guilty of no fraud or deception; but that such reissues are subject to the following qualifications:

First. That it shall be for the same invention as the original patent, as such invention appears from the specification and claims of such original.

Second. That due diligence must be exercised in discover-

ing the mistake in the original patent, and that, if it be sought for the purpose of enlarging the claim, the lapse of two years will ordinarily, though not always, be treated as evidence of an abandonment of the new matter to the public to the same extent that a failure by the inventor to apply for a patent within two years from the public use or sale of his invention is regarded by the statute as conclusive evidence of an abandonment of the patent to the public.

Third. That this court will not review the decision of the Commissioner upon the question of inadvertence, accident or mistake, unless the matter is manifest from the record; but that the question whether the application was made within a reasonable time is, in most, if not in all such cases, a question of law for the court.

To hold that a patent can never be reissued for an enlarged claim would be not only to override the obvious intent of the statute, but would operate in many cases with great hardship upon the patentee. The specification and claims of a patent, particularly if the invention be at all complicated, constitute one of the most difficult legal instruments to draw with accuracy, and in view of the fact that valuable inventions are often placed in the hands of inexperienced persons to prepare such specifications and claims, it is no matter of surprise that the latter frequently fail to describe with requisite certainty the exact invention of the patentee, and err either in claiming that which the patentee had not in fact invented, or in omitting some element which was a valuable or essential part of his actual invention. Under such circumstances, it would be manifestly unjust to deny him the benefit of a reissue to secure to him his actual invention, provided it is evident that there has been a mistake and he has been guilty of no want of reasonable diligence in discovering it, and no third persons have in the meantime acquired the right to manufacture or sell what he had failed to claim. The object of the patent law is to secure to inventors a monopoly of what they have actually invented or discovered, and it ought not to be defeated by a too strict and technical adherence to the letter of the statute, or by the application of artificial rules of interpretation. The

evidence in this case shows that plaintiffs were conceded by manufacturers a monopoly of this invention; that defendant was the only one who had infringed their patents; and that he did not begin to manufacture the infringing device until 1882, six years after the second reissue was granted. In view of this and the fact that the second reissue was applied for within five months from the time the original patent was granted, and within thirty-seven days after the first reissue, and that it covers no more than the actual invention of the patentee, so far as the same is an improvement upon the Augur patent, we think it should be upheld.

(4) Defendant also assigns as error the allowance by the master of damages for the infringement of the Augur patent prior to April 9, 1884, when the plaintiffs first took title to it. It appears from the record that the patentee assigned the patent to one Atwater, on February 4, 1873, subject to the condition that if he paid a certain note of $2000 and interest the assignment was to be void. This vested the real title in the assignee. *Waterman* v. *McKenzie*, 138 U. S. 252. The assignment made no mention of past infringements. On April 9, 1883, Atwater assigned to Saladee all the interest which he had acquired, together with all claims and demands for the past use of such patents, and on April 9, 1884, Saladee made a similar assignment to the plaintiffs.

It is claimed in this connection, first, that the bill did not make the assignment of the claim for damages for prior infringements of the Augur patent a basis or ground of recovery and asked no recovery therefor; and, second, that, if the plaintiffs were entitled to recover the damages which Atwater sustained by reason of the infringement of this patent prior to April 9, 1883, and those which Saladee sustained from April 9, 1883, to April 9, 1884, the date of the assignment to the plaintiffs, there was no evidence that either Atwater or Saladee suffered any damages by reason of the infringement, nor any evidence that they could have supplied the trade during those years.

It is sufficient to say in reply to this, that no such exception was taken in the court below to the master's report, the only

exception being that, in view of the Stringfellow and Surles patent, the master should have reported only nominal damages. It was held by this court, in *Story* v. *Livingston*, 13 Pet. 359, 366, that proper practice in chancery requires that no exceptions to a master's report be made which were not taken before the master, the object being to save time and give him an opportunity to correct his errors or reconsider his opinion. A party neglecting to bring in objections cannot afterwards except to the report, unless the court, upon motion, see reason to be dissatisfied with the report and refer it to the master for review, with liberty to the party to take objection to it. And in *McMicken* v. *Perin*, 18 How. 507, it was held directly that this court will not review a master's report upon objections taken here for the first time. In affirmance of this principle, Rule 21 (Sub. 2) requires that "when the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it." This presupposes that the particular exception relied upon was taken in the court below, and was passed upon by the court adversely to the appellant. Proper practice requires that objections to a master's report shall be taken in that court, that any errors discovered therein may be rectified by the court itself, or by a reference to the master for a correction of his report, without putting parties to the delay and expense of an appeal to this court. It would be manifestly unjust if this court, after having affirmed the action of the court below in every other particular, should take up an error in a master's report which was not called to its attention, and reverse the case upon that ground, when if exception had been duly taken, the error could have been at once corrected. There is nothing in this case to indicate that this point was ever made before the master, nor is it noticed in the eight exceptions taken to his first report, which was set aside upon other grounds, or, as already observed, in the exception to his final report.

(5) For the same reason, that no exceptions were taken at all by the plaintiffs to the master's report, we must decline to notice their first two assignments of error based upon the inadequacy of the damages awarded.

There is much force in the third assignment, that the court erred in overruling plaintiffs' motion to increase the damages, and in refusing to give a decree for such increase. The master finds that for some years before the defendant began to manufacture, he was the travelling sales agent of the plaintiffs; that while so associated in the manufacture of carriage hardware and appliances, they established a large trade in certain parts of the country; and that during this period, the defendant, while travelling for the firm, became acquainted with their trade, and the location, extent of purchase and solvency of their customers. His connection with the firm having terminated, defendant went to Cleveland, and in 1882 opened a rival establishment, and began the infringement of these patents. Before that time, plaintiffs were the exclusive manufacturers of these equalizers, and had equipped their establishment with sufficient machinery to enable them to supply the market; but they neither issued licenses nor established a royalty for the manufacture or use of their improvement. The defendant, knowing all their customers and plaintiffs' facilities for the manufacture of equalizers, made serious inroads upon their business, and sold almost exclusively to those who had formerly been customers of the plaintiffs. Under these circumstances, we should not have disturbed the decree of the court below, if it had seen fit to increase the damages; but in view of the fact that the defendant carried on the business apparently without profit to himself, and that a decree passed against him for the sum of $8480.51 actual damages, we are not inclined to reverse it upon that ground. The allowance of an increase of damages under the statute is a matter which rests somewhat in the discretion of the court, and we should not be inclined to disturb its finding upon this point, unless the evidence clearly demanded it.

The decree of the court below is, therefore,

Affirmed.

PEOPLE OF THE STATE OF NEW YORK *ex rel.* NEW YORK ELECTRIC LINES COMPANY *v.* SQUIRE.

ERROR TO THE COURT OF COMMON PLEAS OF THE CITY AND COUNTY OF NEW YORK.

No. 185. Argued March 3, 4, 1892. — Decided May 2, 1892.

The statute of June 13, 1885, of the State of New York (Sess. Laws 1885, c. 499) requiring companies operating or intending to operate electrical conductors in any city in the State to file with the Board of Commissioners of Electrical Subways maps and plans before constructing the conduits, and the statute of that State of May 29, 1886, (Sess. Laws 1886, c. 503) assessing the salaries and expenses of such board upon the several companies operating electrical conductors in any city in the State, are a constitutional exercise of the general police powers of the State, and are applicable to the New York Electric Lines Company which, before the passage of either of said acts, was incorporated under the laws of New York, and had obtained from the municipal government of the city of New York permission to lay its conductors in and through the streets and highways of the city, and had filed a map, diagram, and tabular statement indicating the amount, position and localities of the spaces it proposed to occupy in and under the streets.

The said law of 1885 simply transferred the reserved police power of the State from one set of functionaries to another and required the company to submit its plans and specifications to the latter, who would determine whether they were in accordance with the terms of the ordinances giving it the right to enter and dig up the streets of the city; and, being so construed, it violates no contract rights of the company which might grow out of the permission granted by the municipality.

The said act of 1886 comes within the principles settled in *Charlotte &c. Railroad* v. *Gibbes*, 142 U. S. 386, and is not in conflict with the provision in the Fourteenth Amendment that no State shall 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.

THE court stated the case as follows:

This was an application for a writ of mandamus on behalf of the New York Electric Lines Company, a New York corporation, to compel the commissioner of public works of New York City to give it written permission to make excavations and

open up the streets and pavements of the city for the purpose of laying its wires and other conductors of electricity underground, and of making its underground electrical connections, in accordance, it was claimed, with its franchise for such purposes, theretofore obtained from the city.

The application was presented to the Court of Common Pleas for the city and county of New York, at a special term, and was denied, on the ground that the relator had not obtained the approval of the commissioners of electrical subways for that city and county, of the plans and specifications proposed by it for the construction of its underground electrical system. Upon appeal to the court in general term the order denying the application was affirmed, (14 Daly, 154, 166,) and the relator thereupon appealed to the Court of Appeals of the State, which affirmed the judgment below. 107 N. Y. 593. The record having been remitted to the Court of Common Pleas, and the judgment of the Court of Appeals having been there entered, as its judgment, this writ of error was sued out.

The case as presented by the petition for mandamus and its accompanying exhibits is substantially this: The relator was incorporated on the 14th of October, 1882, under the general telegraph law of April 12, 1848, (Laws of 1848, c. 265,) and the various acts amendatory thereof and supplementary thereto, "for the purpose," as stated in its certificate of incorporation, "of owning, constructing, using, maintaining and leasing lines of telegraph wires or other electric conductors for telegraphic and telephonic communication, and for electric illumination, to be placed under the pavements of the streets, avenues, and public highways of the cities of New York and Brooklyn in the State of New York, and under the sidewalks of the streets and avenues of the said cities, and upon, over or under private lands in the said cities, within blocks of buildings erected or to be erected therein, and for the purpose of owning franchises for laying and operating the said lines of electric conductors, and the purchasing, owning and disposing of such real estate within the said cities, and such personal property as may from time to time be necessary and

convenient to the building, using, maintaining and leasing the said lines of electric conductors."

By section 5 of the original act of 1848, telegraph companies were authorized to construct their lines "along and upon any of the public roads and highways, or across any of the waters within the limits of the State," "*provided the same shall not be so constructed as to incommode the public use of said roads or highways, or injuriously interrupt the navigation of said waters.*"

By § 2 of the amendatory act of June 29, 1853, Laws 1853, c. 471, the privilege was extended to such companies of erecting or constructing their lines "upon, over or under any of the public roads, streets and highways, and through, across, or under any of the waters," of the State, subject to the same restrictions contained in the act of 1848.

By § 1 of the act of June 10, 1881, Laws 1881, c. 483, amendatory of the preceding acts on this subject, it was provided as follows: "1. Any company or companies organized and incorporated under the laws of this State for the purpose of owning, constructing, using and maintaining a line or lines of electric telegraph within this State, or partly within and partly beyond the limits of this State, are hereby authorized, from time to time, to construct and lay lines of electrical conductors *underground* in any city, village, or town within the limits of this State, *subject to all the provisions of law in reference to such companies not inconsistent with this act: provided*, that such company shall, before laying any such line in any city, village or town of this State, first obtain from the common council of cities, the trustees of villages, or the commissioners of highways of towns *permission* to use the streets within such city, village or town for the purposes herein set forth."

The foregoing embraces the material parts of the statute law of New York relating to telegraph companies, in force when the relator was organized.

Within a few months after the relator was incorporated, to wit, April 10, 1883, the board of aldermen of the city of New York adopted resolutions giving to the relator permission to

lay its wires underground through the city, in accordance with certain restrictions and upon conditions particularly specified. The material portions of these resolutions were as follows:

"*Resolved*, That permission be and hereby is granted to the New York Electric Lines Company to lay wires or other conductors of electricity in and through the streets, avenues and highways of New York City, and to make connections of such wires or conductors underground by means of the necessary vaults, test-boxes and distributing conduits, and thence above ground, with points of electric illumination or of telegraphic or telephonic signal, in accordance with the provisions of an 'ordinance to regulate the laying of subterranean telegraph wires and electric conductors in the streets of the city,' passed by the common council and approved by the mayor, December 14, 1878; *provided*, however, and it is hereby ordained and

"*Resolved*, That whenever the said New York Electric Lines Company, in the progress of laying its lines of electric conductors, shall be prevented or obstructed from placing its wires in the spaces which may have been generally selected under the ordinance, passed and approved as aforesaid, by manholes of *sewer*, *gas*, *steam or water mains*, or other underground or pavement impediments, now and heretofore existing, then, and in such cases, the said company may, under the privileges hereby granted, vary the space selected, by adopting, appropriating and using equivalent and nearest practicable spaces as may be found necessary; and *provided further*, and it is hereby further

"*Resolved and ordained*, That the connection vaults or test-boxes aforementioned, may be extended underground not more than four feet in depth or two feet in any lateral direction beyond the limited spaces contemplated for the lines of wires, in the ordinance passed and approved as aforesaid and may be fitted with covers, or other means of access, at the level of the pavements of the several streets and avenues."

Then follow several paragraphs of the ordinance relating to the compensation to be paid by the relator for the franchise thus given to it.

Statement of the Case.

The ordinance of December 14, 1878, referred to in the first paragraph of that of 1883, as regulating the conditions and limitations upon which the franchise was granted, was as follows:

"No telegraph line or electric conductor shall be laid under the streets of this city at such depth from the surface that the necessary excavation incident to laying or repairing the same shall expose or endanger any water or gas pipes, sewers, or drains, or any parts thereof.

"Such wires or conductors shall in no case be placed at a greater distance from the curbstone separating sidewalks from carriage-way than four feet, except in crossing streets running transverse to the direction of said lines, when such crossing shall be made in the shortest straight line or in making necessary connections with buildings and stations.

"The method employed in laying said conductors shall be such that it will at no time be necessary to remove so much of the pavement, or to make such excavation as to *materially impede traffic or passage upon sidewalks or streets during operation of laying or repairing said conductors*, except when in crossing streets transversely, where it shall be permitted to remove the paving stone for a width not exceeding two feet, and in the nearest straight line from corner to corner. In no case during the general hours of passage and traffic shall passage be interrupted thereby for a longer period than one hour.

"The work of removal and replacement of the pavements in any and all of the streets, avenues, highways and public places in and through which the wires of any telegraph company shall be laid shall be subject to the control and supervision of the commissioner of public works. Excavations in any and all of the unopened streets, avenues, highways or public places shall also be subject to like control and supervision.

"The space selected for placing said wires, in every case being limited as to direction and general position by the foregoing provisions, shall not exceed two feet in width by two feet in depth.

"Grantees under this ordinance shall be required within six

months after such permission shall be granted to file with the county clerk maps, diagrams, and tabular statements, including the amount and position of the spaces proposed to be occupied by them, and their rights and privileges under this ordinance shall be confined to the spaces, positions, and localities as indicated by said maps, diagrams and statements."

On the 16th of April, 1883, the relator accepted the franchises granted to it by the resolutions of the 10th of that month, and on the 18th of May of the same year, it filed in the office of the clerk of the county of New York a map, diagram and tabular statement, indicating the amount and position and localities of the spaces it proposed to occupy in and under the streets and other land in the city and county of New York. The petition avers that the relator immediately thereafter proceeded to make ready its material and plant for the construction of its electrical conductors and underground lines in the city, and began to develop and elaborate its mechanical constructions for the same, and to make ready the machinery, appliances and implements for its works, in pursuance of the objects of its incorporation, and at great expense; that since then it had purchased and partly paid for and become obligated to pay the sum of $50,000 and upwards for property essential to the execution of its rights, under the aforesaid laws and ordinances; and that more than 3000 shares of its capital stock, of the par value of $100, had been issued by it and sold to persons who had relied upon its said franchise.

It seems, however, that notwithstanding the acts done by the relator, as above averred, it took no steps towards opening up the streets and avenues of the city for the purpose of laying its wires and other electrical connections underground, until on or about July 21, 1886, when it made an application to the commissioner of public works for a permit to be allowed to make the necessary excavations, etc., for such purpose, which application was denied by the commissioner on the 23d of the following month. This denial, as already stated, was made because the relator had not obtained the approval of the Board of Commissioners of Electrical Subways, created by the act of

the New York legislature, approved June 13, 1885, Laws 1885, c. 499, of the plans and construction proposed by the relator.

As this act of the legislature has a very important bearing upon the material questions in this case, it will be necessary to refer more particularly to it. Its first section authorized and directed the mayor, comptroller and commissioner of public works of cities having more than one million population to appoint three disinterested persons, residents of the city for which they should be appointed, to be a Board of Commissioners of Electrical Subways. By its second section it was made the duty of such board to cause all electrical wires and other conductors of electricity to be removed from the surface and placed underground wherever practicable, and to require all electrical companies operating or intending to operate electrical conductors in any street, avenue or highway of the city to transact their business by means of underground conductors wherever practicable. Its third section provided as follows:

"SEC. 3. When any company, operating or intending to operate, electrical conductors in any such city shall desire or be required to place its conductors, or any of them, underground in any of the streets, avenues or other highway of any such city, and for that purpose to remove the same from the surface thereof, and shall have been duly authorized to do so, it shall be obligatory upon such company to file with said board of commissioners a map or maps, made to scale, showing the streets or avenues or other highways which are desired to be used for such purpose, and giving the general location, dimensions and course of the underground conduits desired to be constructed. Before any such conduits shall be constructed it shall be necessary to obtain the approval by said board of said plan of construction so proposed by such company; and said board has and shall have power to require that the work of removal and of constructing every such system of underground conductors shall be done according to such plan so approved, subject at all times to such modifications as shall from time to time by the board be made, and subject also to the rules and regulations, not inconsistent herewith, prescribed

or to be prescribed by the local authorities having control of such streets, avenues or other highways of such city."

Various other duties were devolved upon this board by the subsequent sections of the act, but they need not be referred to in this connection. This act of 1885 was amended in certain particulars, also not material to the questions involved in this case, by the act of May 29, 1886, Laws 1886, c. 503. The only other section of the statute necessary to be mentioned is section 7 which, as amended, is as follows:

"The amount of such salaries and expenses [of the board of subway commissioners] shall, in such proportion as is prescribed in section eight of this act, be by the comptroller assessed upon and collected from the several companies operating electrical conductors in any such city of the State which, under the provisions of this act, are or shall be required to place and operate any of their conductors underground, and shall be paid into the treasury of the State, in such instalments as the comptroller shall require."

After the refusal of the commissioner of public works to issue the permit above mentioned, the relator applied to the Common Pleas Court for a peremptory mandamus to compel him to issue it, with the result as stated in the opening paragraphs of this statement.

Mr. E. M. Marble for plaintiff in error.

I. The court erred in holding that the acts of the legislature of the State of New York of 1885 and 1886, were applicable to the relator's contract and franchise, made with and obtained from the city of New York, through its proper officers.

(*a*) Statutes will be construed in accordance with the purpose for which they were passed. The purpose for which the act of June 13, 1885, was passed, was to convert existing overhead systems of electrical wires and cables into underground systems, and this purpose is expressly so declared. Clearer and more explicit language than is used in these acts to express the purpose for which they were passed can hardly be conceived.

There is no provision in either of them which provides for any action or supervision by the board of commissioners in connection with such a system as the relator obtained a franchise to construct under the streets, avenues and highways of the city of New York. On the contrary, as will be seen by reference to the second section of the act of 1885, it is made the duty of the board of commissioners "to cause to be removed from the surface and put, maintained and operated underground, whenever practicable, all electrical wires or cables used or to be used in the business of any such company." Wherever a reference is made to "such company," it is a company which shall be required to remove its electrical conductors from the surface underground.

Nothing can be plainer from the language of the several sections of this act than that the intent of the legislature in passing said act was simply, and only, to compel existing companies to convert their overhead systems into underground systems; and such being the case, we submit that the act should be construed according to its purpose, and not to include more than the legislature intended. *United States* v. *Saunders*, 22 Wall. 492; *Platt* v. *Union Pacific Railroad*, 99 U. S. 48; *James* v. *Milwaukee*, 16 Wall. 159.

(*b*) Statutes will not be construed to act retroactively unless their language imperatively requires such construction. The contract between the city of New York and the relator was made April 16, 1883, when the relator accepted the franchise granted it by the mayor and aldermen of the city of New York, upon the terms and conditions mentioned therein, and it was fully completed and perfected by the filing of a map, diagram and tabular statement indicating the amount, position and localities of the spaces to be occupied in and under the streets and other lands in the city and county of New York, on May 18, 1883.

The franchise thus granted to the relator was not based simply on the agreement to comply with the ordinances and regulations which had been or might be passed by the Common Council of said city, but had as well a money consideration, which was to be paid by the relator into the treasury

of said city, and then the city had the option, either to accept the two wires for the use of the police, and for the fire-alarm telegraph, as a donation, or in lieu thereof a money consideration of two per cent on the gross receipts of said company. In other words, the franchise granted to the relator was granted in part, if not wholly, upon a money consideration to be paid to said city. A franchise obtained in this manner is lawful, under the constitution and laws of the State of New York. *People* v. *O'Brien*, 111 N. Y. 1, 30, 31.

Having thus acquired by its franchise a right of property in the streets of said city, and thereafter having prosecuted its work faithfully to carry out and fufil the undertaking upon which it had entered, we submit that the acts of 1885 and 1886 referred to, cannot be held to apply to the franchise and contract of the relator, unless it be held that said acts must be construed to operate retroactively.

In *Chew Heong* v. *United States*, 112 U. S. 536, this court, through Mr. Justice Harlan, said: "We have stated the main reasons which in our opinion forbid that interpretation of the act of Congress. To these may be added the further one, that the courts uniformly refuse to give to statutes a retrospective operation, whereby 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."

II. The court erred in holding that the acts of the legislature of the State of New York of 1885 and 1886, did not impair the contract made between the city of New York and the relator, if said acts are applicable thereto.

It has uniformly been held by this court that the words "there be and hereby is granted" import a grant *in presenti*. *Railroad Co.* v. *Smith*, 9 Wall. 95; *Schulenberg* v. *Harriman*, 21 Wall. 48, 60; *Leavenworth & Lawrence Railroad* v. *United States*, 92 U. S. 733.

We submit that the words "that permission be and hereby is granted," occurring in the first clause of the relator's franchise, are words of like import and should be construed and held to have the same force as where grants are made of the entire title to lands.

Argument for Plaintiff in Error.

So far as we know, the decisions of this court are uniform in holding that where a grantee or a beneficiary under a grant, has complied with the condition of said grant by filing a map locating its grant and determining its limits, boundaries and quantity, from that moment the grant attaches, and unless there are conditions subsequent, the right of the grantee or beneficiary is complete to the lands granted.

Abolishing an existing remedy for the enforcement of a contract, without substituting an equivalent remedy therefor, impairs the contract.

The contract between the city of New York and the relator is valid and of the kind and character protected by the Constitution of the United States from impairment by state legislatures. *People* v. *O'Brien*, 111 N. Y. 1, 30, 31; *People* v. *Sturtevant*, 9 N. Y. 263; *S. C.* 59 Am. Dec. 536; *Milhau* v. *Sharp*, 27 N. Y. 611; *S. C.* 84 Am. Dec. 314; *Brooklyn Central Railroad* v. *Brooklyn City Railroad Co.*, 32 Barb. 358, 364.

At the time the relator made its contract with the city of New York the writ of mandamus was a right to which the relator was entitled, to compel the defendant, if he refused, to give it a written permit to open the streets, in accordance with its map, diagram and tabular statement, whenever the relator should be ready to commence active operations.

The right to this writ, to enforce its rights under the contract, if the act is applicable to the relator's contract and franchise, by this act is taken away, and thereby the contract of the relator is impaired. *Louisiana* v. *St. Martin's Parish*, 111 U. S. 716; *Walker* v. *Whitehead*, 16 Wall. 314; *Von Hoffman* v. *Quincy*, 4 Wall. 435; *Green* v. *Biddle*, 8 Wheat. 1; *Chicago, Milwaukee &c. Railway Company* v. *Minnesota*, 134 U. S. 418; *Louisiana* v. *New Orleans*, 102 U. S. 203.

III. The court erred in holding that the acts of the legislature of the State of New York of 1885 and 1886, are valid, as applied to the relator's contract and franchise, because said acts provide for the taking away of the relator's rights under its franchise without due process of law.

IV. The court erred in holding that the acts of 1885 and

1886 are proper police regulation, and were passed in the due exercise of the police power of the State.

We do not deny that a State has a right to pass laws to secure good order, to protect the morals, and secure the health and safety of the people of the State. Such right is undoubtedly inherent in a State, and constitutes a part of its sovereignty. There is, however, a limit to which the police power, or the claim of police power of a State can go, and that limit is reached when, by the exercise, or attempted exercise of such power, rights secured by contracts are invaded. A State must not pass laws which shall violate or impair the validity of contracts.

In *New Orleans Gas Light Co.* v. *Louisiana &c. Manufacturing Co.*, 115 U. S. 650 this court said: "Definitions of the police power must, however, be taken subject to the condition that a State cannot in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land."

And statutes passed under the police power of a State cannot take away vested rights. *Fletcher* v. *Peck*, 6 Cranch, 87; *Terrett* v. *Taylor*, 9 Cranch, 43.

Mr. James C. Carter and *Mr. Melville Egleston*, by leave of court, filed an intervening brief on behalf of the Metropolitan Telephone and Telegraph Company.

Mr. David J. Dean (with whom was *Mr. James Hillhouse* on the brief) for defendant in error.

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

In the New York courts it was contended by the relator (1) that the aforesaid acts of the legislature of that State passed in 1885 and 1886 were not applicable to it because passed subsequently to the date of the alleged contract between it and the city, of April 16, 1883; (2) that if they were applicable to it, they were violative of the constitution of the State

of New York, for several reasons stated; and (3) that if applicable, they also violated the Constitution of the United States in certain particulars specified. All of the points made by the relator were decided adversely to it in the state courts.

In this court, necessarily, the contention that the acts in question are violative of the constitution of the State is not raised, as we would have no jurisdiction to consider such questions. The contention here on the part of the relator as gathered from the assignment of errors may be thus stated:

(1) The acts of 1885 and 1886 are not applicable to the relator, for the reason urged before the courts of the State; and

(2) If they be held to apply to the relator they are violative of the Constitution of the United States in two particulars: (*a*) They deprive the relator of its property without due process of law; and (*b*) they impair the obligation of the contract made between the relator and the city on the 16th of April, 1883, the date of the acceptance by it of the provisions of the city ordinance of the 10th of that month. All the other points raised may be arranged under one or the other of the above heads.

It will be convenient to consider the questions involved in this case in somewhat the above order. In no sense of the term do we think it can be safely averred that the acts of 1885 and 1886 are not applicable to the relator. The language of both of these acts clearly precludes such a construction. It is declared in the third section above quoted that "*any* company *operating* or *intending to operate* electrical conductors" in the city shall be obliged to file with the Board of Subway Commissioners a "map or maps, made to scale," showing the proposed plan of construction of its underground electrical system; and shall also be obliged "to obtain the approval by said board of said plan of construction so proposed" before any underground conduits shall be constructed. The board is further given the power to compel the construction of the electrical system in accordance with the plans approved by it, and to modify, from time to time, those plans, if the public interest should require it. This language is plain and unambiguous, and is broad enough to include any and every electrical company, irrespec-

tive of the date of its incorporation, operating or desiring to operate, either directly or indirectly, any lines of wire for telegraphic, telephonic, or illuminating purposes within the cities to which it is applicable, the city of New York confessedly being the only one affected.

Neither can it be said that the acts of 1885 and 1886 have a retroactive effect, at least so far as the relator is concerned, since whatever rights it obtained under the ordinance of 1883, which it accepted as the basis of the contract it claims to have entered into, were expressly subject to regulation, in their use, by the highest legislative power in the State acting for the benefit of all interests affected by those rights and for the benefit of the public generally, so long as the relator's essential rights were not impaired or invaded. *New Orleans Gas Company* v. *Louisiana Light Company*, 115 U. S. 650; *Stein* v. *Bienville Water Supply Company*, 141 U. S. 67.

In order to determine whether the relator's essential rights have been invaded, or the contract which it claims to have entered into impaired, or its property taken away without due process of law, it will be necessary to ascertain what rights and property it possesses under the alleged contract of April 16, 1883. This contract, if such it be, must be gathered from the statutes of the State, under which the relator was organized, and the ordinances of the city (which it accepted) by which its privilege of constructing an underground electrical system was conferred. Recurring to the general telegraph act of 1848 and the acts amendatory thereof and supplemental thereto, the material provisions of which are set out above, it is observed that in none of those acts is there any unqualified right conferred upon any electrical company to construct its lines wherever, or in whatever manner it might choose. On the contrary, in every one of those acts provision is made for the security of the rights of the public in the use of the streets and highways which may be used by the electric companies. Thus in the act of 1848 the proviso is that the electric lines "shall not be so constructed as to incommode the public use of said roads or highways, or injuriously interrupt the navigation of said waters." Like restrictions are carried into the acts of

1853 and 1881; and the additional proviso is inserted in the act of 1881 that before any company shall be allowed to construct its lines in any city, village or town it must "first obtain from the common council of cities, the trustees of villages, or the commissioners of highways of towns permission to use the streets within such city, village or town for the purposes herein set forth." Here, then, in express terms, the power is reserved to regulate the use by the electrical companies of all the public highways of the State; and the rights conferred upon such companies are not absolute rights but the qualified right to construct their lines and operate them so as not to interfere with the public easements or the private rights of prior grantees.

Turning now to the ordinances of 1878 and 1883, the provisions of which were accepted by the relator on the 16th of April, 1883, which acceptance, it is claimed, constituted a contract between it and the city, we find that permission was given to the relator to lay its lines of wire underground, in and through the city, in accordance with certain specified plans of construction. These plans are elaborately described in those ordinances; the depth at which the wires are to be placed; the distance the conduits, test-boxes and connection vaults must be placed from underground gas, sewer, steam or water mains; the distance they are required to be from the curbstone; and the method employed in the construction, are all specified with great particularity. And the supervision and control of these matters of excavation and construction, by the ordinance of 1878, devolve upon the commissioner of public works. Conceding, then, for present purposes, without deciding that such was the case, that the relator had a contract with the city of New York for the laying of its wires, and the construction of its underground electrical system, the terms of the contract, as found in the statutes and the ordinances, gave the relator only the right to carry out the purposes of its organization in a manner which will in nowise interfere either with other underground systems and connections, such as gas, sewer, and water systems, already established and in operation, or with the rights of the public to use the streets, avenues and

highways of the city for the purposes of general travel. The rights of the public and the rights of prior occupants are to be respected and protected.

In what way, therefore, did the acts of 1885 and 1886 impair this contract? Did they take from the relator any rights which it theretofore possessed? Did they prohibit it from laying its lines and constructing its underground electrical system in accordance with the terms, and subject to the restrictions and conditions, of its said contract with the city? We think all these questions must be answered against the relator. The only thing that the acts of 1885 and 1886 did in this matter was to create a Board of Subway Commissioners whose duty it was to carry out the provisions of the ordinances of the city and the prior acts of the legislature relating to electric lines. The statutes of 1885 and 1886 did not prohibit the relator from carrying out the purposes of its organization or from laying its wires underground. They simply said to it, "Submit your plans and specifications of your electrical system to the Board of Subway Commissioners, who will determine whether they are in accordance with the terms of the ordinances giving you the right to enter and dig up the streets of the city." This the statutes had a right to do. It would be an anomaly in municipal administration, if every corporation that desired to dig up the streets of a city and make underground connections for sewer, gas, water, steam, electricity or other purposes, should be allowed to proceed upon its own theory of what were proper plans for it to adopt, and proper excavations to make. The evils that would follow from such a system of practice would be of great gravity to the public and would entail endless disputes and bickerings with prior parties having equal rights. The utmost that can be said against the acts of 1885 and 1886 is, that they transferred the supervision and control of the matters of excavation of the streets and the construction of underground electric systems from the commissioner of public works to the Board of Subway Commissioners. That is the sum total of the change effected. Not a right of the electrical companies was violated, and no contract was impaired. The expressly reserved power of the State or municipality to regu-

late the use of the streets and highways in such manner as not to injuriously affect the public interests was merely transferred from one public functionary to another. The power was not enlarged; only the agency by which the supervising power of the State was to be exercised was changed. It requires no argument or citation of authorities to demonstrate that such proceedings did not impair the obligation of the relator's contract. If it did, every act of incorporation would involve a loss of authority by the legislature to change its public functionaries, or their respective powers and duties.

Independently, however, of the contractual relations of the relator, the statutes of 1885 and 1886 are so clearly an exercise of the general police powers of the State that we do not deem it necessary to add anything on that point to what was said by the Court of Appeals of New York. 107 N. Y. 593, 603, 604.

The contention that the statutes referred to deprive the relator of its property without due process of law is equally without foundation. This argument rests upon the assumption that the legislature could not require the electric companies to pay the salaries of the subway commissioners, as provided in section 7 of the act of 1885, as amended in 1886; and that this requirement of the statute is in violation of the Fourteenth Amendment to the Constitution of the United States. This contention cannot be sustained under the principles of *Charlotte &c. Railroad* v. *Gibbes*, 142 U. S. 386. In that case it was held that a statute of South Carolina, requiring the salaries and expenses of the state railroad commission to be borne by the several corporations owning or operating railroads within the State, was not in conflict with the Fourteenth Amendment, which provides that no State shall "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."

There are no other features of the case that call for special consideration.

Judgment affirmed.

Statement of the Case.

LEHIGH VALLEY RAILROAD COMPANY *v.* PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 275. Argued April 5, 1892. — Decided May 2, 1892.

A state tax against a railroad corporation, incorporated under its laws, on account of transportation done by it from one point within the State to another point within it, but passing during the transportation without the State and through part of another State, is not a tax upon interstate commerce, and does not infringe the provisions of the Constitution of the United States.

THE court stated the case as follows:

April 28, 1887, the auditor general of Pennsylvania settled an account with the Lehigh Valley Railroad Company, in accordance with the act of June 7, 1879, of that Commonwealth, for its taxes on gross receipts for the six months ending December 31, 1886, as follows:

"Gross receipts	$4,798,933 54
Proportion taxable in Pennsylvania, $\frac{26069}{32661}$	3,835,926 60
Tax at rate of eight-tenths of one per cent.	30,642 88
Due Commonwealth	$30,642 88"

This settlement was approved by the state treasurer June 3, 1887. The Lehigh Company thereupon prayed an appeal to the Court of Common Pleas of Dauphin County, Pennsylvania, where a declaration and copy of account were filed and the case tried under stipulation by the court without a jury. Upon the trial it appeared from the affidavit of the treasurer of the Lehigh Company, given November 10, 1887, that he had made to the auditor general for the six months ending December 31, 1886, the report of gross receipts upon which the account for taxes had been settled, and further that "the main line of railroad operated by the Lehigh Valley Railroad Company extends from Perth Amboy, in the State of New

Jersey, to Wilkesbarre, in the State of Pennsylvania, with numerous branches in Pennsylvania and New Jersey. The company has also running arrangements with other companies whereby it runs its own trains, both passenger and freight, on a through line from Jersey City, New Jersey, to Buffalo, New York. A very large portion of its business consists of the transportation of freight, passengers, etc., from points in Pennsylvania to points in other States or from points in other States to points in Pennsylvania, or from points in other States to points in other States, passing through the State of Pennsylvania, about one-half of its entire receipts being derived from the transportation of anthracite coal from Pennsylvania into other States."

The affidavit gave a detailed statement showing the several classes of transportation from which the receipts returned were derived, being from transportation of coal; freight other than coal; passengers, express, and mail; distributed as in a summary, with which the statement concluded, and which was as follows:

"1. Total receipts from transportation from points in Pennsylvania to other points in Pennsylvania without passing out of the State	$1,353,441 50
2. Total receipts from transportation by continuous carriage from points in Pennsylvania to other points in Pennsylvania, but over lines partly in Pennsylvania — that is to say, passing out of Pennsylvania into other States and back again into Pennsylvania in course of transportation	207,660 42
3. Total receipts from transportation by continuous carriage from points in a foreign State to other points in the same State passing through the State of Pennsylvania	50,494 25
4. Total receipts from transportation by con-	

tinuous carriage from points in other States to points in Pennsylvania.....	292,422 00
5. Total receipts from transportation by continuous carriage from points in Pennsylvania to points in other States	2,569,514 58
6. Total receipts from transportation by continuous carriage from points in a foreign State, passing through Pennsylvania, and ending in a third State.....	267,868 59
7. Total receipts from transportation from points in foreign States to other points in foreign States not touching Pennsylvania	57,532 19
Total receipts	$4,798,933 53"

In another affidavit, under date January 20, 1888, the same official stated: "Wherever in the said statement of November tenth, 1887, I used the term 'continuous transportation' or 'continuous carriage,' the freight or passengers from the transportation of which the receipts were derived were carried between the points mentioned for a single sum or charge and upon a single way-bill or ticket, and were, when taken upon the cars of this company, destined to be carried and were actually carried from point to point as in said statement set forth. The Lehigh Valley Railroad Company has no railroad of its own reaching the city of Philadelphia, but transports coal and other merchandise, and sometimes passengers, from Mauch Chunk and other points in Pennsylvania over its own line to Phillipsburg, in the State of New Jersey, from which point it is carried upon the Belvidere and Delaware Railroad to Trenton, and thence by the Pennsylvania Railroad lines to the city of Philadelphia. So far as the Lehigh Valley Railroad line is concerned the transportation is from Mauch Chunk, or the other points in Pennsylvania, to Phillipsburg, in New Jersey; but by arrangements between this company and the corporations owning the other roads the transportation is continuous from Mauch Chunk and the other points in Pennsylvania to Philadelphia. The receipts

mentioned in my statement of November tenth in the second paragraph in each instance under the respective heads of 'coal,' 'freight other than coal,' and 'passenger, express and mail,' and also in the second item in the summary, were derived in the manner above explained. Some of the trains, and in many instances the same cars, which carried the freight and passengers indicated between the points in Pennsylvania and the city of Philadelphia carried also freight and passengers destined and carried from points in Pennsylvania to points in New Jersey and New York, and *vice versa*. The various items of receipts shown in my statement of November tenth and classified in the third paragraph of the summary as 'receipts from transportation by continuous carriage from points in a foreign State to other points in the same State, passing through the State of Pennsylvania,' were derived from transportation of freight and passengers billed or ticketed from the city of New York to other points in the State of New York, and *vice versa*. The same trains and the same cars which carried the said freight and passengers carried also freight and passengers destined and carried from points in Pennsylvania to points in other States and from points in other States to points in Pennsylvania."

It was admitted that the Lehigh Company was originally incorporated by the State of Pennsylvania, and that it owned and operated as part of its main line about sixty-six miles of railroad in New Jersey.

The fraction of the entire gross receipts given in the settlement represented the Lehigh Company's mileage within the State.

The Court of Common Pleas found the facts, and held, for the reasons given in *Commonwealth* v. *Delaware & Hudson Canal Co.*, 21 Weekly Notes of Cases (Penn.) 406, and *Commonwealth* v. *New York, Lake Erie & Western Railroad Company*, *Ib.* 410, that the Commonwealth could only recover taxes upon the two items of $1,353,441.50 and $207,660.42, (classes one and two,) being the amount received for transportation between points both of which were in the State; and directed judgment accordingly, which, exceptions thereto having been over-

ruled, was thereupon entered. The case was carried by writ of error to the Supreme Court of Pennsylvania and the judgment affirmed upon the opinion of the court below. A writ of error was then sued out from this court.

The company, conceding its liability to taxation in respect of the receipts contained in class one, questions by its assignment of errors the validity of the tax as to the receipts in class two.

Mr. M. E. Olmstead for plaintiff in error.

The seventh section of the Pennsylvania revenue statute of June 7, 1879, which has since been repealed, was twice before this court, and, in each instance, condemned as unconstitutional in so far as it imposed a tax upon receipts derived from inter-state commerce. *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Western Union Telegraph Co.* v. *Pennsylvania*, 128 U. S. 39.

The state court concedes the invalidity of the tax in question in this case, as applied to receipts from interstate commerce; but it holds that the receipts of the Lehigh Valley Railroad Company for transportation from Mauch Chunk, Pennsylvania, to Phillipsburg, New Jersey, of freight and passengers, which, at Phillipsburg, were taken upon the system of the Pennsylvania Railroad Company and by it transported more than fifty miles through the State of New Jersey to Trenton, and from there back again into Pennsylvania for ultimate delivery at Philadelphia, to which point the transportation from Mauch Chunk was, by agreement between the companies, continuous, is not interstate commerce. The company contends that it is, and that is the only question in dispute.

Was this transportation *intra*-State or was it *inter*-State? If, as the company contends, it was interstate transportation, it was interstate commerce; for this court has often decided that transportation is not merely an aid to, or an instrument of, commerce, but is itself commerce. *The Passenger Cases*, 7 How. 283–416; *State Freight Tax*, 15 Wall. 232, 275; *State Tax on Railway Gross Receipts*, 15 Wall. 284, 299; *Fargo* v. *Michi-*

gan, 121 U. S. 230, 247; *Wabash Railway Co.* v. *Illinois*, 118 U. S. 557.

In short, in a very long line of cases, which are too familiar to require citation, this court has always and invariably proceeded upon the theory that transportation is commerce; and, wherever the transportation involved has been of an interstate or international character, its regulation by the States has been invariably prohibited; and the only transportation which the States have been permitted to control or regulate is that which is completely internal, and does not in any way affect or concern any other State.

In the article on interstate commerce, in 11 Am. & Eng. Encyclopedia of Law, 539, the following is given as the definition of that term, viz.: "Interstate commerce, or commerce 'among the several States' of the American Union, is commerce which concerns more States than one;" and numerous decisions of this court are there cited sustaining that definition. And this declaration is in entire harmony with the rulings of this court. *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, 193, 194; *State Tonnage Tax Cases*, 12 Wall. 204, 214; *Hall* v. *DeCuir*, 95 U. S. 485, 491; *Fargo* v. *Michigan*, 121 U. S. 230.

It is clear that under these decisions, the State of New Jersey could not interfere with this transportation in any way, because it is interstate commerce as to that State. But if so as to New Jersey, why is it not so also as to Pennsylvania?

In *Coe* v. *Errol*, 116 U. S. 517, a quantity of logs had been cut in the State of Maine and put into the Androscoggin River for the purpose of floating them down to Lewiston, in the same State. The Androscoggin River starts in Maine, but, after running a distance through that State, crosses the line and runs a distance through the State of New Hampshire, and then back again into the State of Maine. It was customary to leave the logs at the town of Errol, in New Hampshire, for one year. Other logs were cut in New Hampshire and drawn down to Errol to be floated also to the State of Maine. The taxing authorities taxed all these

logs at Errol. But this court said that goods on their way through a State from a place outside thereof to another place outside thereof, are in course of interstate or foreign transportation, and are subjects of interstate or foreign commerce, and not taxable by the State through which they are passing, even though detained within that State by low water or other temporary cause. Such goods are already in the course of commercial transportation, and are under the protection of the Constitution. Thus we see that transportation from one State to another point in the same State, passing through another State in the course of the transportation, has been already held by this court to be interstate transportation.

In *Lord* v. *Steamship Company*, 102 U. S. 541, the steamship Ventura was employed in navigation between San Francisco and San Diego, both in the State of California, touching also at intermediate ports on the coast in said State. She neither took on nor put off goods outside of the State of California, but in making her voyage passed out upon the Pacific Ocean, out of the State of California and in again. As stated by Mr. Chief Justice Waite, who delivered the opinion (p. 543): "The single question presented by the assignment of errors is whether Congress has power to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of goods and passengers between ports and places in the same State. It is conceded that while the Ventura carried goods from place to place in California, her voyages were always ocean voyages."

That question was decided in the affirmative, and it was held that the Ventura on her voyage "entered on a navigation which was necessarily connected with other nations," and that, although she was not trading with them, "she was navigating with them, and consequently with them was engaged in commerce. . . . In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress."

Nor does it make any difference that, as suggested by the learned trial judge, the distance of transportation in another State may be very short. In the cases at bar the distance was not short. The transportation through New Jersey was for more than fifty miles; but had it been for a much less distance, the principle would have been the same. In *Pennsylvania* v. *Gloucester Ferry Company*, 114 U. S. 196, this court unanimously condemned the Pennsylvania taxing statute upon the ground that, as stated in the syllabus: "The transportation of passengers and freight for hire by a steam ferry across the Delaware River from New Jersey to Philadelphia by a corporation of New Jersey is interstate commerce, which is not subject to exactions by the State of Pennsylvania." The transportation was simply across the comparatively narrow river between Philadelphia and Camden, which cities are within sight of each other.

Mr. James A. Stranahan, Deputy Attorney General of the State of Pennsylvania, for defendant in error.

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

The Lehigh Valley Railroad Company is a Pennsylvania corporation, which owns and operates an extensive system of railroads in that State, but has no line of its own to Philadelphia. For the traffic from Mauch Chunk to Philadelphia, it makes use of two routes, one by the way of the Philadelphia and Reading road, being wholly within the State, and the other by its own line connecting with the lines of the Pennsylvania Railroad at Phillipsburg, New Jersey, and thence *via* Trenton, in that State, to Philadelphia. Detailed reports of its receipts show that the passenger traffic of the Lehigh Company to Philadelphia from Mauch Chunk is almost wholly taken over the Philadelphia and Reading, while its coal and general freight traffic reaches Philadelphia by the other road. Phillipsburg, New Jersey, lies across the Delaware River, opposite Easton, Pennsylvania. By the running arrangements

between the Lehigh and Pennsylvania Companies, the transportation of through freight and passengers is continuous from Mauch Chunk to Philadelphia.

The receipts named in class two are confined to that part of the transportation from Mauch Chunk to Phillipsburg, and the taxation to the mileage wholly within the State of Pennsylvania; and the question is whether this taxation in respect of such receipts from freight and passengers carried by continuous transportation to Philadelphia from Mauch Chunk by way of Trenton, New Jersey, amounts to a regulation of interstate commerce.

The conflict between the commercial regulations of the several States was destructive to their harmony and fatal to their commercial interests abroad, and this was the mischief intended to be obviated by the grant to the Congress of the power to regulate commerce with foreign nations and among the States. But, as was said by Chief Justice Marshall, the words of the grant do not embrace that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to nor affect other States. "Commerce," observed the Chief Justice, "undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *Gibbons* v. *Ogden*, 9 Wheat. 1, 189. This is no more than an expansion of its simplest signification, that of an exchange of goods, the bringing of them from the seller to the buyer, however vast the range now comprehended by the term in the progress of society.

Taxation is undoubtedly one of the forms of regulation, but the power of each State to tax its own internal commerce, and the franchises, property or business of its own corporations engaged in such commerce, has always been recognized, and the particular mode of taxation in this instance is conceded to be in itself not open to objection. And while interstate commerce cannot be regulated by a State by the laying of taxes thereon, in any form, yet whenever the subjects of taxation

can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the distinction will be acted upon by the courts, and the State permitted to collect that arising upon commerce solely within its own territory. *Ratterman* v. *West. Union Tel. Co.*, 127 U. S. 411, 424.

The tax under consideration here was determined in respect of receipts for the proportion of the transportation within the State, but the contention is that this could not be done because the transportation was an entire thing, and in its course passed through another State than that of the origin and destination of the particular freight and passengers. There was no breaking of bulk or transfer of passengers in New Jersey. The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between those points and not between any other points. Is such intercourse, consisting of continuous transportation between two points in the same State, made interstate because in its accomplishment some portion of another State may be traversed? Is the transmission of freight or messages between two places in the same State made interstate business by the deviation of the railroad or telegraph line on to the soil of another State?

If it has happened that through engineering difficulties, as the interposition of a mountain or a river, the line is deflected so as to cross the boundary and run for the time being in another State than that of its principal location, does such detour in itself impress an external character on internal intercourse? For example, the Nashville, Chattanooga and St. Louis Railway Company is a corporation created under the laws of Tennessee, and through freight and passengers transported from Nashville to Chattanooga pass over a few miles in Alabama and perhaps two miles in Georgia, but we had not supposed that that circumstance would render the taxation of that company, in respect of such business, by the State of Tennessee invalid.

So as to the traffic of the Erie Railway between the cities of New York and Buffalo, we do not understand that that company escapes taxation in respect of that part of its busi-

ness because some miles of its road are in Pennsylvania, while the New York Central is taxed as to its business between the same places, because its rails are wholly within the State of New York.

It should be remembered that the question does not arise as to the power of any other State than the State of the termini, nor as to taxation upon the property of the company situated elsewhere than in Pennsylvania, nor as to the regulation by Pennsylvania of the operations of this or any other company elsewhere, but it is simply whether, in the carriage of freight and passengers between two points in one State, the mere passage over the soil of another State renders that business foreign, which is domestic. We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk.

Nor is the contrary conclusion supported by *Coe* v. *Errol*, 116 U. S. 517, and *Lord* v. *Steamship Company*, 102 U. S. 541, much relied on by plaintiff in error.

In *Coe* v. *Errol*, logs cut in Maine and detained at Errol, New Hampshire, on their way down the Androscoggin River to Lewiston, Maine, were held by the Supreme Court of New Hampshire not taxable at Errol, while logs cut in New Hampshire and hauled down to that town for similar transportation were held taxable, and this court sustained the judgment of the state court in reference to the New Hampshire logs, upon the ground that they were still part of the general mass of property of the State, and had not commenced "their final movement for transportation from the State of their origin to that of their destination." The Maine logs had never been part of the property of New Hampshire, and had no *situs* there. They were therefore not taxable, though whether they were or not was not drawn into decision. These logs were also in course of transportation from the place of cutting to another place likewise in Maine, and as that transportation required them to arrive and remain for a time in New Hampshire, the predicament in that regard was referred to in the

opinion by way of argument, as being such that New Hampshire could not impose a burden on that transportation. But the right of Maine to tax them was not disputed.

The single question in *Lord* v. *Steamship Company* was, as stated by Mr. Chief Justice Waite, delivering the opinion of the court, whether Congress had power to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of goods and passengers between ports and places in the same State, it being conceded that the voyages of the steamship in respect of whose loss the question arose were always ocean voyages. The argument was that "while on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed on for the government of the vehicles of commerce occupying this common property of all mankind. She was navigating among the vessels of other nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce. If in her navigation she inflicted a wrong on another country, the United States, and not the State of California, must answer for what was done. In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such, she and the business in which she was engaged was subject to the regulating power of Congress."

But it was unnecessary to invoke the power to regulate commerce in order to find authority for the law in question. As stated by Mr. Justice Bradley in *In re Garnett*, 141 U. S. 1, 12: "The act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends." In that case the limited liability act was applied to a steamer engaged in commerce on the Savannah River.

In *Ex parte Boyer*, 109 U. S. 629, it was decided that the admiralty jurisdiction extended to a steam canal-boat, in case of collision between her and another canal-boat, whilst the two boats were navigating the Illinois and Lake Michigan Canal, although the libellant's boat was bound from one place in Illinois to another place in the same State.

The principle is well settled, and the cases are largely referred to in *In re Garnett.*

In *Pacific Coast Steamship Co.* v. *Board of Railroad Commissioners*, 9 Sawyer, 253, the Circuit Court for the District of California held, Mr. Justice Field delivering the opinion, that the California State Board of Railroad Commissioners had no power to regulate or interfere with the transportation of persons or merchandise by a steamship company between ports within the State, if they were in transit to or from other States, or if the transportation consisted of voyages upon the ocean, bringing the steamships under the exclusive control of Congress.

But that case involved the direct regulation by a State of transportation which had passed beyond the jurisdiction of the State, and did not decide the question of the power of a State to tax its own corporations in respect of transactions within it in the course of a continuous carriage from one point to another in the State, in accomplishing which a part of another State was incidentally traversed.

This Pennsylvania Company was not taxed in respect of its receipts from transportation from points in foreign States to other points in foreign States not touching Pennsylvania; nor from transportation by continuous carriage from points in a foreign State passing through Pennsylvania and ending into a third State; nor from transportation by continuous carriage from points in Pennsylvania to points in other States; nor from transportation by continuous carriage from points in other States to points in Pennsylvania; nor from transportation by continuous carriage from points in another State to other points in the same State passing through Pennsylvania; but only in respect of receipts from transportation from points in Pennsylvania to other points in Pennsylvania without pass-

ing out of the State, and from transportation by continuous carriage from points in Pennsylvania to other points therein, but passing out of Pennsylvania into another State and back again in the course of transportation.

We do not deem it necessary to continue the discussion. We concur with the state court in sustaining the validity of the tax herein involved, and the judgment is

Affirmed.

LEHIGH VALLEY RAILROAD COMPANY *v.* PENNSYLVANIA. LEHIGH VALLEY RAILROAD COMPANY *v.* PENNSYLVANIA. LEHIGH VALLEY RAILROAD COMPANY *v.* PENNSYLVANIA. Error to the Supreme Court of Pennsylvania. Nos. 276, 428, 429. Argued and decided with No. 275. MR. CHIEF JUSTICE FULLER: These cases involve the same question as that just passed upon in *Lehigh Valley Railroad Co.* v. *Commonwealth, supra,* 192, and for the reasons there given the judgments are severally

Affirmed.

Mr. M. E. Olmstead for plaintiff in error.

Mr. James A. Stranahan for defendant in error.

CULVER *v.* WILKINSON.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 228. Argued April 19, 20, 1892. — Decided May 2, 1892.

In a written instrument a corporation declared that it held for the benefit of C. certain choses in action, stock and bonds, which it described, and said: "The proceeds arising from the sale of said securities and recovered from said choses in action are to be applied to pay off said notes and interest," and the remainder was to be paid to C. or his legal representatives, "subject to the repayment of moneys expended" by the corporation "in prosecuting claims or selling the securities." The notes

were described, and it was stated that C. was indebted to the corporation in their amount; *Held*, that the declaration did not contain or imply any contract whereby the corporation was bound to prosecute claims or sell securities.

A receiver of the corporation, appointed by a court of New Jersey, having recovered in New Jersey a judgment against C. on notes given in renewal of those specified in the declaration, sued C. on the judgment in the Circuit Court of the United States for the Southern District of New York, and C. sought to give testimony of oral agreements, whereby the corporation agreed to prosecute some of the claims, to pay the expenses of such prosecution, and to do various things in regard to the bonds, and that its failure to do so had caused damages to C., which he claimed to first apply in discharge of the judgment and then recover the balance; *Held*, that the evidence was inadmissible and that it was proper to direct a verdict for the plaintiff.

THE case is stated in the opinion.

Mr. R. Floyd Clarke for plaintiff in error.

Mr. Cortlandt Parker and *Mr. Wayne Parker* for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

In August, 1873, Delos E. Culver borrowed $30,000 from the American Trust Company of New Jersey, a New Jersey corporation, and gave to it two promissory notes therefor. One of said notes was dated Newark, August 2, 1873, for $15,000, with interest, payable to the company at its office in Newark, four months after date, and stated that Culver had pledged to the company as security, with authority to sell the same and to apply the proceeds on the note, 24 first-mortgage western extension bonds of the New York and Oswego Midland Railroad Company, for $1000 each. The second note was dated Newark, August 12, 1873, payable four months after date to the company, at its office in Newark, for $15,000, with interest, and recited a similar pledge of $25,000 of like bonds. Those notes were not paid when due.

On the 23d of September, 1873, a proceeding in involuntary bankruptcy was brought against Culver by a creditor, in the

District Court of the United States for the District of New Jersey. Washington B. Williams was appointed his assignee in bankruptcy; and Culver was discharged by that court on the 1st of December, 1874, from all provable debts against him which existed on the 23d of September, 1873. By that discharge in bankruptcy Culver's liability on the two notes for $15,000 each was discharged.

Among the assets of Culver which came into the hands of his assignee in bankruptcy were three choses in action, described as follows: "Delos E. Culver's claim on the N. Y. and O. Midland Railroad Co., for work performed and materials furnished and damages, payable in stock to amount of $400,000, as set forth in his schedule. Delos E. Culver's claim on the N. Y. and O. Midland Railroad Co., and George Opdyke, for breach of contract in not delivering the first-mortgage bonds of said railroad company to amount of $600,000, as set forth in his schedule. Delos E. Culver's claim against Allen, Stephens & Co., bankers in New York, under separate names of Benjamin F. Allen, Wm. A. Stephens, and Herman Blennerhassett, for balance of account, stated to be about $22,000."

The New York and Oswego Midland Railroad Company, in the fall of 1873, defaulted in paying the interest on its first-mortgage bonds. A bill to foreclose that mortgage was filed, Abram S. Hewitt was appointed receiver in November, 1873, and the railroad remained in his hands as receiver until 1880. Culver had been connected with that railroad company since 1871, and a plan for its reorganization under the foreclosure suit was contemplated. In view of that and of other considerations, Culver arranged to have the above-named choses in action purchased, on their sale by his assignee in bankruptcy, and transferred to the American Trust Company, with the understanding that he would renew his debt which had been discharged in bankruptcy. The choses in action were sold on October 21, 1875, and were bought by Culver in the name of John McGregor, one of the directors of the trust company, for the sum of $9, being for one of them $5 and for the other two $2 each. A formal bill of sale of the three choses in

action was given by the assignee to McGregor, and the $9 was paid.

In the meantime, Culver had become interested in the Jersey City and Albany Railroad Company, which was the successor of the Rockland Central Railroad Company and of the Ridgefield Park Railroad Company, and it was proposed that the three companies last mentioned should be reorganized into the Jersey City and Albany Railway Company of New York and New Jersey. As a part of the transaction, the trust company loaned to Culver $5000, with which to purchase 13 bonds of the Rockland Central Railroad Company and 7 bonds of the Ridgefield Park Railroad Company. A written declaration, dated February 24, 1876, was given to Culver by the treasurer of the trust company, and Culver executed to that company the five promissory notes mentioned in the declaration. The declaration is set forth in the margin.[1]

The $39,631.29, mentioned in the declaration, was fixed

[1] Whereas Delos E. Culver, of Jersey City, New Jersey, is indebted unto the American Trust Company of Newark, N. J., in the sum of thirty-nine thousand six hundred and thirty-one and .29 dollars, $39,631.29, for which indebtedness he has given said company his five certain notes or obligations, dated this day, one, $4631.29, due June 27, '76; one $8750, due Aug. 27th, '76; one, $8750, due Nov. 27th, '76; one, $8750 due Feb'y 27th, '77; and one, $8750, due May 27th, '77, all with interest from date.

Now, therefore, the said American Trust Company hereby declares that it holds for the benefit of said Delos E. Culver certain choses in action, stock, and bonds, more particularly described as follows:

Chose in action against Allen, Stevens & Co.

Chose in action against Geo. Opdyke & Co. & N. Y. & O. M. R. R. Co.

Claim for 4000 shares of the capital stock N. Y. & O. M. R. R. Co.

49 bonds of the N. Y. & O. Midland R. R. Co., western extension.

13 bonds of the Rockland Central R. R. Co.

7 bonds of the Ridgefield Park R. R. Co.

The proceeds arising from the sale of said securities and recovered from said choses in action are to be applied to pay off said notes and interest, and the remainder is to be paid to said Delos E. Culver or his legal representatives, subject to the repayment of moneys expended by said American Trust Company in prosecuting claims or selling the securities.

In witness whereof The American Trust Company has caused its treasurer to set his hand this 24th day of February, 1876, at Newark, N. J.

W. A. WHITEHEAD, *Treasurer.*

Witness: JOHN MCGREGOR.

upon as the amount, with interest, of the indebtedness of Culver to the trust company on the two notes for $15,000 each, and the $5000 loan. The notes given February 24, 1876, were renewed from time to time, until they culminated in 10 notes made by Culver, payable to the order of the trust company, one dated October 29, 1877, at 5 months, for $5046.44; one dated November 28, 1877, at 5 months, for $5588.95; one dated December 3, 1877, at 5 months, for $5084.46; one dated December 31, 1877, at 5 months, for $3598.25; one dated January 5, 1878, at 6 months, for $5149.75; one dated January 15, 1878, at 5 months, for $5127.63; one dated January 15, 1878, at 3 months, for $5062.90; one dated February 15, 1878, at 5 months, for $4437.97; one dated February 25, 1878, at 5 months, for $5170.55; and one dated March 2, 1878, at 5 months, for $5692.50.

Those 10 notes, and five others made by Culver for $200 each, to the order of John McGregor, and endorsed by the latter without recourse, and owned by the trust company, all dated September 4, 1877, payable severally 2, 3, 4, 5 and 6 months after date, being all unpaid, George Wilkinson, who had been appointed receiver of the trust company, by the court of chancery of the State of New Jersey, in January, 1879, commenced an action at law, in March, 1879, against Culver, to recover on the above-mentioned 15 notes, in the Supreme Court of the State of New Jersey. Culver was duly summoned in the action, but made default; and on the 31st of May, 1879, Wilkinson, receiver as aforesaid, recovered a judgment against Culver, in that action, for $54,263.33.

On the 3d of December, 1883, Wilkinson commenced an action on that judgment against Culver in the Circuit Court of the United States for the Southern District of New York. Culver was duly served with a summons therein, and appeared by attorney. The complaint set forth an exemplified copy of the New Jersey judgment, acknowledged as payments thereon made by Culver to Wilkinson, $4532.50 on February 16, 1880, $5000 on April 6, 1881, and $1250 on January 29, 1882, and alleged that no part of the balance of the judgment had been

paid, and that it amounted to $43,480.83, besides interest, for which amount judgment was demanded.

Culver put in an answer to the complaint, admitting that the Supreme Court of New Jersey was a court of general jurisdiction; that Culver was duly summoned in the action therein; that the judgment was recovered to the amount stated; that a copy of the judgment-roll was set forth in the complaint; and that Wilkinson was such receiver. The answer denied that the judgment had not been paid except as stated in the complaint, and that the credits given therein were correct, and averred that more ought to be credited on the judgment. It denied that no part of the balance claimed in the complaint had been paid, and that said balance was correctly stated. It alleged that the judgment had been obtained by fraud, and had been paid by virtue of the facts thereinafter stated in the answer; that the credits set forth in the complaint were credits arising upon sums alleged to have been realized by the receiver out of the collaterals held by him to secure the judgment; and that Culver had never recognized the validity of the judgment or made any payment thereon, except in the manner thereinafter stated. The answer then went into the history of the transactions out of which the judgment arose, and set up that the original $30,000 loan was usurious; that the trust company agreed to prosecute the claims set forth in the declaration of February 24, 1876, and pay itself out of the proceeds, and to pay the expenses of such prosecution and turn over the balance to him; that it neglected and refused so to do; and that he had suffered thereby damage enough to extinguish the amount of the judgment, and, in addition thereto, had suffered damages to the amount of $73,336.67, for which amount, with interest and costs, he prayed judgment "against the plaintiff."

The case was tried in November, 1887, before Judge Shipman and a jury. The court directed a verdict for the plaintiff, which was rendered in the sum of $76,659.96; and for that amount, with costs, making in all $76,698.38, a judgment was rendered against Culver, on November 23, 1887, in favor of "George Wilkinson, receiver of the American Trust Com-

pany of New Jersey." To review that judgment, Culver has brought a writ of error. A motion for a new trial was made before Judge Shipman and denied February 7, 1888. (33 Fed. Rep. 708.)

After putting in evidence the declaration of February 24, 1876, the defendant, as a witness, sought to give testimony of contemporaneous, precedent and subsequent oral agreements, whereby the trust company agreed, as was alleged, to prosecute some of the claims mentioned in the declaration, to pay the expenses of such prosecution, and to advance moneys, and to exchange certain bonds for stock or like security, on the reorganization of insolvent corporations; the failure to perform which alleged agreements, it was contended, had produced great damages to the defendant, which, it was insisted, he could first apply to the discharge of the judgment, and then recover the balance from the plaintiff. The court refused to receive such testimony, and the defendant excepted. The court said: "You can show what the circumstances were surrounding the execution of this document." The court also said: "I will not admit testimony of any oral communication in regard to what was to be done by the trust company with this collateral security. If you have a witness to prove an independent agreement upon the part of the trust company involving the expenditure of money or the performance of things by them in regard to it, then the rule in regard to the altering, adding to or varying a written contract is a different thing."

Subsequently, the defendant asked leave of the court to withdraw from the case that portion of his answer which alleged fraud in obtaining the judgment. The bill of exceptions states that thereupon the court ruled that everything tending to prove fraud in obtaining the judgment in New Jersey was excluded; and that the defendant submitted to the ruling.

At the close of the testimony, the defendant's counsel proposed to sum up the case, and claimed that the declaration of February 24, 1876, meant that the trust company was to prosecute claims and sell collaterals in a reasonable time. The court said in reply: "I have already stated my idea of the legal

character of this contract; that there was no obligation on the part of the trust company to sell the stocks and bonds except upon a request of the pledger, and there was no obligation to prosecute the claims to suit at their own expense, although such prosecution might have been requested by the pledger, and there is no evidence that there was any request to sell the securities, and there is no evidence of what the law calls negligence on the part of the trust company." The defendant excepted to each branch of that ruling.

The defendant then asked to have the question go to the jury as to the damages arising from the alleged negligence of the trust company, under the defendant's construction of the contract, and excepted to the ruling excluding that question from the jury.

The defendant also asked to go to the jury on the point that the contract was ambiguous, that the jury must view it as to who was to pay the expenses of the transaction, the trust company or Culver, and that that question must be determined on the circumstances of the case, as the facts had been disclosed; and on that theory of the law, and on the contract, the defendant requested the court to let the case go to the jury. The court in reply stated that it saw no question of fact for the jury. The defendant excepted to such ruling, and also to each specific clause of the court's decision on the question as to the meaning of the contract.

The court then directed the verdict for the plaintiff, and the defendant excepted to such direction.

There was properly no evidence to go to the jury, except the judgment, and the case of the plaintiff was fully admitted by the answer of the defendant. It was proper, therefore, to direct a verdict for the plaintiff.

The evidence offered by the defendant was rightly rejected. It was not sought to prove any new or additional agreement other than that contained in the declaration of February 24, 1876, and no consideration for any such new or additional agreement was suggested. The evidence rejected was evidence to add to or alter the terms of the written declaration.

The Circuit Court was correct in holding that the declara-

tion did not contain or imply any contract whereby the trust company was bound to prosecute claims or sell the securities mentioned in it. The language of it is, that the proceeds arising from the sale of the securities mentioned, and recovered from the choses in action, are to be applied to pay off the notes and interest, and the remainder is to be paid to Culver, subject to the repayment of moneys expended by the trust company in prosecuting claims or selling the securities. There was no contract on the part of the trust company to prosecute or to sell, but only the mention of a power to do so. If it did prosecute or sell, the proceeds were to be applied in the way mentioned.

In the opinion of the court denying the motion for a new trial, it is stated that two of the claims mentioned in the declaration of February 24, 1876, were not prosecuted, and that a suit upon another of them had been instituted by Culver, and was thereafter prosecuted successfully by the trust company at its own expense. It is further there said: "It is insisted by the defendant that the necessary implication of the contract is that the trust company was under an obligation to sell the securities, and to prosecute the claims, at its own risk and expense. No request to sell the bonds was proved. I do not perceive that the contract contains, by implication, an agreement on the part of the pledgee that it would sell the bonds and commence suits, and do not think that it can be inferred or presumed from its terms that the trust company bound itself to prosecute suits at its own charge and risk. It cannot fairly be presumed, from the language of the contract, that the obligation of the company differed from those usually and naturally resting upon holders of collateral security of the same character, viz.: that a sale, in the absence of a request to sell, or the commencement of suits, was not compulsory, but was to be at the discretion of the pledgee." We concur in these views.

Judgment affirmed.

WASHINGTON *v.* OPIE.

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

No. 282. Argued April 8, 11, 1892. — Decided May 2, 1892.

Payments of bonds secured by a mortgage of real estate in Virginia, made in that State during the civil war to the personal representatives of the mortgagee who had deceased, partly in Confederate notes and partly in Virginia bank notes issued prior to the war, are *held* to have been made and received in good faith, and the transactions to have been known to the children of the deceased, and to have been accepted and acquiesced in by them for so long a time as to preclude any interference in their behalf by a court of equity.

THE case is stated in the opinion.

Mr. Marshall McCormick and *Mr. R. T. Barton* for appellants.

Mr. Robert White for R. L. Opie, John N. Opie and Mary Meade, appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

Heirome L. Opie, by deed dated January 1, 1856, conveyed to Henry W. Castleman two tracts of land in Jefferson County, then in Virginia, now in West Virginia — one tract containing 596 acres and the other 419 acres — for the price of $41,733.66\frac{1}{2}$, of which $10,000 was paid at the time in cash, and for the remainder the grantee gave his bonds, or single bills, bearing interest from date and payable annually; two for $5000 each, payable, respectively, on the first days of January, 1857 and 1858, and six for $3622.27\frac{3}{4}$ each, payable respectively on the first days of January, 1859, 1860, 1861, 1862, 1863, and 1864. These bonds were secured by a deed of trust to Robert Y. Conrad, which was duly acknowledged by Castleman and recorded January 2, 1856.

When this transaction occurred both Opie and Castleman

resided in Jefferson County. But shortly afterwards Opie removed with his family to Staunton, in Augusta County, Virginia, where he died in June, 1862, leaving him surviving his wife, Nannie S. Opie, and four children, the present appellee, H. L. Opie; Thomas Opie, born in February, 1840; Mary Opie, born January 25, 1842; and John N. Opie, born March 14, 1844. The record does not show the age of the appellee, but he was old enough to have served in the Confederate army during the entire period of the late civil war. The widow and Thomas Opie qualified as the personal representatives of the decedent.

The bonds maturing in January, 1857, 1858, 1859 and 1860, principal and interest, as well as the interest due on all the others up to January 1, 1861, were paid to Heirome L. Opie in his lifetime; presumably, in lawful money. In the fall of 1862 Castleman paid to his personal representatives the entire amount of the bonds maturing in 1861 and 1862. This payment was made at Staunton in what was known as Confederate treasury notes, which, at the time, constituted the principal, if not the only, circulating medium in that locality, and passed current in the county where Castleman resided. The bonds so paid were surrendered to Castleman.

On the 1st of February, 1863, and 4th of January, 1864, respectively, Castleman paid, through others, to the personal representatives of Opie the full amount of the bonds falling due in those years. The payments were made in what was commonly called Virginia money, that is, Virginia bank notes issued prior to the civil war. Each bond so paid was delivered to Castleman, or to his agent, at the time of payment.

When the last bond, the one maturing in 1864, was paid, the personal representatives of Opie executed and delivered to Castleman's agent, through whom it was paid, a written order addressed to the trustee in the deed of 1856, directing the release of the lien created by that instrument. This order having been presented to the trustee, he made his deed of September 7, 1865, (which was duly acknowledged the same day,) referring to the deed of 1856, and the bonds secured by it, and declaring: "And whereas said Castleman hath pro-

duced to said Conrad the last one of said bonds, paid and cancelled, and also a paper signed by Thomas Opie, administrator, and N. S. Opie, administratrix, of said Heirome L. Opie, (who has deceased,) acknowledging the payment in full of all said purchase-money and requesting a release of said deed of trust: Now, in consideration of the premises, the said Robert Y. Conrad doth release unto the said Henry W. Castleman all his, said Conrad's, claim upon the said tracts of land by virtue of said deed of trust." This deed of release was recorded February 10, 1871.

The plaintiff, in his deposition, given in his own behalf, referring to the payment of the bonds, said: "I first learned of their payment shortly after they were made. I received my first information from the personal representatives of my father's estate. . . . I know that three of the bonds were paid in Confederate money because Castleman told me so, as did also the personal representatives of my father's estate. The payment made in 1864 was made by Mr. Sinclair [for Castleman] in Virginia bank notes. I know this because I got a portion of them after the war. . . . The Confederate money paid by Castleman was put into Confederate bonds, which I saw afterwards. The Virginia money was held until after the war and divided between the heirs, but it was worthless, the Virginia banks having all their money in Confederate bonds, and were so compelled by law. Quite a number of bank notes were returned to Castleman by my mother after the war. I saw them mailed to Castleman. The whole was an entire loss to the distributees of my father's estate."

The present suit was brought by the appellee, H. L. Opie, December 4, 1880, the original defendants being Castleman, Nannie S. Opie, Thomas Opie, John N. Opie and Mary Meade, formerly Mary Opie. Castleman answered, but the bill was taken for confessed as to the other defendants. The executors of Conrad were made parties defendant, and an order recites that they appeared and answered, but the record does not contain their answers.

Subsequently, September 1, 1885, the plaintiff filed a second bill of complaint, stating more fully his cause of action. The

material allegations of the amended bill are: That the obtaining of said bills or bonds from the personal representatives of Heirome L. Opie was in execution of a fraudulent scheme upon the part of Castleman to pay them off with "worthless or next to worthless Confederate money;" that by appealing to the fears of the personal representatives, and by persuasion and with the assistance of one or more persons employed to aid him in executing his fraudulent purposes, he, Castleman, induced them to deliver to him the said bills, and "to receive therefor nothing but said worthless Confederate money to a very large amount — that is, to an amount large enough to cover the total amount of said single bills and interest then unpaid — and passed to said Nannie S. and Thomas such Confederate money at the nominal amount appearing upon the face of the notes;" that nothing was paid by him after the death of his grantor, "except such worthless Confederate money;" that he fraudulently procured the writing signed by the personal representatives, acknowledging the payment of said bills, and requesting the release of the deed of trust; that at the time of said transaction John N. Opie was an infant; that said deferred payments on the land purchased by Castleman became, by reason of his acts, a total loss to the estate of Heirome L. Opie; that the personal representatives have never made a settlement of their accounts, nor accounted to the distributees of the estate for any part of said unpaid purchase-money or bonds; that the estate was entirely solvent; and that the plaintiff many years ago removed to Kentucky, and did not know until recently of the release of the deed of trust, and could not have had constructive notice of it until February 10, 1871, and in fact did not until recently before this suit know of it, or of the condition of affairs connected with the bonds given by Castleman. The bill also alleges: "Your orator knows that even if he could do so it would be wrong for him to make said Nannie S. and Thomas Opie responsible for said unpaid purchase-money bonds under the circumstances of the case, for he feels perfectly satisfied that they were deceived and defrauded by said Castleman in the premises. But he does charge that they had no right to

receive said Confederate money in payment of said bonds or otherwise for them or to give up said bonds to said Castleman, and said Castleman has no right to have them or treat them as paid. Said Castleman has since his said purchase all the while been possessed of and enjoyed the said valuable property for which he has not honestly paid, and so much of said purchase-money as was not paid dollar for dollar by said Castleman has been thus far a total loss to the estate of said Heirome L. Opie and his heirs at law."

The principal relief asked was that Castleman be required to pay "in good, lawful money so much of said purchase-money, single bills and interest thereon, as has not been paid in good, lawful money," and that in default thereof a trustee be appointed by the court, to sell the real estate to pay off the price "in good and lawful money" to the legal representatives or distributees of Heirome L. Opie, according to their respective rights, including the widow.

Castleman demurred to the bill as insufficient in law, and, also, filed an answer denying all the material allegations of the bill. Answers were also filed by Mrs. Meade and John N. Opie, in which they pray that the release of the deed of trust be set aside. But they do not file cross-bills, or make any direct issue, in that mode, with Castleman.

It should be stated in this connection that by deed executed by Castleman March the 22d, 1878, and which was duly recorded, a part of the lands purchased by him from Heirome L. Opie in 1856 was conveyed in trust to secure a debt due by bond to the executor of E. I. Smith, which, on the 1st of August, 1887, amounted, principal and interest, to $5706.67. This debt originated in 1863, the Virginia bank notes paid in that year to Opie's personal representatives having been borrowed by Castleman from Smith.

By an interlocutory decree, passed September 30, 1887, 32 Fed. Rep. 511, it was adjudged that the payments made by Castleman of the above bonds, due in 1861, 1862, 1863 and 1864, were illegal and void, and that the release of the deed of trust by Conrad was of no effect; but, that, inasmuch as the widow and Thomas Opie acquiesced in and consented to

such payment, the bonds were discharged to the extent of their interests; and, that with respect to the plaintiff, Mary Meade and John N. Opie, they were, each, entitled to receive from Castleman (regarding the original interest of the widow as one-third) one-fourth of two-thirds of the original amount of said bonds, principal and interest; and that the deed of trust remained as a valid security for their claims. The release, by Conrad, of the deed of trust was set aside and declared to be of no effect as to the interests of the plaintiff, John N. Opie and Mary Meade. By the final decree it was found and adjudged that the amount due April 16, 1888, to the plaintiff, Mary Meade and John N. Opie, each, was $6369.15. The lands in question were ordered to be sold in satisfaction of those claims, which were given by the decree priority over all other debts against Castleman's estate including even that due to Smith's estate.

The allegation, in the bill, that the personal representatives of Opie were induced by fear or persuasion to accept Confederate money in payment of Castleman's bonds falling due in 1861 and 1862, and Virginia bank notes in payment of those falling due in 1863 and 1864, is unsupported by the evidence. Nor is there any proof of fraud committed by Castleman, unless it was a fraud upon his part to pay his bonds in the only kind of money that was current or in general use in the locality where he and they, at the time of payment resided. Castleman testified that the personal representatives of Opie accepted Confederate notes in payment of the bonds of 1861 and 1862 without the slightest hesitation or objection, and on the occasion of that payment expressed their willingness to accept payment, in like money, of the bonds of 1863 and 1864; but that shortly before the maturity of the bond of 1863 he was notified by them to make payment in Virginia bank notes. And this demand was complied with by him. The bond of 1863 was paid in money of that kind, and was surrendered by the personal representatives. Sinclair, through whom the bond of 1864 was paid, testifies that no objection was made by either of the personal representatives to payment in Virginia bank notes, and that the written order for the release of

the trust deed was prepared and delivered to him for Castleman by Thomas Opie himself. If the statements of Castleman and Sinclair, upon these points, were not strictly in accordance with the truth, the contrary could have been proven by the personal representatives. But their depositions were not taken. The plaintiff gave notice to take their depositions in Baltimore, and Castleman attended, with counsel, at the time and place designated in the notice. But neither the plaintiff nor his counsel appeared, and the depositions were never taken. No reason is suggested why they were not taken. It must, therefore, be taken as conclusively established that the personal representatives of Opie voluntarily accepted payment of the bonds of 1861 and 1862 in Confederate money, and that they demanded and received Virginia bank notes in discharge of the bonds of 1863 and 1864.

But this is not all. Castleman testified that the plaintiff was present when the bonds of 1861 and 1862 were paid in Confederate notes, and counted out the money for his mother. The plaintiff testifies that he was not present at any of the payments. But the plaintiff admits that he learned, from the representatives of his father, of the payments of 1862 and 1863, shortly after they were made, and that after the war the Virginia bank notes were divided among the heirs, he receiving his portion of them. It is absolutely certain, from the evidence, that the plaintiff knew at least fifteen years prior to the commencement of this action, that Castleman's bonds, falling due in 1861, 1862, 1863, and 1864, were paid off, during the war, partly in Confederate money and partly in Virginia bank notes. And it cannot be doubted that these facts were known, during the whole of the same period, to Mary Opie, who reached her majority in January, 1863, and to John N. Opie, who reached his majority in March, 1865. If this were not so, they would have testified as witnesses, and stated the contrary.

Under such circumstances, is the plaintiff entitled to the aid of a court of equity as against the estate of Castleman? Avowing his purpose not to hold the personal representatives of his father's estate responsible for having accepted Confederate

money and Virginia bank notes in discharge of Castleman's bonds, and for having directed the release of the trust deed given to secure those bonds, can he be heard to say that these settlements, some of the fruits of which he and his codistributees enjoyed, and of which he had full knowledge for at least fifteen years prior to the commencement of this action, ought not to have been made and should be now disregarded? These questions can be answered only in one way in a court of equity.

The present case in some of its features is not unlike that of *Glasgow* v. *Lipse*, 117 U. S. 327, 334. The facts in that case were these: Lipse's executors having authority to dispose of the real property of the testator, who died in Virginia, sold certain lands in that State to Spears in 1860. One of the payments fell due in October, 1861, another in October, 1862. The bonds were paid in a check on a Virginia bank, which was deposited in that bank by the resident executor who received it. Against that deposit the executor drew his checks, which were paid in Confederate notes. The principal question in the case was whether the debtor was discharged from liability to pay his bonds in lawful money of the United States. This court, after referring to the doctrine declared by the Court of Appeals of Virginia, (*Patteson* v. *Bondurant*, 30 Gratt. 94,) that a debtor who pays to an executor in depreciated currency a debt payable in gold or its equivalent, knowing at the time that the currency is not needed for the payment of debts or legacies, or other uses of the estate, and that the safety of the debt does not require its collection, may also be charged as a participant in the *devastavit*, said: "The present case does not come under the doctrine. It falls within the class where, for debts payable in lawful money, the depreciated currency of the country where they were contracted and the executor resides can be used at its face value in payment of legacies, and, therefore, may be accepted by him without a breach of trust. The notes received had in October, 1862, to a great extent, superseded the use of coin, and became the principal currency of the Confederate States. All business transactions there were had with reference to them. They were a standard of

value, according to which contracts were made and discharged. Having, therefore, an exchangeable value, they were sought for by residents within the Confederacy." In reference to the issue as to whether the legatees were estopped to question the action of the executor, the court said: "The resident executor there, however, hesitated to accept them [Confederate notes] in payment of the last bond of Spears, which, being made in October, 1860, must be considered as payable in lawful money, and he consulted the wishes of legatees in Virginia, among whom the greater part of the money was to be distributed. They desired him to take the notes, and received them in discharge of their distributive shares. So far as those legatees are concerned their approval of his action was shown by their expressed wishes, and their acceptance of the notes. They, at least, are estopped from questioning the propriety of his conduct."

The plaintiff alleges, in his bill, that his father's estate was perfectly solvent; in nowise involved in debt. The only persons, therefore, interested in the collection of Castleman's bonds were the widow and the children of Heirome L. Opie. The court below correctly held that the widow and Thomas Opie were concluded, as to their interests, by the voluntary acceptance of Confederate money and Virginia bank paper in discharge of Castleman's obligations. Upon every principle of justice, the plaintiff is equally concluded by his knowledge shortly after, if not at the time of, the surrender to Castleman of the bonds of 1861 and 1862, that they were paid in Confederate notes; by his voluntary acceptance of his part of the Virginia bank notes paid by Castleman in discharge of the bonds of 1863 and 1864; and by his failure, for more than fifteen years, to assail, in some direct legal mode, the validity and good faith of the settlements with Castleman. The reason given by the plaintiff why he was so long silent is, that he removed from Virginia to Kentucky in 1873, and from the close of the civil war up to the fall of 1880 was not, although himself a lawyer, financially able to bring this suit or to carry it on. We cannot regard this as a sufficient excuse for his inaction, even if it had been competent for him, after his accept-

ance of a part of the Virginia bank notes paid by Castleman, to have questioned the action of the personal representatives.

With respect to the interests of the two distributees, who were not of full age when Castleman paid the bonds of 1861 and 1862, it is only necessary to say that Mrs. Meade had reached her majority when Castleman made his last payment, and both were of full age when, after the war, the Virginia bank notes received from Castleman were divided among the distributees. We cannot suppose, from the evidence, that they were ignorant of the settlements made by the personal representatives with Castleman. So far as the record discloses, no fraud was practised upon them; nothing was concealed from them. When the Confederacy fell, Confederate notes and Virginia bank notes, based upon Confederate bonds, became, of course, of no value. Then it was that Mrs. Opie sent back, by mail, to Castleman, some of the bank notes paid by him; those, perhaps, which she had retained for herself. At that time, if not before, all the facts were necessarily known to Mrs. Meade and John N. Opie, as they were known to the plaintiff. If the plaintiff, Mrs. Meade and John N. Opie, have determined not to hold their mother and brother liable for having voluntarily received payment from Castleman in the only currency used in the locality where all the parties resided, Castleman's estate, he not being chargeable with fraud, ought to be equally exempt from liability.

According to the decided preponderance of evidence, the plaintiff, Mrs. Meade and John N. Opie, during the entire period from the close of the war until the institution of this suit, acted as if they did not intend, by legal proceedings, to question the validity of the settlements made with Castleman. And they so acted with full knowledge, or with ample opportunity to acquire knowledge, of all the material facts affecting their rights. By their long silence, and their unreasonable delay in commencing proceedings for relief, they have forfeited whatever right they had to invoke the aid of a court of equity. What they did and what they failed to do is sufficient — independently of any statute of limitations, and apart from any question as to the legal right of the personal representa-

tives to accept, or of Castleman to pay, the bonds of the latter in Confederate money or Virginia bank notes — to establish acquiescence upon their part, in what was done by the personal representatives, and to preclude any interference in their behalf by a court of equity. 1 Story's Eq. Jur. § 529; 2 Id. §§ 1520, 1540; 2 Pomeroy's Eq. Jur. §§ 817, 818, 819, and authorities cited under each section; Kerr on Fraud and Mistake, 298 to 305.

The decree is reversed, and the cause is remanded with directions to dismiss the bill.

CLAY CENTER *v.* FARMERS' LOAN & TRUST COMPANY.

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

No. 339. Submitted April 26, 1892. — Decided May 2, 1892.

When, in an action to recover an instalment of rent, the judgment below is for less than $5000, this court is without appellate jurisdiction although the judgment involved the existence and validity of the contract of lease, and thus indirectly an amount in excess of the jurisdictional limit.

THE case is stated in the opinion.

Mr. J. B. Johnson, *Mr. John Martin* *Mr. F. B. Dawes* and *Mr. Henry Keeler* for appellant.

Mr. W. H. Rossington, *Mr. Charles Blood Smith* and *Mr. Herbert B. Turner* for appellee.

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

This was a suit to recover of the city of Clay Center two instalments of hydrant rental for eighteen hundred and fifty dollars each, with interest. These rentals were claimed to be

due under an alleged contract in respect of the erection of water-works, between the city and one Bonebrake and a Water-works company, his assignee and successor, and to be payable under said contract to the Farmers' Loan and Trust Company, trustee in a trust deed to secure bonds issued by the Water-works company for the purpose of borrowing money to complete the construction of the works.

The bill prayed that the city be decreed to have contracted with the Trust Company to pay directly to it so much of the hydrant rental as might be necessary to pay the interest on the bonds, and to pay the two instalments then due with interest. The decree sustained the contract and the liability to pay the Trust Company directly and awarded recovery to the amount of $4042.65. This was all that could be recovered in this suit, if the contract were valid and binding as found. If the Circuit Court had arrived at the contrary conclusion on that point, this was all that in this suit complainant could have lost; and as in the latter contingency complainant could not have brought the case here, so defendant cannot, because the decree, which allowed all that was claimed, is for less than the jurisdictional amount. The value of the matter in dispute was the accrued rental and interest, and although the determination that such rental was due and should be paid to the trustee involved the existence and validity of the contract, yet causes of action for hydrant rental which had not accrued but might subsequently accrue cannot be availed of to make out jurisdiction of the case by this court upon appeal. *New England Mortgage Security Co.* v. *Gay*, *ante* 123.

The appeal is

Dismissed for want of jurisdiction.

FREEMAN *v.* ASMUS.

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

No. 323. Argued April 20, 21, 1892. — Decided May 16, 1892.

The first claim of reissued letters patent No. 3204, granted to George Asmus, November 24, 1868, for an improvement in blast furnaces, on the surrender of original letters patent No. 70,447, granted to F. W. Lürmann, of Osnabruck, in Prussia, November 5, 1867, namely, "A blast furnace with a closed breast, where the slag is discharged through an opening or openings cooled by water, substantially as set forth," is invalid, because there was nothing in the original specification indicating that any such claim was intended to be made in the original patent, although the application for the reissue was made less than a year after the original patent was granted; and because, as respected that claim, the reissue was not for the same invention as the original patent, and was, therefore, within the express exception of the statute (Act of July 4, 1836, c. 357, § 13, 5 Stat. 122).

The cases in this court on the subject of reissues, reviewed.

The fact commented on, that the application for the reissue was not signed or sworn to by the inventor, but only by the assignee of the patent.

THE court stated the case as follows:

This is a suit in equity, brought in the Circuit Court of the United States for the Eastern District of Pennsylvania, by George Asmus against Margaret C. Freeman, founded on the alleged infringement of reissued letters patent No. 3204, granted to said Asmus, November 24, 1868, on the surrender of original letters patent No. 70,447, granted to F. W. Lürmann, of Osnabruck, in Prussia, November 5, 1867, for an improvement in blast furnaces.

On the 12th of July, 1867, Lürmann assigned to Asmus all the right, title and interest in and to the improvement for which Lürmann was about to apply for a patent, and the specification for which was signed by him on that day. The patent was granted to Lürmann, although the assignment was recorded in the Patent Office some time before the granting of the patent.

Statement of the Case.

On the 3d of November, 1868, Asmus filed in the Patent Office a petition signed by himself, but not signed by Lürmann, praying for the reissue of the patent. In that petition, Asmus stated that he believed that the original patent was inoperative and invalid by reason of a defective specification, which defect had arisen from inadvertence and mistake; and he asked that a new patent might issue to him for the same invention, for the residue of the period of the original patent, under the amended specification therewith presented. The oath annexed thereto, made by Asmus, was sworn to October 24, 1868, and stated that Asmus verily believed that by reason of an insufficient or defective specification, the original patent was not "fully valid and available to him," and that the error had arisen from inadvertence, accident or mistake, and without any fraudulent or deceptive intention. Accompanying the petition and oath was a statement signed by the attorneys for Asmus, which said: "The errors and defects occurring in the original specification by inadvertence and mistake and sought to be corrected by this application for a reissue are as follows: The invention, as described in the original specification and represented in the drawings, clearly comprises a blast furnace with a closed breast, where the slag is discharged through an opening or openings cooled with water, but the claim in the original specification is confined to a slag-discharge piece or cinder block constructed and attached in a certain specific manner. It is obvious that the cinder block D can be connected to or cast solid with the plate C, without changing the nature of the invention, and in the new specification this defect has been corrected and a clause has been added to the claim with the view to cover the whole ground of the invention."

The answer of the defendant denies the novelty of the invention, the alleged infringement, and the validity of the reissue, and assigns as grounds of such invalidity that the application for the reissue was not assented to, signed or sworn to by Lürmann; that the reissue was for an invention different from that claimed in the original patent; and that the reissue contains much new matter interpolated by Asmus. Several other defences were also set up.

Statement of the Case.

With a view to a comparison of the specification of the original with that of the reissue, the following paper contains both of the specifications, the parts in italics not being found in the original, and the parts in brackets not being found in the reissue:

"Be it known that [I] F. W. Lürmann, of Osnabruck, in the Kingdom of Prussia [have] invented a new and useful improvement in blast furnaces, and I, *George Asmus, of the city, county, and State of New York, assignee of the said F. W. Lurmann*, do hereby declare [that] the following [is] *to be* a full, clear, and exact description thereof, which will enable those skilled in the art to make and use the same, reference being had to the accompanying drawing, forming part of this specification, in which drawing Figure 1 is a vertical central section of a furnace [to which my improvement is applied] *built according to this invention.* Fig. 2 is a horizontal section through the tuyeres. Fig. 3 is a front elevation of the slag-discharge piece *or cinder block* detached. Fig. 4 is a vertical section *thereof* [of the latter, also detached]. *Similar letters indicate corresponding parts.*

"This invention relates to [furnaces for smelting iron ore, and has for its object to dispense with the 'tymp' or fore hearth and the 'wall stone' now in common use in iron blast furnaces, and to replace the tymp arrangement by such a construction as allows the slag to] *certain improvements in blast furnaces with a closed breast; and it consists, principally, in a blast furnace with a closed breast, where the slag is discharged through an opening cooled with water in such a manner that the tymp or fore hearth and the wall stone can be dispensed with, and that the slag can* be tapped directly from the hearth. *It consists, further, in a slag-discharge piece or 'cinder block' of peculiar construction, as will be hereinafter more fully explained, whereby the building of a furnace according to this invention and its correct operation are materially facilitated. In order to enable those skilled in the art to fully understand the object of this invention, I will first point out the disadvantages of blast furnaces with a fore hearth, such as are now in common use for melting iron ore.* In *such* [the tymp arrange-

ment] *furnaces* the slag is driven out [of the furnace] by *first being* [being first] forced below the tymp stone, which projects below the level of the tuyeres and intercepts the currents of air and prevents their escape with the slag which stands in the [tymp] *fore hearth* at the same level as on the hearth, the slag being discharged only when it rises in the [tymp] *fore hearth* high enough to overflow the top of the wall stone that forms the bottom of the discharging orifice. By this arrangement the tymp stone constitutes a trap which intercepts the currents of air and causes their pressure to be exerted directly on the surface of the slag on the hearth. This method of construction has several disadvantages, one of which is the difficulty of keeping the tymp stone and the surrounding parts in repair; another is, that the pressure of the currents of air or wind is limited [and counteracted] by the counter-pressure of the column of slag in the [tymp] *fore hearth;* and another is that, one side of the furnace being occupied by the [tymp,] *fore hearth*, no tuyere can be applied on that side, and consequently the supply of wind is irregularly distributed. *By the improvement which constitutes the subject-matter of this present invention these disadvantages are overcome* [My invention avoids or overcomes these disadvantages] in a simple and effective manner.

"In [this example of my invention] *the drawings* the letter A designates the furnace, and B several tuyeres, which are arranged therein at a proper height. *The furnace is constructed with a closed breast*, [My furnace has no tymp] and the sides of the hearth, whether round or square, extend clear down to the bottom stone, the usual opening, (not shown in the drawing,) being made in the lower part of the hearth for the discharge of the iron. The openings for the tuyeres B are distributed at equal distances apart in the sides of the hearth. At a suitable height from the bottom stone [I leave] an opening *is left* in the hearth, in which [I place] *is placed* a cast-iron or brass slag-discharge piece *or cinder block*, D, which is cast or made with numerous channels or pipes running up and down or in other directions through it, as shown in Figs. 3 and 4. The *cinder block* [piece] D [is] *may be*

formed with a dovetail on its upper end, which is fitted into the bottom of a stationary metallic plate, C, connected with the furnace, *or it may be attached to said plate in any other desirable manner, or cast solid with the same, if desired.* [The] *This* plate [C] is also cast or made with channels or pipes running through it, and the channels or pipes of said plate and of the *cinder block* [piece] D may be so arranged as to connect or communicate with each other when the plate C and *cinder block* [piece] D are in their proper *position*, [positions] or they may be independent of each other. *In the drawing the plate C is shown above the cinder block, but it may also be placed below or in any other desirable position in relation to the same.* The object of the [said] channels or pipes is to permit the plate C and *cinder block* [piece] D to be cooled by forcing water through them while the furnace is in operation, proper connections being made for that purpose with a reservoir of cold water or with a force-pump. One or more holes are made in *the* [said piece] *cinder block* D, through which the slag is discharged, the shape of said holes being shown in Figs. 3 and 4, the middle portion being cylindrical, but each end being conical or flaring. The dimensions of the [slag-discharge piece] *cinder block* are a little less than the opening in which it is placed and the space left around it is filled with sand, which can be readily removed in case it is desired to remove the block D to repair it or if it is desired to have an opening in the hearth to work through, as when any irregularity in the smelting process has taken place. The flow of the cooling water through the [slag-discharge piece] *cinder block* D is regulated for the purpose of controlling the discharge of the slag through it. By allowing much cooling water to circulate through its water channels or pipes, the temperature of the *block* [piece] D is lowered sufficiently to allow a coating of slag to adhere and choke its discharge openings, which are of less diameter in the middle than at their ends. By reducing the flow of cooling water the *cinder block* [piece] is allowed to retain a higher temperature, and in consequence the slag is melted out of the discharge openings and they become clear and open and permit the slag to flow

without interruption. When the slag in the hearth is [lower than] *below* the level of the discharge openings the latter are simply closed by an iron *plug* [rod]. [My] *This* invention can be easily applied by those skilled in the art to which it belongs, to blast furnaces of the common construction, *by removing the fore hearth and closing the aperture left in the breast of the furnace under the tymp stone by inserting the plate C with the cinder block D.* [This invention is attended with several advantages over the common method of constructing or arranging furnaces, among which I mention the following:] *The principal advantages derived from this invention are as follows:* First, it permits a higher pressure of wind. Second, the hearth is preserved in better condition than where the common mode of construction is retained. Third, the labor of the operation of smelting is lessened. Fourth, it allows one more side of the hearth for a tuyere. Fifth, it avoids the stoppages of the wind supply now necessary as often as the iron is discharged. Sixth, a considerable increase is gained in the product of the furnace, while at the same time the cost of labor and repairs is lessened.

"*Having thus described this invention*, [What] *what* I claim as new, and desire to secure by letters patent, is —

"1. *A blast furnace with a closed breast, where the slag is discharged through an opening or openings cooled by water, substantially as set forth.*

"[1.] 2. The slag-discharge piece *or cinder block* D, constructed and arranged substantially as described.

"[2.] 3. The [slag-discharge piece] *cinder block* D, in combination with the plate C, to which it is *fitted* [attached,] substantially as described.

"[3.] 4. The shape of the discharge opening or openings of the *cinder block* [piece] D, being made flaring at its ends, and of diminished diameter in the middle or central part, substantially as described.

"[4.] 5. *The combining* [Combining with] *of* the slag-discharge piece *or cinder block with* a series of water channels or pipes, substantially as and for the purpose above set forth.

"[5.] 6. Combining with the metallic plate C a series of water channels or pipes, substantially as and for the purpose set forth.

"[6.] 7. The method of controlling the discharge of slag from blast furnaces by regulating the temperature of the slag-discharge piece *or cinder block*, substantially as described.

"This specification signed by me this [twelfth day of July, 1867,] 24*th day of October*, 1868.

"[F. W. LÜRMANN.] *George Asmus.*"

After a hearing on pleadings and proofs, the court entered a decree, on the 19th of July, 1886, adjudging that the reissued patent was valid; that the defendant had infringed its first claim; and that the plaintiff was entitled to recover profits and damages, and referring it to a master to ascertain the same. The opinion of the Circuit Court was given May 14, 1886, and is reported in 27 Fed. Rep. 684. On the report of the master, a final decree was made by the court October 12, 1888, awarding to the plaintiff $1000 damages and the costs of suit. The defendant has appealed to this court.

Mr. William D. Baldwin for appellant. *Mr. Wayne MacVeagh* was with him on the brief.

Mr. William Bakewell and *Mr. Thomas B. Kerr* for appellee.

The validity of the patent in suit is contested on the grounds that the original patent was not surrendered for good and lawful cause; that the reissue, as granted, is not for the same invention "which was specified in the said original letters patent," but, on the contrary, was obtained on the application of an assignee, without the knowledge or consent of the inventor, for the purpose of expanding or enlarging the claims, so as to cover another and different invention from that described and claimed in the original letters patent, and that the reissue was unlawfully and unwarrantably expanded and enlarged to cover inventions other and different from and broader than those de-

scribed and claimed in said original letters patent, and that said reissued letters patent are therefore void.

In the cases on reissue, especially those decided by this court, it will be found that it is not the mere fact of reissue, or of a change in the specification or in the claims, which is the cause of the trouble. There is always something else which renders such changes improper, as, for example, that the patentee has slept on his rights and allowed an undue time to elapse after the grant of the original patent before applying for reissue, the reasonable time being usually two years in analogy to the right an inventor has to use his invention publicly for that length of time before completing his application; or that the purpose of the reissue is merely to expand the claims beyond the scope of the described invention; or that it was made in order to claim that for which the applicant was refused a patent by the patent office, withdrawing the claim in order to obtain his patent; or to introduce into the specification some new suggestion of invention and base a claim upon it, or to claim a patent for that which was not claimed in the original. In these cases reissues are held to be invalid.

None of these adverse circumstances exist in this case. We start with the following facts: (1) That the specification and drawings of the reissue are substantially the same as the original patent. This appellant's expert admits: (2) That the only claim in which a decree is asked in favor of the appellee (the first) is for an invention which is (*a*) clearly and fully described in the original specification: (*b*) distinctly stated in the original specification to be the invention of the applicant: (*c*) manifestly the same which the original patent states to be the gist of the invention: (3) That the application was made within one year after the date of the original patent: (4) That there is no evidence that the invention was used by the public between the dates of the original and the reissue so that no adverse rights have accrued.

An objection to the reissue is made in the answer that it was obtained on an application of an assignee and without the knowledge or consent of the inventor. A sufficient reply to this is that the reissue was granted under the act of 1836,

which does not require the consent or knowledge of the inventor, and that by the act of March 3, 1871, it is expressly provided that the requirement that in case of reissue by assignees the specification shall be sworn to by the inventor, if living, shall not be construed to apply to patents issued and assigned, (as was the patent in this suit,) prior to July 8, 1870. In such a case the reissue was proper. *Walker* v. *Terre Haute*, 44 Fed. Rep. 70, 73.

Nor may it be amiss to advert to the fact that this reissue was granted in 1868, under the provisions of the 13th section of the Patent Act of 1836, which expressly authorized the amendment of the claims of the original patent as well as of the description of the invention. Prior to the act of 1870 the word "specification" always meant the claim as distinguished from the description, as is clearly pointed out in Robinson on Patents, Vol. 2, Sec. 655 and note 2, and admirably elucidated by Mr. Justice Blatchford, in *Wilson* v. *Coon*, 18 Blatchford, 532–536. Now, the reissue section of the act of 1836 (§ 13) provides that on surrender of a patent the Commissioner shall "cause a new patent to be issued to the said inventor for the same invention . . . in accordance with the patentee's corrected description *and specification*."

In the case of *Hurlbut* v. *Schillinger*, 130 U. S. 456, 468, the original patent was for concrete pavement laid in sections with strips of tar paper interposed between the sections. The only claim was "the arrangement of tar paper, or its equivalent, between adjoining blocks of concrete, substantially as and for the purpose described." This patent was dated July 19, 1870. In May, 1871, a reissue was granted with two claims, one like the claim of the original, except for the substitution of the words "set forth" in place of the word "described." Another claim was added as follows: "A concrete pavement laid in detached blocks or sections substantially in the manner shown and described."

In this case as in the patent in suit, the invention covered by the new claim of the reissue was not specifically claimed in the original, and the reissue application was made within one year. A clause had been inserted in the new specification to

the effect that "the tar paper may be omitted and the blocks formed without interposing anything between the joints," but this was stricken out by disclaimer. The reissue was sustained by this court, and Mr. Justice Blatchford, speaking for the court, says: "To limit the patent to the permanent interposition of a material equivalent to tar paper would limit the actual invention." See also *Eames* v. *Andrews*, 122 U. S. 40.

We submit that these examples of the application by this court of the doctrines of law relating to reissues fully warrant the reissue in the present case; for, if anything is clear in the case at bar, it is that the original specification not only fully describes the invention claimed in the first claim of the reissue, but distinctly states it to be the invention sought to be patented, the whole described construction, as well as the claims necessarily implying the use of a closed breast to the blast furnace with provision for discharging the slag through an opening cooled by water.

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

As we are of opinion that the decree below must be reversed, because of the invalidity of the reissue, it is unnecessary to consider any other question.

The only claim of the reissue which, it is now contended, was infringed, is the first claim, which reads as follows: "1. A blast furnace with a closed breast, where the slag is discharged through an opening or openings cooled by water, substantially as set forth." Claims 2 to 7, inclusive, of the reissue are substantially in the same language as claims 1 to 6 of the original. Claim 1 in the reissue is entirely new, and it is not contended here that the defendant infringed any of the claims of the original patent, or any claim of the reissue other than claim 1.

It was held by the Circuit Court that, while claim 1 of the reissue was not embraced in the original, the matter claimed by that claim was so embraced; that the language of the original specification clearly described the closed-breast furnace; that a furnace built in accordance with the language of the

original would be necessarily closed-breasted; that the other element of claim 1 of the reissue, "where the slag is discharged through an opening or openings cooled by water," was no less clearly described in the original; that the drawings originally filed showed the same; that claim 1 of the reissue might, therefore, have been embraced in the patent as first issued, or introduced into the reissue without changing the specification; that the change made by the reissue simply expressed the same thing in different terms; that claim 1 of the reissue was, therefore, not an enlargement of the invention; that such additional claim, omitted through inadvertence, accident or mistake, might be secured by means of a reissue, if applied for within a reasonable time; that in this case the application was made a little after the expiration of one year; and that the question whether the omission occurred through inadvertence, accident or mistake, was a question for the Commissioner of Patents.

But we are of opinion that these views cannot prevail in the present case. It is apparent, from the description contained in the specification of the original patent, that Lürmann considered his invention to consist essentially of a removable slag-discharge piece, cast with numerous channels or pipes running through it, formed with a dovetail at its upper end fitted into the bottom of a stationary metallic plate connected with the furnace, and provided with channels or pipes so that water might flow through the slag-discharge piece and plate, conjointly or separately, that they might be cooled while the furnace was in operation. The slag-discharge piece was made removable, and provided with one or more holes, the middle portion of the holes being cylindrical, but each end being conical or flaring. By regulating the flow of water through the slag-discharge piece, its temperature could be lowered sufficiently to allow a coating of slag to choke the discharge-opening, which coating could be melted out by diminishing the flow of water and thus allowing the temperature to rise. The opening could be closed by an iron block when necessary.

The fundamental devices claimed by Lürmann as his improvements were (1) the metal plate C, provided with water

channels; (2) the removable slag-discharge piece provided with water channels; and (3) the method of regulating the discharge of the slag by raising and lowering the temperature of the slag-discharge piece.

The first claim of the original patent claimed a slag-discharge piece provided with a water circulation, connected with a water-cooled plate C, having small hour-glass-shaped discharge openings, and capable of being removed from the furnace when desired. The slag-discharge piece of the second claim was of the same character as that described in the first claim. The third claim was for the shape of the slag-discharge opening, flaring at its ends, and of diminished diameter in the middle. The fourth claim was for the combination of such slag-discharge piece and a series of water channels or pipes. The fifth claim was for the combination of the metallic plate C, with a series of water channels or pipes. The sixth claim was for regulating the discharge of the slag by varying the temperature of the water-cooled slag-discharge piece.

Asmus, in his testimony, states that his reason for obtaining a reissue was to make the meaning of the whole invention as clear as possible; that the reason why he did not apply sooner for the reissue was that, in arranging a number of furnaces, they differed more or less in construction, and he had to adapt his construction according to the circumstances; that this made it necessary to give the construction quite different shapes, retaining always the main points; that experience caused him, in order to prevent mistakes, to find a formula which expressed the spirit of the invention in the clearest way possible, and which flowed plainly from the technical description given in the original patent; and that the experience and the reasoning derived from it took up some time. When asked what kind of mistakes he referred to, he said, "That difference in shape might be taken for a different thing."

This testimony shows that, instead of desiring merely to remedy formal defects which appeared on the face of the papers, Asmus waited until experience and reasoning had shown him the broadest formula in which to express the claims of his patent so as to cover all possible modifications.

While the petition for the reissue states that Asmus believes that the original patent "is inoperative and invalid by reason of a defective specification," he does not make that allegation in his oath, but states in the latter merely that the patent "is not fully valid and available to him;" and in the statement accompanying the petition and oath, his attorneys say that the claim in the original specification is confined to a slag-discharge piece or cinder block constructed and attached in a certain specific manner, and that the new first claim is added "with the view to cover the whole ground of the invention." A comparison of the original specification with that of the reissue shows that the only substantial change made is to insert in the latter enlarged definitions and descriptions of the alleged invention, and the new and enlarged first claim.

In the assignment of July 12, 1867, from Lürmann to Asmus, which bears date the same day as the signature of Lürmann to the original specification, the latter says that his invention "is fully described in the specification pertaining to said application, which I have signed under oath." The inventor did not swear to the specification filed for the reissue; and, although his oath was not required to it, as the law stood at the time the reissue was applied for, yet the fact remains that the reissue was wholly the work of the assignee and not at all of the inventor; and it by no means followed that the inventor would ever have asserted that there was any error in the original specification or claims, arising from inadvertence, accident or mistake.

The new matter inserted in the specification of the reissue, and hereinbefore set forth in italics, in connection with the omission from the reissue of the parts in brackets contained in the original, constituted a broad definition on which to found claim 1 of the reissue — a claim to "a blast .furnace with a closed breast, where the slag is discharged through an opening or openings cooled by water, substantially as set forth." In addition to the description in the original of the connection of the slag-discharge piece with the metallic plate C, it is also stated in the reissue that such slag-discharge piece may be attached to the plate C "in any other desirable manner, or

cast solid with the same, if desired." This is new matter, as is also the addition, in the specification of the reissue, that, in the drawing, the plate C is shown above the slag-discharge piece or cinder block, but that it may also be placed below, or in any other desirable position in relation to the same. So, also, it is added in the specification of the reissue that the invention can be applied to blast furnaces of the common construction "by removing the fore hearth and closing the aperture left in the breast of the furnace under the tymp stone by inserting the plate C with the cinder block D."

But the material point is the extension of the invention claimed, by the addition of claim 1 of the reissue, the words in which, "substantially as set forth," refer to the new matter in the reissue, that the slag is discharged "through an opening cooled with water in such a manner that the tymp, or fore hearth, and the wall stone can be dispensed with." The intention manifestly was to construe the first claim so as to cover any kind of blast furnace with a closed breast, having a slag-discharge opening cooled in any manner or to any extent by water. There is nothing in the original specification which indicates that any such claim was intended to be made in the original patent. On the contrary, the whole purport of that specification shows that it was intended to claim only a slag-discharge piece or cinder block constructed and attached in a specific manner, as is set forth in the statement of the attorneys of Asmus, accompanying his application for the reissue.

This case was decided in the Circuit Court, May 14, 1886; and both before and since that there have been numerous decisions in this court which require that the present reissue be held invalid, although it was applied for within less than a year after the granting of the original patent. Those cases are *Mahn* v. *Harwood*, 112 U. S. 354; *Coon* v. *Wilson*, 113 U. S. 268; *Ives* v. *Sargent*, 119 U. S. 652; *Parker & Whipple Co.* v. *Yale Clock Co.*, 123 U. S. 87; *Matthews* v. *Ironclad Mfg. Co.*, 124 U. S. 347; *Hoskin* v. *Fisher*, 125 U. S. 217; *Flower* v. *Detroit*, 127 U. S. 563; *Yale Lock Co.* v. *Berkshire Bank*, 135 U. S. 342; *Electric Gas Co.* v. *Boston Electric Co.*, 139 U. S. 481.

In *Mahn* v. *Harwood*, a reissue was held invalid, where it was clear that the only object of it was to enlarge the claims of the original patent. The description was not altered in the least. The claims in the original were clear and explicit, one of them being retained substantially in the reissue. Nothing was altered or changed, except to multiply the claims and make them greater, and that was done, not for the benefit of the original patentee, but for that of his assignee.

In *Coon* v. *Wilson*, the application for the reissue was made a little more than three months after the granting of the original patent; but it was said that a clear mistake, inadvertently committed, in the wording of the claim, was necessary, without reference to the length of time; that there was no mistake in the wording of the claim of the original; that the description warranted no other claim and did not warrant the claim of the reissue; that the description had to be changed in the reissue to warrant its new claim; and that the description in the reissue was not a more clear and satisfactory statement of what was described in the original, but was a description of a different thing, so ingeniously worded as to cover what was claimed in the reissue.

In *Ives* v. *Sargent*, the doctrine of *Coon* v. *Wilson* was approved and applied.

The whole subject was reviewed in *Parker & Whipple Co.* v. *Yale Clock Co.*, and the *dicta* in the case of *Seymour* v. *Osborne*, 11 Wall. 516, were considered; and it was held that what was suggested or indicated in the original specification was not to be considered as a part of the original invention intended to be covered by the original patent, unless it could be seen, from a comparison of the two patents, that the invention which the original was intended to cover embraced the things thus suggested or indicated in the original specification, and unless the original specification indicated that those things were embraced in the invention intended to have been secured by the original patent. The cases of *Mahn* v. *Harwood* and *Coon* v. *Wilson* were cited and approved.

The case of *Parker & Whipple Co.* v. *Yale Clock Co.* is cited and applied in *Matthews* v. *Ironclad Mfg. Co.*, in *Hoskin* v.

Counsel for Appellants.

Fisher, in *Yale Lock Co.* v. *James*, 125 U. S. 447, 464, and in *Flower* v. *Detroit*.

In *Yale Lock Co.* v. *Berkshire Bank*, a reissue was held invalid, although it was applied for only thirteen days after the granting of the original, because there was not a clear mistake, inadvertently committed, in the wording of the claim; and the cases of *Coon* v. *Wilson*, *Ives* v. *Sargent* and *Parker & Whipple Co.* v. *Yale Clock Co.* were cited and applied.

In *Electric Gas Co.* v. *Boston Electric Co.*, a reissue was held invalid because there was no inadvertence, accident or mistake, such as would authorize a reissue with new claims, and the sole object of the reissue was unlawfully to expand the claims.

We are of opinion that the present reissue is invalid, so far as the first claim of it is concerned, because it is not for the same invention as the original patent, and is, therefore, within the express exception of the statute, (Act of July 4, 1836, c. 357, § 13, 5 Stat. 122). There is nothing inconsistent with the foregoing views, in our decision in *Topliff* v. *Topliff*, *ante*, 156.

The decree of the Circuit Court is reversed, and the case remanded to that court, with a direction to dismiss the bill, with costs.

RYAN *v.* HARD.

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

No. 346. Argued April 28, 1892. — Decided May 16, 1892.

Letters patent No. 241,321, granted May 10, 1881, to Charles H. Dunks and James B. Ryan, for improvements in swing woven-wire bed-bottoms, are invalid for want of patentability; all that was done being to suspend a fabric well known as a bed-bottom in substantially the same manner that other fabrics used for that purpose had been suspended.

THE case is stated in the opinion.

Mr. John B. Gleason for appellants.

Mr. James B. Jenkins for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought April 7, 1887, in the Circuit Court of the United States for the Northern District of New York, by James B. Ryan, Francis A. Hall, William R. Cougle and Richard W. Elliott, against Charles H. Hard, John J. Crawford and Henry D. Hard, for an alleged infringement of letters patent No. 241,321, granted May 10, 1881, to Charles H. Dunks and James B. Ryan for improvements in swing woven-wire bed-bottoms. The alleged infringement consisted in the sale by the defendants of woven-wire bed-bottoms, containing the patented improvements. The answer of the defendants set up, among other things, the want of novelty and of patentability. Issue was joined and proofs were taken, and the Circuit Court, held by Judge Coxe, on August 13, 1888, gave an opinion in favor of the defendants, (35 Fed. Rep. 831,) in pursuance of which a decree was entered dismissing the bill.

The specification of the patent says:

"C represents a central section of the ordinary woven-wire fabric in common use in bed-bottoms. This fabric is attached, at either or both ends, to a swinging cross-bar, which, in turn, is suspended from one of the end rails of the bedstead. By preference we construct the swinging bar in two parts — a lower portion, D, formed of wood, to which one end of the woven fabric is secured by means of suitable pins, or otherwise, and an upper portion, D', provided upon its outer edge with a series of holes, *d*, the upper and lower portions being secured to each other by rivets, bolts or other analogous devices. Thus the upper part may be made to assist in securing the end of the woven fabric, to cover the end of the fabric, and thus protect the mattress from undue wear, and also as a means by which to attach the springs E, links or other devices employed to connect said swinging bar with the end rail of the bedstead.

"E E represent a series of spiral springs, each connected at one end to the swinging bar, and at the other end to the end

rail of the bedstead, preferably by means of an interposed supplemental bar or rail, F, which, in this instance, we have represented as being a metal bar provided with holes upon one edge for the attachment of the springs, and provided, also, upon the other edge with holes, *f*, adapted to receive pins, by means of which said bar F can be attached, either to the end rail of the bedstead or to a separate rail, G, which, in turn, is secured to the end rail of the bedstead.

"In Fig. 1 we have shown both methods of attaching the bar F to the bedstead, it being attached to the foot-rail B′ by means of a series of bolts, hooks or pins, *b*; and in case pins are inserted in the rail B′ for this purpose, we prefer to incline them backward, in order to prevent the bar F from being accidentally detached when in use; or the pins may be provided with heads, the holes in the end rail of the bedstead being inclined inwardly at their lower ends, when the tension of the springs E will keep the form in position.

"When the bar G is employed its ends may be notched to engage with the vertical posts of the bedstead, or with cleats or ribs secured to the inner faces of the posts or of the side rails, as the construction of the bedstead shall indicate as being most convenient; or the end rail of the bedstead may be provided with an inwardly projecting rib having pins or hooks corresponding to those marked *b*; or hooks may be attached to and project from the inner face of the rail in proper position to receive the bar F.

"Referring to Fig. 4, H H are the side rails, and I I′ the end rails, of a bed-bottom adapted to be applied to a bedstead of any ordinary or approved construction, and rest upon the cleats with which such bedsteads are usually provided for the purpose of supporting a detachable bed-bottom.

"In this construction we prefer to dispense with the supplemental rail G and attach the bars F directly to the end rails, I I′ in such manner as to be readily detached therefrom, in order to facilitate the rolling up of the spring portions for transportation.

"By an examination of the drawings it will be seen that the cut ends of the woven-wire fabric enter and are secured within

a throat formed between the upper and lower faces of the swinging bar D D', and that the springs or links which connect said bar to the end rail are attached to the bar at the edge opposite to that at which the woven wire enters the throat, and in about the same horizontal plane, so that the tension of the parts tends to maintain the bar in a substantially horizontal plane, thus presenting a suitable surface adapted to support the mattress without undue wear upon any portion of its lower surface. So, also, constructing the bar in such manner that it is adapted to receive a hook formed of one of the convolutions of the springs E facilitates the employment of such springs as they are usually found in the market, this result being best obtained by the employment of a strip of metal for one part of the bar D D'; but we do not wish to be limited to the use of metal for that purpose. One advantage which is due to the use of wood for this bar is the fact that its yielding and elastic nature permits attachment of the spring-wire of which the fabric C is formed, and the vibrations of the bar, when in use, without breaking their attached ends.

"By the use of the springs and swinging bars the great strain upon the woven fabric which is required in beds of other construction may be dispensed with, because the springs may be made of such strength as will permit the fabric to be supported with comparatively little tension upon it when the bed is not sustaining any weight except that of the bedding, the springs preventing undue sagging of the fabric when the weight of a person is thrown upon it.

"We do not wish to be limited to any particular description of springs for connecting the swinging bar or bars with the bedstead, or with the supporting frame shown in Fig. 2, as many other forms of springs might be employed without departing from the spirit of our invention.

"Whenever in this patent we use the word 'bed-bottom' or 'bed' we wish to be understood as meaning either a removable construction, like that shown in Fig. 4, which is adapted to be made and sold as an article of manufacture, separate and apart from the bedstead with which it is to be used, or a construction adapted to be attached directly to the end rails of an

ordinary bedstead, our invention being equally adapted for use upon either of such constructions."

The claims are three in number, as follows:

"1. In a bed-bottom, the combination, with an end rail, of the links or springs, the section of woven-wire fabric, and an intermediate connecting transverse bar, provided upon one edge with a throat adapted to receive the ends of a wire, and upon the opposite side with means for attaching the links or springs, substantially as described.

"2. In a bed-bottom, the combination, with the end rail, of the links or springs, the section of woven-wire fabric, and an intermediate connecting bar consisting of a part to which the fabric is attached, and a part adapted to protect the mattress from contact with the ends of the wire, substantially as set forth.

"3. In a bed-bottom, the connecting rail consisting of the part D, of wood, to which the fabric is attached, and the part D', of metal, adapted to have the end of the springs E attached thereto, substantially as set forth."

The opinion of the Circuit Court says: "The essential feature of the invention consists in attaching the woven-wire fabric to a swinging cross-bar, which in turn is suspended by helical springs from the end rails of the bedstead. The patentees assert that by this arrangement are secured all the advantages of a swinging bed — elasticity, durability, and resiliency — while sagging in the centre and the sudden jerky motion common in some bed-bottoms are avoided." It then recites the first two claims, and proceeds: "Every element of the combination covered by these claims was concededly old and well known at the date of the patent. Woven wire had been used for more than twenty-five years as a fabric for bed-bottoms. It had been stretched from end rail to end rail and fastened by means very similar to that described in the patent. Bed-bottoms made of canvas, cord, sacking, and jointed links attached to 'swing-bars' had been suspended by helical springs in analogous combinations. If, for instance, a fabric of woven wire were substituted for the canvas of the Loomis structure, it would probably be an exact anticipation of the

complainant's combination." The "Loomis structure" thus referred to is the structure described in letters patent No. 101,029, granted March 22, 1870, to George W. Loomis, for an improved spring bed-bottom. The specification and drawings of the Loomis patent show a bed-bottom which has an intervening, vibrating, connecting swing-bar, the office of which is the same as in the plaintiff's patent, namely, to connect the web with the helical springs. The bed-bottom has a web of canvas, an intervening connecting bar, and helical springs. The web of canvas is fastened at both ends to the wooden swing cross-bars, which are attached to helical springs on the opposite sides.

The opinion of the Circuit Court then proceeds: "Is there patentable novelty in this change? It is thought not. If the patentees had been the first to introduce woven wire into the art, there would be more difficulty in reaching this conclusion, but they were not. All that they did was to suspend a fabric well known as a bed-bottom in substantially the same manner that other fabrics used for that purpose had been suspended. If the patentees, instead of using woven wire had used some other woven fabric — woven twine or tape, for example — if their claims had included carpet or rubber cloth instead of woven wire, it will hardly be contended that they would be entitled to take rank as inventors. Why, then, should the use of woven wire give them this distinction? Its peculiar advantages above referred to as a material for beds were not discovered by them. The idea of swinging a bed-bottom was not theirs. They have substituted one well-known material for another and nothing more."

The court also said that the same material had been fastened to the rigid end rails by similar devices, and that the changes made by the patentees were only those which would occur to a mechanic who had skill enough to adapt the heavy and cumbersome joint to the new circumstances.

We concur with the Circuit Court, and its decree is

Affirmed.

EARNSHAW *v.* CADWALADER.

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

No. 348. Argued April 29, 1892. — Decided May 16, 1892.

Under schedule C of § 2502 of the Revised Statutes, as enacted by § 6 of the act of March 3, 1883, c. 121, (22 Stat. 497,) iron ore was charged with a duty of 75 cents per ton, and that duty was assessible on the number of pounds of iron ore reported by the United States weigher, and not on the ore after the moisture was dried out of it.

THIS is an action at law, brought in January, 1888, in the Circuit Court of the United States for the Eastern District of Pennsylvania, by John W. S. Earnshaw against John Cadwalader, collector of customs for the district of Philadelphia, to recover $71.61, as an alleged excess of duties exacted by the collector on three importations of iron ore, made in February and April, 1887, by the plaintiff, into the port of Philadelphia, from Porman, Spain. The case was tried before a jury, in October, 1888, who rendered a verdict for the defendant, and he had a judgment, to review which the plaintiff has brought a writ of error.

The iron ore was dutiable under Schedule C of § 2502 of the Revised Statutes, as enacted by § 6 of the act of March 3, 1883, c. 121, (22 Stat. 497,) under the provision imposing a duty as follows: "Iron ore, including manganiferous iron ore, also the dross or residuum from burnt pyrites, seventy-five cents per ton." The plaintiff seasonably paid, protested, appealed and brought suit. The form of his protest as to each of the three importations was the same. The collector imposed a duty of 75 cents per ton on the number of pounds of iron ore reported by the United States weigher. The protest stated that the importer claimed that the collector erred in exacting duty on the full weight reported by the weigher, and that the importer paid the same under protest, "because the importation is dutiable as merchandise which is described as 'iron ore' in act of

March 3, 1883, chapter 121, sec. 6, Schedule C, and 'iron ore' was and is understood among dealers in and consumers of such iron ore in this country to refer and did refer to iron ore in the condition of dryness in which it is sold in trade, which condition of dryness is usually ascertained in trade by subjecting the iron ore to a temperature of 212° Fahrenheit; but you have levied the rate of seventy-five cents per ton on my importation when mixed with, and the weight increased by, a considerable per cent of water, thereby making me pay, in violation of law, that rate of duty on water, because the iron ore of commerce, to which the said tariff law applies, is iron ore in a dry state — *i.e.* free from water not chemically combined — and because, although the method of ascertaining the amount of such mechanically mixed moisture is well known, easily applied, and actually used between buyers and sellers of such ores in this country, you have refused to ascertain the true taxable weight of the iron ore of this entry in this or any other way, or make any allowance for such mechanically and accidentally combined moisture, in ascertaining the weight."

The plaintiff introduced evidence tending to show that samples, representative of the whole mass, were taken by three different samplers, on the arrival of the different cargoes, which samples were delivered to two chemists, in the same condition as taken, in order that the amount of moisture mechanically present, and the amount of metallic iron, might be ascertained. The plaintiff then introduced evidence tending to show that the cargoes of iron ore so imported contained water mechanically present, and not chemically combined with the ore, and claimed that such water was not subject to duty as "iron ore." Evidence was given as to the quantity of such water; and there was no dispute as to the propriety of the method of ascertaining it, which was to dry the samples at the heat of 212° Fahrenheit, and thus expel the water or moisture mechanically present, without having any effect on the chemical ingredients of the ore.

The plaintiff asked the court to rule that "the term 'iron ore,' in its ordinary meaning, does not include water which is mechanically present and not chemically combined with

the ore." The court refused so to rule, and the plaintiff excepted.

In the course of the trial, the court, against the objection of the plaintiff, admitted evidence tending to show that the iron ores of the United States, which resembled, and were like and had the same characteristics as, the imported iron ore involved in this suit, were dealt in in this country without an allowance for moisture. The court, in ruling in favor of the admission of such evidence, stated that the purpose of the testimony was to show whether it was true, as was said by some of the witnesses, that the signification of "iron ore," when applied to the description of ore in question, meant the dry ore; because, as the court said, if it were shown that, in dealing in precisely the same character of ore mined in the United States, there was no such limitation of the meaning, and no such dealing, that bore directly on the weight and credibility of the testimony given by the plaintiff for the purpose of making an exception in favor of the particular description of ore in question; that it was a legitimate argument that, if the designation or signification of the term "iron ore," when applied to such description of soft ore mined in the United States, included the water, it would be unreasonable to believe that the designation of "iron ore," when applied to precisely the same kind of iron ore, meant the dry ore, without the water, simply because it came from across the sea; and that, although it was not direct testimony as to the iron ore in question, it was testimony in respect to iron ore precisely like it. The plaintiff excepted to the admission of the evidence.

The court, among other things, charged the jury as follows: "The term 'iron ore,' as defined by lexicographers and used and understood in commerce generally, includes the water as well as other foreign substances held in combination with iron, whether the combination be chemical or physical. It follows, therefore, that the duty imposed and complained of here was properly imposed, unless a distinction is to be drawn between this ore and iron ore generally." The plaintiff excepted to that part of the charge.

The plaintiff requested the court to charge the jury as fol-

lows: "If iron ore, as imported into the United States, is generally bought and sold on the basis that the water which is only mechanically present and not chemically united with the constituents of the ore should be removed, and the usual mode to remove such moisture, to ascertain this basis and determine the true ore, is by drying at 212 degrees Fahrenheit, that course should be adopted to determine what is dutiable iron ore under the tariff." The court refused so to charge, and remarked that there was no evidence to warrant a finding that the iron ore in question "is generally bought and sold on the basis that the water which is only mechanically present should be removed," except where that basis was stipulated for by special contract; and that such transactions (founded on contract) were unimportant, standing alone, in the consideration of the case. To such ruling of the court the plaintiff excepted.

The plaintiff also requested the court to charge the jury as follows: "If upon the whole evidence you are in doubt whether the iron ore of commerce is iron ore free from water, not chemically combined with it, it is your duty to give the importer, the plaintiff in this case, the benefit of the doubt, and your verdict should be for the plaintiff." The court refused so to charge, and stated that the question must be decided according to the weight of the evidence.

In the course of the charge given, the court submitted to the jury the question as to what the term "iron ore" was understood to mean commercially, and on this subject the court said to the jury: "In the enactment of tariff statutes, Congress must be understood, when employing terms to describe articles of commerce, to employ them in the sense in which they are commercially understood and employed by persons dealing in such articles and familiar with the subject — in other words, as they are understood and employed in the commerce to which they relate. If, therefore, the plaintiff has proved that the term 'iron ore' when applied to the imported ore here in question, signifies to those dealing in it and familiar with the subject dry ore only — that is, ore from which the water has been extracted — this signification must be given to the term as applied to this ore. To warrant this construction, however,

the evidence must satisfy you that the term has this signification generally — that is, habitually, commonly — in the commerce respecting this ore, so as to be obligatory upon parties dealing in the ore, without special contract on the subject. Does the evidence satisfy you that it has? Looking at the question in the light of the plaintiff's testimony alone (in the first instance), is the existence of this signification, under the circumstances stated, proved? His witnesses when first examined went little further than to say that in buying and selling and dealing generally in this ore parties act upon the understanding that the ore is dry; in other words, that the water is excluded from the weight. They further say, however, that special contracts are entered into respecting it generally, if not always, whereby the rights of purchasers to have the water so excluded is secured. If the case had rested here, as it did when the plaintiff first closed his testimony and the defendant moved for a nonsuit, the court would, as it intimated, have held that the evidence was insufficient to justify a finding in the plaintiff's favor. The evidence seemed to show no more than a course or custom of dealing by express contract respecting the ore, which, standing alone, should have no influence in ascertaining the signification of the term in question as applied to it. Subsequently the plaintiff called these witnesses back and inquired of them, 'What is the term "iron ore" understood to mean commercially among importers and dealers in imported ore?' In other words, What is the iron ore of commerce — imported ore? And the witnesses answered, substantially, that it is understood to be ore without the water; dry ore. The witnesses repeat their former testimony respecting the custom or habit of dealing in the ore, that parties proceed upon the understanding that the water is to be excluded, and that their contracts contain a stipulation securing its exclusion. There were three or four witnesses, very intelligent men, called back, who thus testified respecting the signification of the term as applied to this ore. This testimony, in terms, at least, seemed to have a broader scope than that previously heard, and to warrant a submission of the question to you. In considering it, however, you must bear in mind

what these witnesses said when first examined, as well as subsequently, and inquire whether their testimony thus taken altogether shows more than a course or custom of dealing, in which parties habitually contract, by special provision, for the exclusion of water from dry ore. If it shows no more than this, it is of no value. To sustain the plaintiff's case the testimony must show, as before stated, that the term 'iron ore,' as applied to the ore in question, signifies, to persons familiar with the commerce respecting it, dry ore only; that this is the common, well known, and recognized signification of the term, when so applied, upon which signification parties buying and selling, or otherwise dealing in the ore, have a clear right to depend, without any contract or stipulation respecting it. Does the plaintiff's testimony, even when considered alone, show that the term so applied has this signification? In determining this, it is important to remember that parties dealing in the ore, according to the plaintiff's testimony, do not seem to rely alone upon the existence of this signification in dealing, but resort to contract for excluding the water. Neither you nor the court can overlook the fact that this manner of dealing by special contract seems to be inconsistent with the alleged existence of a common, well-understood signification of the term 'iron ore,' such as is here set up. I have thus called your attention to the question in the light of the plaintiff's testimony alone. It is not to be decided, however, without considering as well the testimony produced by the defendant. The government has called several witnesses — a larger number than were called by the plaintiff, and equally intelligent, apparently — who say, in substance, that they are familiar with the ore in question, several of them being dealers in it, and that the signification of the term 'iron ore' as applied to it, includes the water, as well as everything else contained in the mass, just as the term does when applied to any other description of iron ore; that there is no such commodity known to commerce as dry iron ore; that, while the soft foreign ore is sometimes bought with the water excluded, it is also bought without respect to the water, and [*? as*] all other iron ore is bought, and that when it is so bought, with the water excluded,

this is always specially provided by the term 'ores,' as when applied to hard and all other descriptions of ore. Now you must determine, from all the evidence in the case, whether it is proved that the term 'iron ore,' when applied to the description of imported ore here involved, has the limited signification attributed to it by the plaintiff — that is, that it signifies dry ore — ore with the water excluded. If you find it has this signification generally, commonly, when so applied, your verdict will be for the plaintiff for the amounts claimed. Otherwise, your verdict will be for the defendant." There was no other exception by the plaintiff to any part of the charge than the exception above specifically mentioned.

Mr. William S. Hall for plaintiff in error.

The term "iron ore," in its ordinary meaning, does not include water which is mechanically present and not chemically combined with the ore.

Evidence was introduced by the plaintiff in regard to the nature and character of this water, so mechanically present and not chemically combined, which was not contradicted, and tended to show that the amount of water, mechanically present and not chemically combined, in iron ores like those in suit is variable and accidental, and varies in ores which come from the same mine, the chemical ingredients of which remain practically constant, according as the ore has been subjected to rain, or exposure to the elements; that the amount of the water so present varies from a few hundredths of 1 per cent up to 12, 16 and 25 per cent; that this variation is due to the mechanical absorption of water, and varies with the season or weather to which it is subjected; and that all such moisture would dry out of the ore if exposed long enough to the sun; and that the ore, as it comes from the mines in dry weather, is dry as dust.

The words "iron ore" in the act of March 3, 1883, 22 Stat. c. 121, p. 488, § 6, Schedule C, p. 496, have been interpreted in *Marvel* v. *Merritt*, 116 U. S. 11, 12, where the court says: "Webster, in his dictionary, defines . . . *ore* as 'the compound of a metal and some other substance, as oxygen, sulphur

or arsenic, called its *mineralizer*, by which its properties are disguised or lost.' "

It certainly cannot be claimed that water or moisture merely mechanically present, which would dry out if exposed to the sun, in any way mineralizes the metal or causes its properties to be disguised or lost.

Worcester, in his dictionary, defines ore as "a mineral body which is reduced to the metallic state by fire; a metal *chemically combined* with some mineralizing substance which completely disguises its usually recognized and useful properties." This definition by its express terms excludes water unless chemically combined with the metal.

The water is worthless, in fact is worse than worthless, and is an injury to the metallurgical value of the ore. It is an impurity which is mixed with, but is not a part of, the ore. Take away any of the chemical constituents of the ore and you are taking away part of the ore, and the residuum will not be ore. Take away this mechanically mixed water and you have left the true ore free from an impurity.

The same act imposed a duty of 20 cents per bushel on linseed or flaxseed. An importation of that article contained clay, sand and gravel to an average of 4 per cent. It was held that the importer should be required to pay duty only after deducting, with proximate accuracy, the quantity of such impurities. *Wright & Lawther Lead Co.* v. *Seeberger*, 44 Fed. Rep. 258.

This term iron ore received a legislative interpretation in the act of October 1, 1890, 26 Stat. 574, c. 1244, Schedule C, where, after imposing a duty upon "iron ore" it was "*provided further*, that in levying and collecting the duty on iron ore no deduction shall be made from the weight of the ore on account of moisture which may be chemically or physically combined therewith."

"When one finds a proviso, the presumption is, that but for the proviso the enacting part of the section would have included the subject matter of the proviso." *Mullins* v. *Treasurer of Surrey County*, 5 Q. B. D. 170, 173. "The proviso is generally intended to restrain the enacting clause and to except something which would otherwise have been within it,

or in some measure to modify the enacting clause." *Wayman* v. *Southard*, 10 Wheat. 1, 30. "It takes out of the body of the enactment that which otherwise would be within it." *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 236.

By this proviso Congress recognizes that the term "iron ore," in the body of the enactment does not include water mechanically or physically present, and that an allowance in ascertaining the dutiable weight on the custom house scales should be made for it, and provides that this allowance shall not hereafter be made.

Laws imposing duties are never to be construed beyond the natural import of the language. Such statutes are construed most strongly against the government. *Adams* v. *Bancroft*, 3 Sumner, 384, 387; *United States* v. *Wigglesworth*, 2 Story, 369, 374. "If the question were one of doubt, the doubt would be resolved in favor of the importer." Mr. Justice Blatchford in *Hartranft* v. *Wiegmann*, 121 U. S. 609, 616.

Mr. Assistant Attorney General Parker for defendant in error.

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

The evidence on the part of the plaintiff tended to show that the quantity of water mechanically present, and not chemically combined, in iron ores like those in question, was variable and accidental, and varied in ores which came from the same mine, the chemical ingredients of which remained practically constant, accordingly as the ore had been subjected to rain or to exposure to the elements; that the amount of water thus mechanically present would vary from a few hundredths of 1 per cent up to 12, 16 and 25 per cent; that such variation was due to the mechanical absorption of water; that practically all the moisture mechanically present would dry out in the sun; and that the ore as it came from the mines in dry weather was as dry as dust.

The question involved was, whether the duty of 75 cents

per ton should be imposed on the government weight of the article, according to the finding and record of the weighing officers, or whether such official weight should be reduced by an allowance sufficient to render the iron ore no greater in weight than its weight if raised, under conditions favorable to evaporation, to a heat of 212° Fahrenheit. The burden of making out a claim to the recovery of this difference rests upon the importer.

The history of the question in the Treasury Department is as follows:

On September 8, 1879, Assistant Secretary French, in a letter to the collector of customs at New York, refused to make an allowance for the increase of weight from moisture in certain imported iron ore, holding that the duty accrued on the total quantity landed, as shown by the weigher's return.

In a letter of May 17, 1886, by Acting Secretary Fairchild to the collector of customs at Philadelphia, the same ruling was made, and it was held that under the regulations of the Department and its decisions, no allowance could be made for the absorption of moisture or sea water on the voyage of importation, unless upon an application filed with the collector of customs within ten days after the landing of the goods, and an ascertainment and report by the appraiser of the percentage of damage or increased weight.

In September, 1886, an importer of iron ore contended that the duty of 75 cents per ton imposed by the act of March 3, 1883, upon iron ore, meant ore dry at the temperature of 212° Fahrenheit. The Treasury Department submitted the question to the Attorney General; and Acting Attorney General Jenks, in a letter to the Secretary, dated September 17, 1886, (18 Opinions, 466,) held that the duty was to be levied on whatever was the known commercial signification of "iron ore;" and that if iron ore dried at a temperature of 212° Fahrenheit was the standard adopted in commercial transactions of iron ore, and was what was known in commerce as iron ore, it was the ore contemplated by the statute, and the duty should be levied on that basis, citing *Two Hundred Chests of Tea*,

9 Wheat. 430; *Barlow* v. *United States*, 7 Pet. 404; and *Drew* v. *Grinnell*, 115 U. S. 477.

Assistant Secretary Fairchild, on October 29, 1886, transmitted to the collector of customs at New York a copy of the ruling of Acting Attorney General Jenks, of September 17, 1886, and stated that the Department had made careful inquiry as to the custom of trade in buying and selling imported iron ore; that the great weight of evidence was to the effect that the iron ore of commerce was iron ore free from water not chemically combined; that it was the custom to expel water which was only mechanically present, before proceeding to ascertain the amount of ore which was bought and sold; that, to do this, the ore was heated to 212° Fahrenheit; that the rule "is hereby established" that, for the purpose of ascertaining the amount of duty to be paid upon importations of iron ore, the weight of the ore when heated to a temperature of 212° Fahrenheit should be first found, and upon that weight duty should be collected; and that entries of prior importations might be reliquidated and duties refunded in accordance with that rule, in cases where the importers had fully complied with the provisions of § 2931 of the Revised Statutes as to protest, appeal, and suit.

On the 5th of November, 1886, Assistant Secretary Fairchild telegraphed to the collector of customs at Baltimore to suspend until further orders all reliquidations of entries on account of allowance for moisture on importations of iron ore, under the Department's decision of October 29, 1886.

On the 12th of January, 1887, the Treasury Department submitted to the Attorney General substantially the whole question whether the term "iron ore," as used in the tariff act of March 3, 1883, meant iron ore dried at a temperature of 212° Fahrenheit, or iron ore as it was delivered at the port of entry for weighing. In reply, Attorney General Garland, in a letter to the Secretary of the Treasury, dated January 19, 1887, (18 Opinions, 530,) referred to the letter of Acting Attorney General Jenks, of September 17, 1886, and, in speaking of the rule that the iron ore of the statute was to be interpreted as the iron ore of commerce, cited the cases of *Two*

Hundred Chests of Tea, 9 Wheat. 430; *Barlow* v. *United States*, 7 Pet. 410; and *Elliott* v. *Swartwout*, 10 Pet. 137, 151; and said that "commerce," as used in that connection, was to be understood in its comprehensive sense of buying and selling and exchange in the general sales or traffic of our own markets; that special contracts in which the term iron ore was defined by special description or qualifying words would be no evidence of the general commercial signification of the term; that, if the departmental practice and interpretation as to the collection of customs on iron ore had been of long standing and uniform prior to 1883, it was to be presumed that, if such interpretation had been false and vicious, Congress would have guarded against a like interpretation of the act of 1883; that, as that act had not repudiated any prior interpretation, the presumption was very strong that Congress in enacting the act of March 3, 1883, had understood the iron ore of commerce to be what the practice of the Department had established; and that, if the decision before referred to, of September 8, 1879, that the total quantity landed, as shown by the weigher's return, without allowance for increase of weight, from moisture, of the iron ore imported, was subject to duty, was in accordance with the practice of the Department prior to September 8, 1879, and was adhered to afterwards as the rule, it would be a pregnant fact to guide to the same conclusion.

On February 3, 1887, Secretary Manning, in a letter to the collector of customs at New York, stated that, since the letter of Assistant Secretary Fairchild of October 29, 1886, and the suspension announced by Assistant Secretary Fairchild to the collector of customs at Baltimore by the telegram of November 5, 1886, the Secretary had duly considered a large amount of new testimony, both for and against the proposition laid down in such letter of October 29, 1886, that the term "iron ore," as used in the tariff act of March 3, 1883, meant iron ore when dried at a temperature of 212° Fahrenheit, and had received the opinion of Attorney General Garland, of January 19, 1887; that, in the light of such new testimony and of the opinion of the Attorney General, the Secretary decided that

iron ore, as known to the commerce of the United States, was the ore in its natural state in respect to moisture; and that the instructions of October 29, 1886, were therefore revoked, and the collector was directed to assess duty on the actual weights as reported by the United States weigher at the time of importation; but that, in the case of importations of iron ore which importers might claim had been increased in weight on the voyage by the addition of sea water, the regulations of the Department applied, and importers, on making due application thereunder, might obtain such allowance as might be estimated and reported by the United States appraiser.

No statute of the United States, in force when the importations in question were made, recognized any deduction from the weight of iron ore when imported, because of its containing moisture. The ore was weighed by the government's officers at the ship's side, and the weight so taken was entered in a book and became a public record of the government weight of the importation. No statute authorized a deduction from such government weight in imposing the duty of 75 cents a ton on the ore.

It appeared by the evidence that dried ore was an article unknown to commerce or trade; and the evidence was clear that the allowance between dealers for the moisture that would be expelled by heating the ore to 212° Fahrenheit, had been based on contract and stipulation, and that no custom existed authorizing such allowance, even among dealers, except where the express conditions of the contract authorized such an allowance. But this whole question, in connection with the fact that the evidence showed that no such custom as an allowance for moisture was ever applied to a purchase or sale of American iron ore, even by a stipulation in a contract, and that some foreign ores were always sold by the ton and without allowance, was submitted to and passed upon by the jury, under a proper charge.

The evidence shows that water, mechanically mixed, is one of the natural and constant constituents of the iron ore of commerce, both domestic and foreign; and that there is no warrant for the conclusion that the iron ore of the statute is

limited to dry ore, or ore with such mechanically mixed water excluded. A verdict to the contrary would have been entirely unsupported by the evidence.

The claim of the plaintiff is really for an allowance by the government upon the government weight of the article imported, in the condition in which the plaintiff imported it, with a view to making it a different article from what it was when the importer presented it to the weigher. By § 2890 of the Revised Statutes, the weigher is to make a return of the articles weighed by him out of a vessel, within three days after the vessel is discharged, and such return is to be made in a book prepared by the weigher for that purpose, and kept in the custom house. Under the statute, the weight so ascertained and recorded becomes the government weight of iron ore, for the purpose of imposing thereon the duty of 75 cents a ton, in the absence of a contrary provision in the statute. Any allowance between dealers is shown to have been based upon an agreement previously made to allow for moisture.

The importer has the right to introduce iron ore only on complying with the statute, and that authorizes the entry only upon payment of a duty of 75 cents per ton upon the article brought in; and the ton is 2240 pounds, by § 2951 of the Revised Statutes. It is a necessity that all ore should have some moisture mechanically mixed with it; and the statute is silent as to the moisture mechanically mixed or chemically combined with the iron ore.

It appears that no alleged custom of dealers controls a carrier as to the payment of freight for the transportation of the imported iron ore, but the charge for transportation is by the actual weight, including the water.

The provision of § 2927 of the Revised Statutes, as carried out by the regulations of the Treasury Department, protects the importer from losses by reason of water, if he employs the methods prescribed for such protection. Such methods exclude the non-statutory method sought to be applied in the present case.

The duty of 75 cents per ton on iron ore containing such quantity of water as it may contain, applies equally to the

duty per ton imposed by the act of 1883 on imported hay, as to which no method is provided by statute for an allowance for the moisture contained in it, except as provided in regard to imports damaged by water. In each case, the duty is imposed on the weight of the article brought in. The principle is different from that in regard to dirt clinging to the skin of a potato, or clay, sand, and gravel mixed with flaxseed. In those cases, the dirt, clay, sand, and gravel are plainly discoverable and readily eliminated, and do not inhere in the article as moisture does in iron ore or in hay.

Reference is made by the counsel for the plaintiff in error to the provision of Schelude C of the act of October 1, 1890, c. 1244, (26 Stat. 567, 574,) paragraph 133, which imposes a duty of 75 cents per ton, on "iron ore, including manganiferous iron ore, also the dross or residuum from burnt pyrites," and which further provides "that in levying and collecting the duty on iron ore, no deduction shall be made from the weight of the ore on account of moisture which may be chemically or physically combined therewith." It is contended that this provision of the tariff act of 1890 is a legislative interpretation, which shows that Congress did not consider the term "iron ore," when used alone, as in the act of 1883, broad enough to embrace water held in mechanical combination; that this is a recognition by Congress that the term in the act of 1883 did not include water mechanically or physically present in the iron ore; and that, under that act, an allowance ought properly to be made in ascertaining the dutiable weight at the custom house, from the fact of the provision in the act of 1890 that such allowance should not be made thereafter.

But it is manifest, from the history of the importation of the article, as shown in the proceedings of the Treasury Department in regard to it, above set forth, that the provision of the act of 1890 was inserted to save further trouble as to the question. The rule, claimed by the plaintiff to be applicable, would exclude from the government weight water chemically combined, as well as that physically mixed, with the iron ore, for the proviso, being that no deduction shall be

made from the weight on account of moisture "chemically or physically" combined with the ore, if regarded as evidence that the act of 1883 allowed for moisture physically or mechanically combined, would also show that the act of 1883 allowed for water chemically combined. No statute in regard to iron ore ever permitted an allowance for the water chemically combined with it; and the act of 1883 must have the same construction in regard to all moisture, however mixed or combined with the ore.

The rule is invoked by the plaintiff in error, which is set forth in *Hartranft* v. *Wiegmann*, 121 U. S. 609, 616, that if the question in regard to a rate of duty is one of doubt, the doubt is to be resolved in favor of the importer, as duties are never imposed upon the citizen on vague or doubtful interpretations. In the present case, the imposition of the duty is distinct and clear, and there is no doubtful interpretation; and the rule does not apply, for the reason that the importer seeks to obtain an allowance in reduction of a duty which is distinctly imposed.

It is stated in the brief for the plaintiff in error that, as the Circuit Court ruled that the ordinary definition of the term "iron ore" included water mechanically present, the burden was on the plaintiff to satisfy the jury that the interpretation given to the term among commercial men did not include such water; that the plaintiff was to fail or prevail as the jury interpreted the meaning of the term in commerce to be the mass inclusive or exclusive of the water; and, that if, on the whole evidence, the jury were in doubt as to what was the proper interpretation, that doubt should have been resolved in favor of the importer.

But, the burden of proof being on the plaintiff to prove the interpretation he contends for to be the true one, he could not be entitled to a verdict so long as he failed to satisfy the jury, by a preponderance of evidence, that his interpretation was the correct one. The question of doubt referred to in *Hartranft* v. *Wiegmann*, 121 U. S. 609, 616, is a doubt of a very different character; and is as to whether, as matter of legal construction, and not as matter of fact, the article is within the terms of the statute. The intention of Congress

to impose a duty of seventy-five cents a ton on the weight of iron ore is expressed in clear and unambiguous language. *American Net and Twine Co.* v. *Worthington*, 141 U. S. 468, 474.

The evidence put in on the part of the defendant, and objected to by the plaintiff, that the iron ores of the United States which resemble, and were like, and had the same characteristics as, the imported iron ores in question, were dealt in in the United States without an allowance for moisture, was justified by the evidence which had been put in on the part of the plaintiff; and the explanation made by the court, as before set forth, that the testimony was received as bearing directly upon the weight and credibility of the testimony on the part of the plaintiff, was sound. The evidence, too, was proper under the claim of custom set up by the plaintiff.

We see no ground for a reversal of the judgment, and it is

Affirmed.

INTERSTATE COMMERCE COMMISSION *v.* BALTIMORE AND OHIO RAILROAD COMPANY.

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

No. 889. Argued March 17, 18, 1892. — Decided May 16, 1892.

The issue by a railway company engaged in interstate commerce of a "party-rate ticket" for the transportation of ten or more persons from a place situated in one State or Territory to a place situated in another State or Territory, at a rate less than that charged to a single individual for a like transportation on the same trip, does not thereby make "an unjust and unreasonable charge" against such individual within the meaning of § 1 of the act of February 4, 1887, to regulate commerce, 24 Stat. 379, c. 104; nor make an "unjust discrimination" against him within the meaning of § 2 of that act; nor give "an undue or unreasonable preference or advantage" to the purchasers of the party-rate ticket within the meaning of § 3.

Section 22 of that act, as amended by the act of March 2, 1889, 25 Stat. 855, 862, c. 382, § 9, provides that discriminations in favor of certain persons

therein named shall not be deemed unjust, but it does not forbid discriminations in favor of others under conditions and circumstances so substantially alike as to justify the same treatment.

So far as Congress, in the act to regulate commerce, adopted the language of the English Traffic Act, it is to be presumed that it had in mind the construction given by the English courts to the adopted language, and intended to incorporate it into the Statute.

THE court stated the case as follows:

This proceeding was originally instituted by the filing of a petition before the Interstate Commerce Commission by the Pittsburg, Cincinnati and St. Louis Railway Company against the Baltimore and Ohio Railroad Company, to compel the latter to withdraw from its lines of road, upon which business competitive with that of the petitioner was transacted, the so-called "party-rates," and to decline to give such rates in future upon such lines of road; also for an order requiring said company to discontinue the practice of selling excursion tickets at less than the regular rate, unless such rates were posted in its offices as required by law. The petition set forth that the two roads were competitors from Pittsburg westward; that the Baltimore and Ohio road had in operation upon its competing lines of road so-called "party-rates," whereby "parties of ten or more persons travelling together on one ticket will be transported over said lines of road between stations located thereon, at two cents per mile per capita, which is less than the rate for a single person; said rate for a single person being about three cents per mile."

There was another charge that the defendant was in the habit of selling excursion tickets without posting its rates for the same in its offices; but this charge was subsequently abandoned.

The answer of the Baltimore and Ohio Railroad Company admitted that it had at one time in effect the so-called "party-rates," but prior to the filing of the complaint had withdrawn said rates, not that it believed that they were illegal, but because it was claimed by other companies that said rates were put into effect in violation of an agreement between companies belonging to a certain association of which defend-

ant was a member. It further averred that said rates were in no way a violation of the act to regulate commerce, and were an accommodation to the public, necessary to the business of theatrical and other amusement companies, and that when the legality of such rates was properly raised for decision, it was prepared to defend the legality of the same. The answer further denied the right of the complainant to institute the proceeding, and prayed that the complaint might be dismissed.

The cause was heard before the Commission, which found "that so-called party-rate tickets, sold at reduced rates, and entitling a number of persons to travel together on a single ticket or otherwise, are not commutation tickets within the meaning of section 22 of the act to regulate commerce, and that when the rates at which such tickets for parties are sold are lower for each member of the party than rates contemporaneously charged for the transportation of single passengers between the same points, they constitute unjust discrimination, and are therefore illegal." It was ordered and adjudged "that the defendant, the Baltimore and Ohio Railroad Company, do forthwith wholly and immediately cease and desist from charging rates for the transportation over its lines of a number of persons travelling together in one party, which are less for each person than rates contemporaneously charged by said defendant under schedules lawfully in effect for the transportation of single passengers between the same points."

The defendant road having refused to obey this mandate, the Commission, on May 1, 1890, pursuant to section 16 of the Interstate Commerce Act, filed this bill in the Circuit Court of the United States for the Southern District of Ohio for a writ of injunction to restrain the defendant from continuing in its violation of the order of the Commission. The bill set up the proceedings which had theretofore been taken before the Commission, and set forth as its gravamen that the defendant had wholly disregarded and set at naught the authority and order of the Commission in that regard, and had wilfully and knowingly disobeyed said order, and had not ceased and desisted from allowing party-rates as it had been ordered to

do; and had upon divers occasions since the service of said order charged rates for the transportation over its lines of a number of persons travelling together in one party which were less for each person than rates contemporaneously charged under schedules lawfully in effect between the same points for the transportation of persons, citing a number of instances of such disobedience.

The answer admitted the proceedings set forth in the bill, but denied that it had been made to appear to the Commission that defendant had violated the provisions of the act to regulate commerce, or that the Commission had duly and legally determined the matters and things in controversy and at issue between the parties; and averred that several of the conclusions of fact stated in the report of the Commission were not true, or justified by the evidence produced at the hearing; and that the conclusions of law contained in the report, and the interpretation therein given to the act, were not correct. It admitted that it had not wholly ceased charging rates for transportation over its lines for a number of passengers travelling together in one party upon one ticket, which are less for each person than rates contemporaneously charged by it for the transportation of single passengers between the same points, and admitted a violation of the order of the Commission.

The seventh and eighth paragraphs of the answer are the material ones, and are here given in full:

"7. That for many years prior to the passage of the said 'Act to Regulate Commerce,' all the railroad carriers in the United States had habitually made a rate of charge for passengers making frequent trips, trips for long distances, and trips in parties of ten or more, lower than the regular single fare charged between the same points, and such lower rates were universally made at the date of the passage of said act. To carry on this universal practice many forms of tickets were employed to enable different classes of passengers to enjoy these lower rates, and so stimulate travel. To meet the needs of the commercial traveller the thousand-mile ticket was used; to meet the needs of the suburban resident or frequent traveller,

several forms of tickets were used, *e.g.* monthly or quarterly tickets, good for any number of trips within the specified time, and ten, twenty-five or fifty-trip tickets, good for the specified number of trips by one person, or for one trip by the specified number of persons; to accommodate parties of ten or more, a single ticket, one way or round trip, for the whole party, was made up by the agent on a skeleton form furnished for the purpose; to accommodate excursionists travelling in numbers too large to use a single ticket, special individual tickets were issued to each person. Tickets good for a specified number of trips were issued also between cities where travel was frequent. In short, it was an established principle of the business that whenever the amount of travel more than made up to the carrier for reduction of the charge per capita, then such reduction was reasonable and just in the interests both of the carrier and of the public. Long experience has proved the soundness of the principle. Under its application grew up the business of commercial travellers, the enormous suburban business, the constant travel between large cities, and the excursion business. Under its application has grown up also the business of travelling companies or parties, which has reached an aggregate of many hundreds of thousands of dollars, and which depends for its existence upon a continuance of the transportation rates under which it has grown up.

"8. That since the passage of the said 'act to regulate commerce,' this respondent has continued as theretofore the practice above stated, of making a lower charge on passenger travel, in consideration of the amount and frequency of the travel, and with that purpose and to accommodate the various classes of passengers, it has continued in use all the forms of ticket described in the next preceding section. That the charge fixed by it for the transportation of parties of ten or more, on a single ticket, has been two cents per mile per capita, which is the same rate charged on thousand-mile tickets, and is a higher rate than it charges on long-distance passenger travel, and excursion travel, and higher than its general rate for suburban travel on time or other suburban tickets. That the said charge for the transportation of parties on a

single ticket is just and reasonable, affording a fair compensation to the carrier, and for the best interests both of the carrier and of the public, because any higher rate would destroy the business. That the business reasons, circumstances and conditions which induced this respondent to make such lower charge for the transportation of parties as aforesaid, and that make it the interest of this respondent as a carrier to make such lower charge, are precisely the same reasons, circumstances and conditions that induce it and make it its interest to fix a lower charge for the transportation of passengers buying mileage tickets, time or trip tickets, and excursionists. That while so-called party-rate tickets are used principally by travelling amusement companies, because no other form of ticket meets the requirement of such companies, yet this respondent has avoided confining such tickets to any class of business, by offering them on the same terms to the public at large. That this respondent has obviated the danger that such lower charge for parties might be taken advantage of by speculators or ticket brokers, by issuing only one ticket for the whole party. And respondent avers that, as such tickets are now issued by it they are not and cannot be used for speculative purposes, and afford no opportunity for evading the law in the hands of ticket brokers. This respondent further avers that it may rightly and legally make a charge per capita for persons travelling on said party-rate tickets, lower than its charge for a single passenger making one trip between the same points, the character, circumstances and conditions of the service being substantially different, and that the making of such lower charge per capita to the member of the party makes or gives no undue or unreasonable preference or advantage to him, and subjects no person, company, firm, corporation or locality, or particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The answer further averred the illegality of the order of the Commission, and averred "that by the true construction of the act the second section thereof requires the same charge for transportation service only in cases where the commercial circumstances and conditions are substantially similar, and the

third section requires the same charge to be made only when a difference in charge would work a prejudice or disadvantage to some one without reason therefor. That the twenty-second section, so far from making exceptions to an otherwise absolute rule, was inserted merely as additional precaution to insure the giving to the second and third sections of the act the construction which Congress intended. That the twenty-second section is a legislative declaration; that under the provisions of the second section of the act, circumstances and conditions of a commercial nature are to be considered, and among such circumstances and conditions, in the case of passenger traffic, the amount of service purchased or contracted for, and the interest of the carrier in stimulating travel are to be considered."

Upon the hearing before the Circuit Court upon pleadings and proofs the bill was dismissed, separate opinions being delivered by Judges Jackson and Sage. 43 Fed. Rep. 37. From this decree the Interstate Commerce Commission appealed to this court. The provisions of the Interstate Commerce act, so far as the same are material to this case, are set forth in the margin.[1]

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[1] An Act to Regulate Commerce.

"Sec. 1. That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one State or Territory . . . to any other State or Territory. . . .

"All charges made for any service rendered, or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

"Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous

Argument for Appellant.

Mr. Samuel Shellabarger and *Mr. Alfred G. Safford* (with whom were *Mr. Attorney General* and *Mr. J. M. Wilson* on the brief) for appellant.

Section 2 of the act is one creating a prohibition and rule of commerce not embraced in section 1, (prohibiting unreasonable charges,) and creates an offence that is not embraced in section 1.

The thing required by section 2 is *equality* in charges for like and contemporaneous service in transportation of persons or property. By the provisions, therefore, of this section, to

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service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

"SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

"SEC. 22 as amended by the act of March 2, 1889, 25 Stat. 855, c. 382, § 9, p. 862. That nothing in this act shall prevent the carriage, storage or handling of property free or at reduced rates for the United States, State or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employés, or prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employés; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this act."

charge for the same service, contemporaneously rendered, unequal prices, is rendered unlawful, without regard to its being violative of the rule of justice and reasonableness of charge established by section 1.

It is therefore no answer to the proposition that party-rate tickets are prohibited by section 2, to say, or to show, that party-rate tickets are no more than just and reasonable and are merely fairly compensatory considered by themselves. *Messenger* v. *Pennsylvania Railroad*, 37 N. J. Law, 531; *Chicago & Alton Railroad* v. *People*, 67 Illinois, 11; *Great Western Railway Co.* v. *Sutton*, L. R. 4 H. L. 226; *Parker* v. *Great Western Railway Co.*, 7 Man. & Grang. 253; *Crouch* v. *Railway Co.*, 9 Exch. 556; *Piddington* v. *Southeastern Railway*, 5 C. B. (N. S.) 111; *Garton* v. *Bristol & Exeter Railway*, 1 Best & Smith, 112; *Branley* v. *Southeastern Railway*, 12 C. B. (N. S.) 63; *Baxendale* v. *Great Western Railway*, 14 C. B. (N. S.) 1.

There cannot be, and there is not, the slightest doubt about this provision of the statute being one establishing a clear and peremptory rule of charge applicable to all common carriers, and requiring absolute equality of charge in a designated case or class of cases.

What that case or class of cases is to which this positive and peremptory rule of all equality is inflexibly applicable, according to section 2, is also made as plain by the statute as words can make it. The service so subjected to this rule of equality is one which requires to have in it the following elements of sameness or identity. The two services contrasted must be:

(1) Like service; (2) They must be contemporaneous; (3) They must be in "a like kind of traffic;" (4) The services must be rendered "under substantially similar circumstances and conditions."

If the subject matter of the charge has in it these four elements of sameness, then neither the court below, nor, so far as we know, anybody else, has ever questioned that the statute makes the obligation to make the charge equal, and the violation thereof a crime.

Now, apply this to the present case. The service rendered by the carrier on the two classes of tickets — single and party-rate — are identical in the following elements: (1) The service is "like" in each case so far as it relates to the manner of rendering it, each being rendered by transportation in the same car; (2) The service is "like" in that it is rendered by carrying a passenger over the same identical line; (3) The service is "like" in their being carried in the same direction; (4) The service is "like" in that it is rendered at the same time; and (5) The service is "like" in that the subject of transportation is the same, to wit, a human being, or several such.

Then coming to the question of the identity or similarity of conditions. The conditions of the service are "similar" in each and every one of the five particulars just enumerated in regard to the character of the services; and the conditions are similar in the following respects: (1) The conditions are "similar" so far as relates to the manner of rendering the services, each being rendered by transportation in the same car; (2) The conditions are "similar" in that the services are rendered by carrying a passenger, one or more; (3) The conditions are "similar" in that the services are rendered at the same time; (4) The conditions are "similar" in that the passengers are carried in the same direction and over the same line; (5) The conditions are "similar" in that the subject of transportation is the same, to wit, a human being.

Thus far on the question of "like" services and the "similarity" of conditions, there is, we apprehend, no difference of opinion.

The result, therefore, of this analysis is this, that the only difference between the two services, thus contrasted, is that the ticket upon which the "party-rate" passengers are carried is one covering more than one human being, and was purchased by one application or payment, and the persons represented by the ticket are alleged to be required to travel together, as one company; whereas, in the case of a single ticket, it represents but one person. The question is thus reduced to this: Whether the transportation of two persons on one ticket differs from the transportation of two persons on two tickets,

on the same train? The court below held that it did. In this we submit that it erred.

How is the service itself, rendered by the carrier, changed in its intrinsic qualities by the fact that, in one case a ticket for one is bought, and in the other case a ticket for more than one? What is the difference either in the service rendered, or the conditions under which it was rendered? There is no difference.

Another view taken by the court below, which, we submit, was erroneous, is that this entire statute was intended to add, as between common carriers and their customers, nothing in the way of securing justice between the carrier and such customers, and also as between the several customers of the carrier, that is not secured to them by the common law; that, in so far as it defines and fixes rights and obligations as between the public and the carrier, it is simply declaratory of the common law, and adds no new rights or obligations, and only defines preëxisting rights and obligations, and adds facilities for enforcing them. If by this is meant the common law as declared to be in such cases as *Railroad Co.* v. *People*, 67 Illinois, 11, and *Messenger* v. *Pennsylvania Railroad Co.*, 36 N. J. Law, 407, we have no controversy on this point. But if it means the common law as declared in *Great Western Railway Co.* v. *Sutton*, L. R. 4 H. L. 226, which holds that, by such common law, "like services" under similar conditions must be compensated "reasonably," and no more, but not necessarily "equally," then we do most confidently submit that such position is erroneous; and, if enforced, virtually repeals, in all of its essential provisions, the interstate commerce law.

Reduced to its exact substance, this position of the court is that neither section 2, nor any other section establishes any rule of "equality" of charge, and leaves all, as the court assumes it was at common law, a subject matter to be contracted about; subject to no other limitation than that "unjust discrimination" should not be made. And having thus abolished section 2, or robbed it of all signification in the way of prohibition of inequality, the court concludes that section 22 is not "exceptive" in its nature; but is, as the court says, "in-

serted merely as an enumeration of a class of persons and things not within either the letter or spirit of the interstate commerce act, which it would be lawful to discriminate in favor of without its being so provided in section 22." This emasculates the entire act, and renders it utterly insignificant and worthless, except in so far as it may turn out to be useful in securing the enforcement of the obligations established by the common law.

Neither in England nor in the States in this country where equality clauses are inserted in the statutes, has this position been adopted. *Great Western Railway Co.* v. *Sutton*, *ubi supra*; *Atchison, Topeka &c. Railroad* v. *Denver & New Orleans Railroad*, 110 U. S. 667, 684. In the latter case it was held that these English statutes added new remedies and rights of action securing equality of charge which did not before exist, according to this English view of what was the common law.

This court has, in a recent case, repeated what it has in substance often held before, namely, that after a statute has received from the courts its final and settled interpretation, the construction becomes, in effect for purposes of interpretation, a part of the statute itself as much as if such interpretation were embodied in the words of the act; and if that statute is adopted by future legislatures after its meaning is thus judicially settled by the highest courts of the country, then it will be assumed and presumed by the courts, in construing that new law, that it was the design of the legislature that the statute should have the same meaning under the reënactment that the courts had given to it before the reënactment. *German Bank* v. *Franklin County*, 128 U. S. 538; *Douglass* v. *Pike County*, 101 U. S. 677, 686, 687.

Applying that rule to this case, the equality clauses in the English statute had, when the Interstate Commerce Act was enacted, received this interpretation: "When it is sought to show that a charge is extortionate, as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of

persons at a lower charge, during the period throughout which the party complaining was charged more under like circumstances. *Great Western Railway Co.* v. *Sutton*, *ubi supra.*

It must therefore be assumed that the equality clause found in section 2 of this act is a law; that it is a law which means what it says, and that it does peremptorily require equality of charge for substantially "like" service, rendered under substantially "similar" conditions, and that it is a new and additional obligation created by statute that can never be whistled down or contracted away as against the public, according to the discretion of the carrier and the party with whom he deals. And it being already established that there is no substantial difference in the service rendered on the sale of one ticket to transport ten persons on a given train, and that rendered on the sale of one ticket to transport one person on the same train, which would entitle the company to make a difference in the rate, that would seem to dispose of this branch of the case.

Mr. John K. Cowen and *Mr. Hugh L. Bond, Jr.*, for appellee.

Mr. Justice Brown delivered the opinion of the court.

Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act, 24 Stat. 379, c. 104, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service; *Fitchburg Railroad Co.* v. *Gage*, 12 Gray, 393; *Baxendale* v. *Eastern Counties Railway Co.*, 4 C. B. (N. S.) 63; *Great Western Railway Co.* v. *Sutton*, L. R. 4 H. L. 226, 237; *Ex parte Benson*, 18 South Car. 38; *Johnson* v. *Pensacola Railway Co.*, 16 Florida, 623;

though the weight of authority in this country was in favor of an equality of charge to all persons for similar services. In several of the States acts had been passed with the design of securing the public against unreasonable and unjust discriminations; but the inefficacy of these laws beyond the lines of the State, the impossibility of securing concerted action between the legislatures toward the regulation of traffic between the several States, and the evils which grew up under a policy of unrestricted competition, suggested the necessity of legislation by Congress under its constitutional power to regulate commerce among the several States. These evils ordinarily took the shape of inequality of charges made, or of facilities furnished, and were usually dictated by or tolerated for the promotion of the interests of the officers of the corporation or of the corporation itself, or for the benefit of some favored persons at the expense of others, or of some particular locality or community, or of some local trade or commercial connection, or for the destruction or crippling of some rival or hostile line.

The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons travelling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable. For instance, it would be obviously unjust to charge A a greater sum than B for a single trip from Washington to Pittsburg;

but if A agrees not only to go but to return by the same route, it is no injustice to B to permit him to do so for a reduced fare, since the services are not alike, nor the circumstances and conditions substantially similar, as required by section 2 to make an unjust discrimination. Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust. We agree, however, with the plaintiff in its contention that a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination or an unreasonable preference under sections 2 and 3. As was said by Mr. Justice Blackburn in *Great Western Railway Co.* v. *Sutton*, L. R. 4 H. L. 226, 239: "When it is sought to show that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

The question involved in this case is, whether the principle above stated as applicable to two individuals applies to the purchase of a single ticket covering the transportation of ten or more persons from one place to another. These are technically known as party-rate tickets, and are issued principally to theatrical and operatic companies for the transportation of their troupes. Such ticket is clearly neither a "mileage" nor an "excursion" ticket within the exception of section 22; and upon the testimony in this case it may be doubtful whether it falls within the definition of "commutation tickets," as those words are commonly understood among railway officials. The words "commutation ticket" seem to have no definite meaning. They are defined by Webster (edition of 1891) as "a ticket, as for transportation, which is the evidence of a contract for service at a reduced rate." If this definition be applicable here, then it is clear that it would include a party-rate ticket. In the language of the railway, however, they are principally, if not wholly, used to designate tickets for transportation during a limited time between neighboring

towns or cities and suburban towns. The party-rate ticket upon the defendant's road is a single ticket issued to a party of ten or more, at a fixed rate of two cents per mile, or a discount of one-third from the regular passenger rate. The reduction is not made by way of a secret rebate or drawback, but the rates are scheduled, posted and open to the public at large.

But, assuming the weight of evidence in this case to be that the party-rate ticket is not a "commutation ticket," as that word was commonly understood at the time of the passage of the act, but is a distinct class by itself, it does not necessarily follow that such tickets are unlawful. The unlawfulness defined by sections 2 and 3 consists either in an "unjust discrimination" or an "undue or unreasonable preference or advantage," and the object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance, are property of the United States, state or municipal governments; destitute and homeless persons transported free of charge by charitable societies; indigent persons transported at the expense of municipal governments; inmates of soldiers' homes, etc., and ministers of religion, in favor of whom a reduction of rates had been made for many years before the passage of the act. It may even admit of serious doubt whether, if the mileage, excursion or commutation tickets had not been mentioned at all in this section, they would have fallen within the prohibition of sections 2 and 3. In other words, whether the allowance of a reduced rate to persons agreeing to travel one thousand miles, or to go and return by the same road, is a "like and contemporaneous service under

substantially similar conditions and circumstances" as is rendered to a person who travels upon an ordinary single-trip ticket. If it be so, then, under state laws forbidding unjust discriminations, every such ticket issued between points within the same State must be illegal. In view of the fact, however, that every railway company issues such tickets; that there is no reported case, state or federal, wherein their illegality has been questioned; that there is no such case in England; and that the practice is universally acquiesced in by the public, it would seem that the issuing of such tickets should not be held an unjust discrimination or an unreasonable preference to the persons travelling upon them.

But whether these party-rate tickets are commutation tickets proper, as known to railway officials or not, they are obviously within the commuting principle. As stated in the opinion of Judge Sage in the court below: "The difference between commutation and party-rate tickets is, that commutation tickets are issued to induce people to travel more frequently, and party-rate tickets are issued to induce more people to travel. There is, however, no difference in principle between them, the object in both cases being to increase travel without unjust discrimination, and to secure patronage that would not otherwise be secured."

The testimony indicates that for many years before the passage of the act it was customary for railroads to issue tickets at reduced rates to passengers making frequent trips, trips for long distances, and trips in parties of ten or more, lower than the regular single fare charged between the same points; and such lower rates were universally made at the date of the passage of the act. As stated in the answer, to meet the needs of the commercial traveller the thousand-mile ticket was issued; to meet the needs of the suburban resident or frequent traveller, several forms of tickets were issued. For example, monthly or quarterly tickets, good for any number of trips within the specified time; and ten, twenty-five or fifty-trip tickets, good for a specified number of trips by one person, or for one trip by a specified number of persons; to accommodate parties of ten or more, a single ticket, one way or round trip,

for the whole party, was made up by the agent on a skeleton form furnished for that purpose; to accommodate excursionists travelling in parties too large to use a single ticket, special individual tickets were issued to each person. Tickets good for a specified number of trips were also issued between cities where travel was frequent. In short, it was an established principle of the business, that whenever the amount of travel more than made up to the carrier for the reduction of the charge per capita, then such reduction was reasonable and just in the interests both of the carrier and of the public. Although the fact that railroads had long been in the habit of issuing these tickets would be by no means conclusive evidence that they were legal, since the main purpose of the act was to put an end to certain abuses which had crept into the management of railroads, yet Congress may be presumed to have had those practices in view, and not to have designed to interfere with them, except so far as they were unreasonable in themselves or unjust to others. These tickets then being within the commutation principle of allowing reduced rates in consideration of increased mileage, the real question is, whether this operates as an undue or unreasonable preference or advantage to this particular description of traffic, or an unjust discrimination against others. If, for example, a railway makes to the public generally a certain rate of freight, and to a particular individual residing in the same town a reduced rate for the same class of goods, this may operate as an undue preference, since it enables the favored party to sell his goods at a lower price than his competitors, and may even enable him to obtain a complete monopoly of that business. Even if the same reduced rate be allowed to every one doing the same amount of business, such discrimination may, if carried too far, operate unjustly upon the smaller dealers engaged in the same business, and enable the larger ones to drive them out of the market.

The same result, however, does not follow from the sale of a ticket for a number of passengers at a less rate than for a single passenger; it does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact

that another is able in a particular instance to travel at a less rate than he. If it operates injuriously toward any one it is the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another. If it be lawful to issue these tickets, then the Pittsburg, Chicago and St. Louis Railway Company has the same right to issue them that the defendant has, and may compete with it for the same traffic; but it is unsound to argue that it is unlawful to issue them because it has not seen fit to do so. Certainly its construction of the law is not binding upon this court. The evidence shows that the amount of business done by means of these party-rate tickets is very large; that theatrical and operatic companies base their calculation of profits to a certain extent upon the reduced rates allowed by railroads; and that the attendance at conventions, political and religious, social and scientific, is, in a great measure, determined by the ability of the delegates to go and come at a reduced charge. If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single-trip passenger would gain absolutely nothing. If a case were presented where a railroad refused an application for a party-rate ticket upon the ground that it was not intended for the use of the general public, but solely for theatrical troupes, there would be much greater reason for holding that the latter were favored with an undue preference or advantage.

In order to constitute an unjust discrimination under section 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate or other device; but in either case it must be for a "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." To bring the present case within the words of this section, we must assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted

fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible.

In this connection we quote with approval from the opinion of Judge Jackson in the court below: "To come within the inhibition of said sections, the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons, or classes, between whom differences in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination."

The English Traffic Act of 1854 contains a clause similar to section 3 of the Interstate Commerce Act, that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

In *Hozier* v. *Caledonian Railway*, 17 Sess. Cas. (2d Series) 302, (*S. C.* 1 Nev. & Macn. Railway Cases, 27,) complaint was made by one who had frequent occasion to travel, that passengers from an intermediate station between Glasgow and Edinburgh were charged much greater rates to those places than were charged to other through passengers between these termini; but the Scotch Court of Session held that the petitioner had not shown any title or interest to maintain the proceeding; his only complaint being that he did not choose that parties travelling from Edinburgh to Glasgow should enjoy the benefit of a cheaper rate of travel than he himself could enjoy. "It provides," said the court, "for giving undue preference to parties *pari passu* in the matter, but you must bring them into

competition in order to give them an interest to complain." This is in substance holding that the allowance of a reduced through rate worked no injustice to passengers living on the line of the road, who were obliged to pay at a greater rate. So, in *Jones* v. *Eastern Counties Railway*, 3 C. B. (N. S.) 718, the court refused an injunction to compel a railway company to issue season tickets between Colchester and London upon the same terms as they issued them between Harwich and London, upon the mere suggestion that the granting the latter, the distance being considerably greater, at a much lower rate than the former, was an undue and unreasonable preference of the inhabitants of Harwich over those of Colchester. Upon the other hand, in *Ransome* v. *Eastern Counties Railway*, 1 C. B. (N. S.) 437, where it was manifest that a railway company charged Ipswich merchants, who sent from thence coal which had come thither by sea, a higher rate for the carriage of their coal than they charged Peterboro' merchants, who had made arrangements with them to carry large quantities over their lines, and that the sums charged the Peterboro' merchants were fixed so as to enable them to compete with the Ipswich merchants, the court granted an injunction, upon the ground of an undue preference to the Peterboro' merchants, the object of the discrimination being to benefit the one dealer at the expense of the other, by depriving the latter of the natural advantages of his position. In *Oxlade* v. *Northeastern Railway*, 1 C. B. (N. S.) 454, a railway company was held justified in carrying goods for one person for a less rate than that at which they carried the same description of goods for another, if there be circumstances which render the cost of carrying the goods for the former less than the cost of carrying them for the latter, but that a desire to introduce northern coke into a certain district was not a legitimate ground for making special agreements with different merchants for the carriage of coal and coke at a rate lower than the ordinary charge, there being nothing to show that the pecuniary interests of the company were affected; and that this was an undue preference.

In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all per-

sons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. But so far as relates to the question of "undue preference," it may be presumed that Congress, in adopting the language of the English act, had in mind the constructions given to these words by the English courts, and intended to incorporate them into the statute. *McDonald* v. *Hovey*, 110 U. S. 619.

There is nothing in the objection that party-rate tickets afford facilities for speculation and that they would be used by ticket brokers or "scalpers" for the purpose of evading the law. The party-rate ticket, as it appears in this case, is a single ticket covering the transportation of ten or more persons, and would be much less available in the hands of a ticket broker than an ordinary single ticket, since it could only be disposed of to a person who would be willing to pay two-thirds of the regular fare for that number of people. It is possible to conceive that party-rate tickets may, by a reduction of the number for whom they may be issued, be made the pretext for evading the law, and for the purpose of cutting rates, but should such be the case, the courts would have no difficulty in discovering the purpose for which they were issued, and applying the proper remedy.

Upon the whole, we are of the opinion that party-rate tickets, as used by the defendant, are not open to the objections found by the Interstate Commerce Commission, and are not in violation of the act to regulate commerce, and the decree of the court below is, therefore,

Affirmed.

MUTUAL LIFE INSURANCE COMPANY *v.* HILLMON.

MUTUAL LIFE INSURANCE COMPANY *v.* HILLMON.

NEW YORK LIFE INSURANCE COMPANY *v.* HILLMON.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY *v.* HILLMON.

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

Nos. 181, 182, 183, 184. Argued March 2, 3, 1892. — Decided May 16, 1892.

Under Rev. Stat. § 921, a court of the United States may order actions against several insurers of the same life, in which the defence is the same, to be consolidated for trial, against their objection.

The consolidation for trial, under Rev. Stat. § 921, of actions against several defendants, does not impair the right of each to three peremptory challenges under § 819.

The intention of a person, when material, may be proved by contemporaneous declarations in his letters, written under circumstances precluding a suspicion of misrepresentation.

Upon the question whether a person left a certain place with a certain other person, letters written and mailed by him at that place to his family, shortly before the time when other evidence tends to show that he left the place, and stating his intention to leave it with that person, are competent evidence of such intention.

On July 13, 1880, Sallie E. Hillmon, a citizen of Kansas, brought an action against the Mutual Life Insurance Company, a corporation of New York, on a policy of insurance, dated December 10, 1878, on the life of her husband, John W. Hillmon, in the sum of $10,000, payable to her within sixty days after notice and proof of his death. On the same day the plaintiff brought two other actions, the one against the New York Life Insurance Company, a corporation of New York, on two similar policies of life insurance, dated respectively November 30, 1878, and December 10, 1878, for the sum of

$5000 each; and the other against the Connecticut Mutual Life Insurance Company, a corporation of Connecticut, on a similar policy, dated March 4, 1879, for the sum of $5000.

In each case, the declaration alleged that Hillmon died on March 17, 1879, during the continuance of the policy, but that the defendant, though duly notified of the fact, had refused to pay the amount of the policy, or any part thereof; and the answer denied the death of Hillmon, and alleged that he, together with John H. Brown and divers other persons, on or before November 30, 1878, conspiring to defraud the defendant, procured the issue of all the policies, and afterwards, in March and April, 1879, falsely pretended and represented that Hillmon was dead, and that a dead body which they had procured was his, whereas in reality he was alive and in hiding.

On June 14, 1882, the following order was entered in the three cases: "It appearing to the court that the above-entitled actions are of like nature and relative to the same question, and to avoid unnecessary cost and delay, and that it is reasonable to do so, it is ordered by the court that said actions be, and the same are hereby, consolidated for trial." To this order the defendants excepted.

On February 29, 1888, after two trials at which the jury had disagreed, the three cases came on for trial, under the order of consolidation. Each of the defendants moved that the order be set aside, and each case tried separately. But the court overruled the motion, and directed that, pursuant to that order, the cases should be tried as one cause; and to this each defendant excepted.

At the empanelling of the jury, each defendant claimed the right to challenge peremptorily three jurors. But the court ruled that, the cases having been consolidated, the defendants were entitled to three peremptory challenges only; and, after each defendant had peremptorily challenged one juror, ruled that none of the defendants could so challenge any other jurors: and to these rulings each defendant excepted.

At the trial the plaintiff introduced evidence tending to show that on or about March 5, 1879, Hillmon and Brown left Wichita in the State of Kansas, and travelled together through

Southern Kansas in search of a site for a cattle ranch; that on the night of March 18, while they were in camp at a place called Crooked Creek, Hillmon was killed by the accidental discharge of a gun; that Brown at once notified persons living in the neighborhood; and that the body was thereupon taken to a neighboring town, where, after an inquest, it was buried. The defendants introduced evidence tending to show that the body found in the camp at Crooked Creek on the night of March 18 was not the body of Hillmon, but was the body of one Frederick Adolph Walters. Upon the question whose body this was, there was much conflicting evidence, including photographs and descriptions of the corpse, and of the marks and scars upon it, and testimony to its likeness to Hillmon and to Walters.

The defendants introduced testimony that Walters left his home at Fort Madison in the State of Iowa in March, 1878, and was afterwards in Kansas in 1878, and in January and February, 1879; that during that time his family frequently received letters from him, the last of which was written from Wichita; and that he had not been heard from since March, 1879. The defendants also offered the following evidence:

Elizabeth Rieffenach testified that she was a sister of Frederick Adolph Walters, and lived at Fort Madison; and thereupon, as shown by the bill of exceptions, the following proceedings took place:

"Witness further testified that she had received a letter written from Wichita, Kansas, about the 4th or 5th day of March, 1879, by her brother Frederick Adolph; that the letter was dated at Wichita, and was in the handwriting of her brother; that she had searched for the letter, but could not find the same, it being lost; that she remembered and could state the contents of the letter.

"Thereupon the defendants' counsel asked the question: 'State the contents of that letter.' To which the plaintiff objected, on the ground that the same is incompetent, irrelevant, and hearsay. The objection was sustained, and the defendants duly excepted. The following is the letter as stated by witness:

"Wichita, Kansas,

"March 4th or 5th or 3d or 4th — I don't know — 1879.

"Dear sister and all: I now in my usual style drop you a few lines to let you know that I expect to leave Wichita on or about March the 5th, with a certain Mr. Hillmon, a sheep-trader, for Colorado or parts unknown to me. I expect to see the country now. News are of no interest to you, as you are not acquainted here. I will close with compliments to all inquiring friends. Love to all.

"I am truly your brother,

FRED. ADOLPH WALTERS."

Alvina D. Kasten testified that she was twenty-one years of age and resided in Fort Madison; that she was engaged to be married to Frederick Adolph Walters; that she last saw him on March 24, 1878, at Fort Madison; that he left there at that time, and had not returned; that she corresponded regularly with him, and received a letter about every two weeks until March 3, 1879, which was the last time she received a letter from him; that this letter was dated at Wichita, March 1, 1879, and was addressed to her at Fort Madison, and the envelope was postmarked "Wichita, Kansas, March 2, 1879;" and that she had never heard from or seen him since that time.

The defendants put in evidence the envelope with the postmark and address; and thereupon offered to read the letter in evidence. The plaintiff objected to the reading of the letter, the court sustained the objection, and the defendants excepted.

This letter was dated "Wichita, March 1, 1879," was signed by Walters, and began as follows:

"Dearest Alvina: Your kind and ever welcome letter was received yesterday afternoon about an hour before I left Emporia. I will stay here until the fore part of next week, and then will leave here to see a part of the country that I never expected to see when I left home, as I am going with a man by the name of Hillmon, who intends to start a sheep ranch, and as he promised me more wages than I could make at anything else I concluded to take it, for a while at least,

until I strike something better. There is so many folks in this country that have got the Leadville fever, and if I could not of got the situation that I have now I would have went there myself; but as it is at present I get to see the best portion of Kansas, Indian Territory, Colorado, and Mexico. The route that we intend to take would cost a man to travel from $150 to $200, but it will not cost me a cent; besides, I get good wages. I will drop you a letter occasionally until I get settled down; then I want you to answer it."

Rulings upon other questions of evidence, excepted to at the trial, are not reported, because not passed upon by this court.

The court, after recapitulating some of the testimony introduced, instructed the jury as follows: "You have perceived from the very beginning of the trial that the conclusion to be reached must practically turn upon one question of fact, and all the large volume of evidence, with its graphic and varied details, has no actual significance, save as the facts established thereby may throw light upon and aid you in answering the question, Whose body was it that on the evening of March 18, 1879, lay dead by the camp-fire on Crooked Creek? The decision of that question decides the verdict you should render."

The jury, being instructed by the court to return a separate verdict in each case, returned verdicts for the plaintiff against the three defendants respectively for the amounts of their policies, and interest, upon which separate judgments were rendered. The defendants sued out four writs of error, one jointly in the three cases as consolidated, and one in each case separately.

Mr. Julien T. Davies, (*Mr. J. W. Green* and *Mr. E. L. Short* were on his brief,) for the New York Company, contended as to the consolidation of the causes:

The right of the Circuit Court to try separate causes of a like nature or relative to the same question at the same time and before the same jury, and to consolidate causes, rests upon section 921 of the Revised Statutes of the United States.

Argument for Defendant in Error.

Under this statute causes could be tried together, but not necessarily thereby consolidated. The ideas are distinct between trying causes together or consolidating them for trial by order, and directing them to be tried as one cause, and therefore virtually consolidating them.

Under this section, speaking generally, two classes of cases in which in the Circuit Courts of the United States a trial of different causes of action has been had properly at the same time and before the same jury, when such causes were of a like nature or relative to the same question: (1) Where one case is ordered to be tried and the other cases are ordered to abide the event of the one ordered for trial; (2) Where there is an absolute consolidation of different causes of action against the same defendants.

The class of cases, to which those before the court belong, constitutes a third class, in which a consolidation for trial of different causes of action against different defendants for the purposes of saving time has been ordered.

We claimed that the court had no power to make the order here complained of, because: (*a*) The causes were not of a like nature or relative to the same question; (*b*) An order for consolidation for purposes of trial where there are different defendants is not conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and is not reasonable. Tidd's Pr. (3d Am. ed.) 614; *Worley* v. *Glentworth*, 5 Halsted, (10 N. J. Law,) 241; *Howard* v. *Chamberlin*, 64 Georgia, 654, 696.

Mr. Samuel A. Riggs and *Mr. L. B. Wheat* (with whom were *Mr. John Hutchings* and *Mr. R. J. Borghalthaus* on the brief) for defendant in error.

When the actions were so consolidated that the matter of impanelling a jury was to be proceeded with, § 819, Rev. Stat. was applicable, and limited the parties to three challenges. 1 Thompson on Trials, § 46 and n. 1.

If each plaintiff in error was entitled to three peremptory challenges, then of course the defendant in error would have

been entitled to the same number; so that twelve jurors, equivalent to a full panel, could have been peremptorily challenged without the consent of either one of the defendants; or if each plaintiff in error was entitled to three peremptory challenges and defendant in error to only three, then in addition to this favor being three to one against defendant in error each defendant might have been required to see half of a full panel peremptorily challenged off in addition to the six challenges allowed by that section.

As to the 86th assignment of error relating to testimony of Miss Alvina Kasten it will be noticed that the envelope was introduced in evidence and that witness showed when and from whence she received the letter, but the contents of the letter were not permitted to be given to the jury. Considering that, together with the 74th and 85th assignments of error, we submit that the contents of the three letters therein referred to were incompetent and hearsay. Neither was written by Walters at a time when he expected to die; the statements therein were not made under the obligation of an oath, nor under circumstances in law equivalent thereto; nor under any such circumstances as would render or make them *res gestæ* as to any act or fact competent to be proven. Whether he did or went according to any statement in either of those letters, or whether he had anything to do with any other person, or whether he made or had any transaction with any other person, or knew or had seen any other person named in either of said letters, were questions of fact to be proved as any other fact; and his statement thereof or of any intention in any of said letters expressed, was not competent evidence against any other person whomsoever. Such statements were not *res gestæ* as to any fact, material or competent in this case, but only of the fact of writing the letters.

The contents of those letters were no more competent than a letter written by any other person to any other person would have been if such last mentioned letters had contained similar statements therein, or any other statement. *Insurance Co.* v. *Guardiola*, 129 U. S. 642; *State* v. *Medlicott*, 9 Kansas, 257; *Simpson* v. *Smith*, 27 Kansas, 565; *State* v. *Smith*, 35 Kansas,

618; *Dwyer* v. *Dunbar*, 5 Wall. 318; *People* v. *Fong Ah Sing*, 64 California, 253; *State* v. *Draper*, 65 Missouri, 335, 340; *Barfield* v. *Britt*, 2 Jones (Law) N. C. 41; *S. C.* 62 Am. Dec. 190; *Leiber* v. *Commonwealth*, 9 Bush, 11; *Lund* v. *Tyngsborough*, 9 Cush. 36; *S. C.* 59 Am. Dec. 159; *Commonwealth* v. *Densmore*, 12 Allen, 535; *Rex* v. *Mead*, 2 B. & C. 605.

Mr. Edward S. Isham (with whom were *Mr. James W. Green* and *Mr. William G. Beale* on the brief) for the Connecticut Mutual Life Insurance Company, plaintiff in error.

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

The order of the Circuit Court that the three actions be consolidated for trial, because they appeared to the court to be of like nature and relative to the same question, because it would avoid unnecessary cost and delay, and because it was reasonable to do so, was within the discretionary power of the court, under section 921 of the Revised Statutes, which provides, in substantial accordance with the act of July 22, 1813, c. 14, § 3, (3 Stat. 21,) that "when causes of a like nature or relative to the same question are pending before a court of the United States, or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

The consolidation rule, introduced in England by Lord Mansfield, to avoid the expense and delay attending the trial of a multiplicity of actions upon the same question arising under different policies of insurance, enabled the several insurers to have proceedings stayed in all actions except one, upon undertaking to be bound by the verdict in that one, to admit all facts not meant to be seriously disputed, and not to file a bill in equity or bring a writ of error; and was considered as a favor to the defendants; and insurers under different policies could not obtain such a rule without the plaintiff's consent.

1 Tidd's Practice (9th ed.) 614, 615; *McGregor* v. *Horsfall*, 3 M. & W. 320. The English practice appears to have been followed in early times in New York. *Camman* v. *New York Ins. Co.*, 1 Caines, 114; *S. C.* Coleman & Caines, 188; *Thompson* v. *Shepherd*, 9 Johns. 262. The later cases in New York, cited at the bar, were governed by statute. *Brewster* v. *Stewart*, 3 Wend. 441; *Mayor* v. *Mayor*, 64 How. Pract. 230.

Where the English consolidation rule has not been adopted, the American courts, state and federal, have exercised the authority of ordering several actions by one plaintiff against different defendants to be tried together, whenever the defence is the same, and unnecessary delay and expense will be thereby avoided. *Den* v. *Kimble*, 4 Halst. (9 N. J. Law) 335; *Worley* v. *Glentworth*, 5 Halst. (10 N. J. Law) 241; *Witherlee* v. *Ocean Ins. Co.*, 24 Pick. 67; *Wiede* v. *Insurance Cos.*, 3 Chicago Legal News, 353; *Andrews* v. *Spear*, 4 Dillon, 470; *Keep* v. *Indianapolis & St. Louis Railroad*, 3 McCrary, 302; 1 Thompson on Trials, § 210. The learning and research of counsel have produced no instance in this country, in which such an order, made in the exercise of the discretionary power of the court, unrestricted by statute, has been set aside on bill of exceptions or writ of error.

But although the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remained distinct, and required separate verdicts and judgments; and no defendant could be deprived, without its consent, of any right material to its defence, whether by way of challenge of jurors, or of objection to evidence, to which it would have been entitled if the cases had been tried separately. Section 819 of the Revised Statutes provides that in all civil cases "each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section." Under this provision, defendants sued together upon one cause of action would be entitled to only three peremptory challenges in all. But defendants in different actions cannot be deprived of their several challenges,

by the order of the court, made for the prompt and convenient administration of justice, that the three cases shall be tried together. The denial of the right of challenge, secured to the defendants by the statute, entitles them to a new trial.

There is, however, one question of evidence so important, so fully argued at the bar, and so likely to arise upon another trial, that it is proper to express an opinion upon it.

This question is of the admissibility of the letters written by Walters on the first days of March, 1879, which were offered in evidence by the defendants, and excluded by the court. In order to determine the competency of these letters, it is important to consider the state of the case when they were offered to be read.

The matter chiefly contested at the trial was the death of John W. Hillmon, the insured; and that depended upon the question whether the body found at Crooked Creek on the night of March 18, 1879, was his body, or the body of one Walters.

Much conflicting evidence had been introduced as to the identity of the body. The plaintiff had also introduced evidence that Hillmon and one Brown left Wichita in Kansas on or about March 5, 1879, and travelled together through Southern Kansas in search of a site for a cattle ranch, and that on the night of March 18, while they were in camp at Crooked Creek, Hillmon was accidentally killed, and that his body was taken thence and buried. The defendants had introduced evidence, without objection, that Walters left his home and his betrothed in Iowa in March, 1878, and was afterwards in Kansas until March, 1879; that during that time he corresponded regularly with his family and his betrothed; that the last letters received from him were one received by his betrothed on March 3 and postmarked at Wichita March 2, and one received by his sister about March 4 or 5, and dated at Wichita a day or two before; and that he had not been heard from since.

The evidence that Walters was at Wichita on or before March 5, and had not been heard from since, together with the evidence to identify as his the body found at Crooked

Creek on March 18, tended to show that he went from Wichita to Crooked Creek between those dates. Evidence that just before March 5 he had the intention of leaving Wichita with Hillmon would tend to corroborate the evidence already admitted, and to show that he went from Wichita to Crooked Creek with Hillmon. Letters from him to his family and his betrothed were the natural, if not the only attainable, evidence of his intention.

The position, taken at the bar, that the letters were competent evidence, within the rule stated in *Nicholls* v. *Webb*, 8 Wheat. 326, 337, as memoranda made in the ordinary course of business, cannot be maintained, for they were clearly not such.

But upon another ground suggested they should have been admitted. A man's state of mind or feeling can only be manifested to others by countenance, attitude or gesture, or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen. When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention. But whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party.

The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony that he then had that intention would be. After his death there can hardly be any other way of proving it; and while he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation.

The letters in question were competent, not as narratives of

facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon, than if there had been no proof of such intention. In view of the mass of conflicting testimony introduced upon the question whether it was the body of Walters that was found in Hillmon's camp, this evidence might properly influence the jury in determining that question.

The rule applicable to this case has been thus stated by this court: "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light, and to give them their proper effect. As independent explanatory or corroborative evidence, it is often indispensable to the due administration of justice. Such declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury." *Insurance Co.* v. *Mosley*, 8 Wall. 397, 404, 405.

In accordance with this rule, a bankrupt's declarations, oral or by letter, at or before the time of leaving or staying away from home, as to his reason for going abroad, have always been held by the English courts to be competent, in an action by his assignees against a creditor, as evidence that his departure was with intent to defraud his creditors, and therefore an act of bankruptcy. *Bateman* v. *Bailey*, 5 T. R. 512; *Rawson* v. *Haigh*, 9 J. B. Moore, 217; *S. C.* 2 Bing. 99; *Smith* v. *Cramer*, 1 Scott, 541; *S. C.* 1 Bing. N. C. 585.

The highest courts of New Hampshire and Massachusetts have held declarations of a servant, at the time of leaving his master's service, to be competent evidence, in actions between third persons, of his reasons for doing so. *Hadley* v. *Carter*,

8 N. H. 40; *Elmer* v. *Fessenden*, 151 Mass. 359. And the Supreme Court of Ohio has held that, for the purpose of proving that a person was at a railroad station intending to take passage on a train, previous declarations made by him at the time of leaving his hotel were admissible. *Lake Shore &c. Railroad* v. *Herrick*, 29 Northeastern Reporter, 1052. See also *Jackson* v. *Boneham*, 15 Johns. 226; *Gorham* v. *Canton*, 5 Greenl. 266; *Kilburn* v. *Bennett*, 3 Met. 199; *Lund* v. *Tyngsborough*, 9 Cush. 36.

In actions for criminal conversation, letters by the wife to her husband or to third persons are competent to show her affection towards her husband, and her reasons for living apart from him, if written before any misconduct on her part, and if there is no ground to suspect collusion. *Trelawney* v. *Coleman*, 2 Stark. 191, and 1 B. & Ald. 90; *Willis* v. *Bernard*, 5 Car. & P. 342, and 1 Moore & Scott, 584; *S. C.* 8 Bing. 376; 1 Greenl. Ev. § 102. So letters from a husband to a third person, showing his state of feeling, affection and sympathy for his wife, have been held by this court to be competent evidence, bearing on the validity of the marriage, when the legitimacy of their children is in issue. *Gaines* v. *Relf*, 12 How. 472, 520, 534.

Even in the probate of wills, which are required by law to be in writing, executed and attested in prescribed forms, yet where the validity of a will is questioned for want of mental capacity or by reason of fraud and undue influence, or where the will is lost and it becomes necessary to prove its contents, written or oral evidence of declarations of the testator before the date of the will has been admitted, in Massachusetts and in England, to show his real intention as to the disposition of his property, although there has been a difference of opinion as to the admissibility, for such purposes, of his subsequent declarations. *Shailer* v. *Bumstead*, 99 Mass. 112; *Sugden* v. *St. Leonards*, 1 P. D. 154; *Woodward* v. *Goulstone*, 11 App. Cas. 469, 478, 484, 486.

In *Shailer* v. *Bumstead*, upon the competency of evidence offered to show that a will propounded for probate "was not the act of one possessed of testamentary capacity, or was

obtained by such fraud and undue influence as to subvert the real intentions and will of the maker," Mr. Justice Colt said: "The declarations of the testator accompanying the act must always be resorted to as the most satisfactory evidence to sustain or defend the will, whenever this issue is presented. So it is uniformly held that the previous declarations of the testator, offered to prove the mental facts involved, are competent. Intention, purpose, mental peculiarity and condition, are mainly ascertainable through the medium afforded by the power of language. Statements and declarations, when the state of the mind is the fact to be shown, are therefore received as mental acts or conduct." 99 Mass. 120.

In *Sugden* v. *St. Leonards*, which arose upon the probate of the lost will of Lord Chancellor St. Leonards, the English Court of Appeal was unanimous in holding oral as well as written declarations made by the testator before the date of the will to be admissible in evidence. Lord Chief Justice Cockburn said: "I entertain no doubt that prior instructions, or a draft authenticated by the testator, or verbal declarations of what he was about to do, though of course not conclusive evidence, are yet legally admissible as secondary evidence of the contents of a lost will." 1 P. D. 226. Sir George Jessel, M. R., said: "It is not strictly evidence of the contents of the instrument, it is simply evidence of the intention of the person who afterwards executes the instrument. It is simply evidence of probability — no doubt of a high degree of probability in some cases, and of a low degree of probability in others. The cogency of the evidence depends very much on the nearness in point of time of the declaration of intention to the period of the execution of the instrument." 1 P. D. 242. Lord Justice Mellish said: "The declarations which are made before the will are not, I apprehend, to be taken as evidence of the contents of the will which is subsequently made — they obviously do not prove it; and wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were." 1 P. D. 251.

Upon an indictment of one Hunter for the murder of one Armstrong at Camden, the Court of Errors and Appeals of New Jersey unanimously held that Armstrong's oral declarations to his son at Philadelphia, on the afternoon before the night of the murder, as well as a letter written by him at the same time and place to his wife, each stating that he was going with Hunter to Camden on business, were rightly admitted in evidence. Chief Justice Beasley said: "In the ordinary course of things, it was the usual information that a man about leaving home would communicate, for the convenience of his family, the information of his friends, or the regulation of his business. At the time it was given, such declarations could, in the nature of things, mean harm to no one; he who uttered them was bent on no expedition of mischief or wrong, and the attitude of affairs at the time entirely explodes the idea that such utterances were intended to serve any purpose but that for which they were obviously designed. If it be said that such notice of an intention of leaving home could have been given without introducing in it the name of Mr. Hunter, the obvious answer to the suggestion, I think, is that a reference to the companion who is to accompany the person leaving is as natural a part of the transaction as is any other incident or quality of it. If it is legitimate to show by a man's own declarations that he left his home to be gone a week, or for a certain destination, which seems incontestable, why may it not be proved in the same way that a designated person was to bear him company? At the time the words were uttered or written, they imported no wrongdoing to any one, and the reference to the companion who was to go with him was nothing more, as matters then stood, than an indication of an additional circumstance of his going. If it was in the ordinary train of events for this man to leave word or to state where he was going, it seems to me it was equally so for him to say with whom he was going." *Hunter* v. *State*, 11 Vroom (40 N. J. Law) 495, 534, 536, 538.

Upon principle and authority, therefore, we are of opinion that the two letters were competent evidence of the intention of Walters at the time of writing them, which was a material

Counsel for Plaintiff in Error.

fact bearing upon the question in controversy; and that for the exclusion of these letters, as well as for the undue restriction of the defendants' challenges, the verdicts must be set aside, and a new trial had.

As the verdicts and judgments were several, the writ of error sued out by the defendants jointly was superfluous, and may be dismissed without costs; and upon each of the writs of error sued out by the defendants severally the order will be

Judgment reversed, and case remanded to the Circuit Court, with directions to set aside the verdict and to order a new trial.

SOUTH SPRING HILL GOLD MINING COMPANY *v.* AMADOR MEDEAN GOLD MINING COMPANY.

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

No. 338. Submitted April 27, 1892. — Decided May 16, 1892.

The court, being informed that the control of both the corporations, parties to this suit, had come into the hands of the same persons, but that there was a minority of stockholders in the Amador Medean Gold Mining Company who retained the interest that they had, at the time the decision was rendered — that the two corporations were still in existence and organized — and that the present managers and owners of the properties were anxious that the question should be decided, in order that the minority of the stockholders might receive whatever, by the finding of the court, would be due to them — reverses the judgment and remands the case for further proceedings in conformity to law, without considering or passing upon the merits of the case in any respect.

THE case is stated in the opinion.

Mr. George S. Boutwell for plaintiff in error.

No appearance for defendant in error.

Opinion of the Court.

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

This was an action brought by the Amador Medean Gold Mining Company against the South Spring Hill Gold Mining Company in the Circuit Court of the United States for the Northern District of California, where it was tried on an agreed statement of facts, and a judgment rendered in favor of the plaintiff, to review which this writ of error was prosecuted. The opinion of Judge Sawyer, holding the Circuit Court, will be found reported in 36 Fed. Rep. 668.

When the case came on for argument in this court the attorney for plaintiff in error very properly called our attention to the fact that, since the decision in the Circuit Court, "the control of both the corporations, parties to this suit, had come into the hands of the same persons, but that there was a minority of stockholders in the Amador Medean Gold Mining Company who retained the interest that they had at the time the decision was rendered;" "that the two corporations were still in existence and organized, and that the present managers and owners of the properties were anxious that the question should be decided, in order that the minority of the stockholders might receive whatever, by the finding of the court, would be due to them." No appearance has been entered for defendant in error, but a copy of the opening and closing briefs, filed on its behalf in the Circuit Court, has been printed and filed here by plaintiff in error. We cannot, however, consent to determine a controversy in which the plaintiff in error has become the *dominus litis* on both sides. We assume that this is not an agreed case gotten up by collusion; but the litigation has ceased to be between adverse parties, and the case therefore falls within the rule applied where the controversy is not a real one. *Wood-paper Company* v. *Heft*, 8 Wall. 333; *Cleveland* v. *Chamberlain*, 1 Black, 419; *Lord* v. *Veazie*, 8 How. 251; *Washington Market Co.* v. *District of Columbia*, 137 U. S. 62.

If the writ of error be dismissed the judgment will remain undisturbed, and the plaintiff in error might be cut off from

submitting the questions involved to the determination of the appellate tribunal; while if the judgment be reversed the minority of the stockholders of defendant in error would be deprived of the benefit of an adjudication in its favor. But although the latter might be thereby subjected to the delay and expense of further litigation, they would still be free to vindicate whatever rights they are entitled to.

Without considering or passing upon the merits of the case in any respect, we deem it most consonant to justice to reverse the judgment and remand the case for further proceedings in conformity to law, and it is so ordered.

HOYT *v.* HORNE.

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

No. 336. Argued April 26, 27, 1892. — Decided May 16, 1892.

The machine manufactured under letters patent No. 347,043, issued August 10, 1886, to John H. Horne for "new and useful improvements in rag engines for beating paper-pulp" is an infringement of the first claim in letters patent No. 303,374, issued August 12, 1884, to John Hoyt, for a rag engine for paper making.

Whether it infringes the second claim in Hoyt's patent is not decided.

THE court stated the case as follows:

This was a bill in equity for the infringement of letters patent No. 303,374, issued August 12, 1884, to John Hoyt, for a rag engine for paper making. "This invention," said the patentee in his specification, "relates to engines for beating rags and similar fibrous material into pulp for the manufacture of paper. In these machines a beater-roll set with knives around its periphery is used, in combination with a bed-plate also set with knives, the said parts being placed in a tank or vessel in which a constant circulation of the material to be pulped is maintained.

Statement of the Case.

"Heretofore ordinarily the material has been circulated horizontally around an upright partition termed a 'mid-fellow,' and the beater-roll and bed-plate have been placed in the alley or channel between this mid-fellow and one side of the tank. The beater-roll lifted the material over a sort of dam, (termed a 'back-fall,') and the material then flowed by the action of gravity around the mid-fellow and entered again between the beater-roll and the bed-plate. It has, however, been proposed to dispense with the mid-fellow and have the material turned under the back-fall and bed-plate. In either case, however, the circulating force is that of gravity due to the piling up of the liquid or semi-liquid on the side of the back-fall opposite from the beater-roll. Consequently the flow is comparatively feeble, and it is necessary to use a large quantity of water in order to prevent the fibre in suspension from depositing. In the present invention a much more rapid and vigorous circulation is maintained. The beater-roll is placed at one end of the vat, which is of a depth sufficient to contain it, and the other part of the vat is divided by a horizontal partition or division, which extends from the beater-roll nearly to the other end. The material to be pulped is carried around by the beater-roll, and is delivered into the upper section above the partition. It flows over the partition, then passes down around the end of the same, and returns through the lower section of the vat to the beater-roll. The bed-plate is placed at the bottom of the vat under the beater-roll. The beater-roll not only draws in the material, creating a partial vacuum in the lower section of the vat, but delivers it into the upper section with considerable force, impelling it forward very rapidly. By the aid of this more rapid as well as more vigorous circulation not only is the material returned more quickly, and therefore acted upon more often by the beater-roll in the same time, but it may be worked with a much less quantity of water, and thereby very important advantages may be secured. These advantages are, first, in the improved quality of the product, for when a considerable body of the fibrous material is drawn between the knives the different pieces are rubbed together and thus disintegrated without

destroying the length and felting quality of the fibre, whereas when the pulp is thin the pieces are ground individually, as it were, between the knives, and the integrity of the fibre in large measure destroyed; secondly, in the greater quantity of pulp which can be prepared in a medium of given size, owing to the larger proportion of fibrous material in the charge; and, thirdly, in avoiding the liability of the fibrous material depositing out of the liquid and lodging in the channels. . . .

"The operation of the engine is as follows: The beater-roll and bed-plate knives being adjusted properly, the vat is filled with the rags or fibrous material to be pulped and the proper quantity of water. The beater-roll being revolved at the proper speed — say, for a roll four feet in diameter, at the speed of one hundred and twenty revolutions per minute — the rags and liquid are drawn between the knives, are carried up by the beater-roll, and thrown over the edge of the plate P. They flow around the partition N with considerable velocity and return again and again to be acted upon by the knives. The roll is revolved until the pulp is properly reduced.

"Modifications may be made in details of construction without departing from the spirit of the invention, and parts thereof can be separately used if desired."

The claims alleged to have been infringed were as follows:

"1. The improvement in beating rags to pulp in a rag engine having a beater-roll and bed-plate knives, consisting in circulating the fibrous material and liquid in vertical planes, drawing the same between the knives at the bottom of the vat, carrying it around and over the roll and delivering it into the upper section of the vat, substantially as described.

"2. A rag engine for paper-making, comprising the vat, the beater-roll mounted on a horizontal shaft in one end of the vat, and the horizontal partition dividing the body of the vat into an upper and a lower section or passage, the fibrous material and liquid being carried from the lower section between the knives and delivered over the top of the beater-roll into the upper section or passage, substantially as described."

The device employed by the defendant was manufactured

under letters-patent No. 347,043, issued August 10, 1886, to John H. Horne, the defendant. With relation to the peculiar feature of his invention he stated in his specification as follows: "One great difficulty hitherto in the construction of these engines, whatever may be the path of travel given to the material contained in them, consists in the fact that the various fibres or bunches of fibre, after being placed within the engine, maintain concentric paths of movement with respect to each other. Thus a piece of stock located near the sides of the tub, or one placed near the mid-feather, will continue to travel in concentric paths until the engine is emptied, except in case manual labor is applied with a paddle to disturb their courses and compel them to deviate therefrom; hence it is obvious that the fibre travelling the more rapidly will be reduced more quickly, and the 'stuff' is of uneven quality. . . .

"The essential object of my invention is to effect a change in the course of the material in the engine automatically and obliquely to the longitudinal axis of the engine during each complete passage thereof around the tub, and thereby thoroughly mix the stock. Thus the particles which are nearest the mid-feather in one passage about the tub, and which therefore travelled the fastest, are directed and changed obliquely across the engine prior to their passage about the roll, and hence they will emerge and are located near the side. Such stock will consequently travel the slowest during the next passage around the tub, since it remains contiguous to the retaining-walls of the latter. This mixing and stirring of the material within the tub is effected primarily by the shape of the tub in cross-section, the width of which is equal to the active face of the roll, or thereabouts, the latter located in one end thereof. Thus to effect the desired change in the path of movement of the stock the proportions of the tub are altered, and in cross-section the two passages formed in the tub by the mid-feather are twice as deep as they are wide, or thereabout. Again, the stock is permitted to fill the entire width of the engine just prior to its entrance beneath the roll, and also immediately after leaving the same; hence the mid-feather terminates a

short distance before reaching the roll, and the stock, as it approaches the latter, as before premised, is permitted to spread out and fill the entire width of the engine. . . . After the passage of the stock between the roll and the bed-plate, the particles composing it are directed upon and over the back-fall, which here extends entirely across the engine and in front of the roll, but contracts as it extends away from the latter, until it unites with the mid-feather, whence it is continued downward between the latter and the side of the engine to the bottom of the tub. This contraction of one-half its width again restores the mass of stock to a general vertical position, and the latter is so maintained until just prior to its return passage beneath the roll. Thus it will be evident that the fibres composing the material in process of being pulped cannot travel in continuous concentric paths of movement, but are changed and forced obliquely of the engine, whereby a thorough mixing of the stock is automatically effected by the spiral motion imparted to it both before and after leaving the roll."

The case was heard in the Circuit Court upon pleadings and proofs, and a final decree entered dismissing the bill upon the ground that the defendant had not infringed the plaintiff's patent. 35 Fed. Rep. 830. From this decree the plaintiff appealed to this court.

Mr. Philip Mauro and *Mr. Anthony Pollok* for appellant.

Mr. Frederick P. Fish (with whom was *Mr. W. K. Richardson* on the brief) for appellee.

Mr. Justice Brown delivered the opinion of the court.

The engine in ordinary use by paper makers for the reduction of rags to pulp prior to the invention in question consisted of a tub about fourteen feet in length with straight sides and semicircular ends. Through the centre of this ran a vertical partition called the mid-feather, extending lengthwise of the tub, and with sufficient room between the ends of

the partition and the ends of the tub to allow the pulp to pass around from one side of the tub to the other. Midway of the tub and between the mid-feather and one side was a wheel or beater-roll, armed with knives, placed longitudinally upon the periphery of the wheel. Beneath the roll were corresponding knives in the bed-plate, and by the revolution of the wheel the rags were drawn between these knives and reduced to pulp. At one side of the roll the bottom of the tub was curved upwards forming a ridge or dam, termed a back-fall, about four inches high extending across the channel parallel with the roll. The beater-roll revolved away from the top of the back-fall, and the material being lifted by the rotation of the roll to the top of the back-fall, slid down the incline by gravity, which was the only force acting to cause a flow of nearly thirty feet, from the back of the beater-roll around to the front of it again. The speed of the pulp was thus necessarily very slow.

1. The novelty and patentability of the Hoyt patent were not denied, though two prior patents were referred to for the purpose of limiting its claims. The Umpherston engine was patented in England in April, 1884, a few months before the Hoyt patent was issued in this country. This machine differs from the old tub only in the fact that the mid-feather runs horizontally instead of vertically, and the return passage or channel for the pulp is underneath instead of alongside of the channel containing the beater-roll. Apparently the only advantage which it possesses over the old one is in economy of floor space.

The Cooke engine, patented in England in 1880, is a machine of the type known as disk-grinders, and is not a beating engine of the type of the machines involved in this suit. It has no beater-roll, the grinding being done by two disks at the end of the tub between which the pulp is drawn in at the centre of the disks, and works its way outward to the periphery between the grinding surfaces. It seems to us to have little bearing upon the present case except in the fact that the grinding mechanism is located at the end of the tub instead of in the centre.

The Hoyt engine differs from the old tub in ordinary use

in two or three important particulars. First, the beater-roll is located at the end of the tub, instead of in the centre, having in this particular a certain resemblance to the Cooke machine; second, the mid-feather runs horizontally instead of vertically, a feature in which it resembles the Umpherston engine; and, third, the beater-roll extends across the whole width of the tub, and its revolutions are toward instead of away from the top of the back-fall or dam. The result of this is such a greatly increased speed in the flow of the pulp that it is said to be brought in contact with the knives twelve times as often as was possible in the old tub or engine.

The circulation of the material around the roll in vertical planes is the salient feature of the Hoyt invention, and its utility is shown in its general adoption by paper makers.

2. The main question in the case is that of infringement. In the defendant's engine the beater-roll is also located at the end of the tub and extends across its entire width; the top of the back-fall or dam also extends across the entire width in front of the beater-roll, but narrows at one side as it descends to the bottom of the tub to one-half of its width. The mid-feather is made vertical instead of horizontal, so that the pulp after it leaves the dam circulates in a horizontal instead of a vertical plane; but as it returns to the beater-roll it passes back under the dam, spreading out to the entire width of the tub, and is taken up by the beater-roll precisely as in the Hoyt patent. It is insisted by the defendant in this connection that there is no infringement of the first claim of the Hoyt patent, since the pulp is not circulated "in vertical planes," nor is it delivered by the beater-roll "into the upper section of the vat," as specified in that claim. Literally it is not. A technical reading of the specification undoubtedly required that the mid-feather should run horizontally instead of vertically; but the object of this was that the pulp should be received and delivered by the beater-roll along its entire length, viz.: across the entire width of the tub, and this is accomplished in the same way in both devices. In both engines the beater-roll revolves toward the top of the dam or back-fall, and a similar acceleration of speed is obtained. How

the pulp shall circulate at the other end of the tub is a matter of small consequence so long as it shall circulate in vertical planes at the point where it comes in contact with the roll.

An additional function is claimed for the Horne device in the fact that the pulp, falling as it descends the dam from a vertical to a horizontal plane in a kind of torsional current, is more thoroughly mixed than in the Hoyt device, where the pulp continues to flow in parallel lines from the time it is delivered by the beater-roll to the time it is received by it again. This may be true, and defendant's engine may be in this particular an improvement upon the other; but he has none the less succeeded in appropriating all that was of value in the Hoyt device, viz.: the beater-roll at the end of the tub, extending across its entire width, and the circulation of the pulp in vertical planes at the only point where such circulation is of value. The substitution of a vertical for a horizontal mid-feather at the inoperative end of the tub is merely the use of an old and well known mechanical equivalent, and obviously intended to evade the wording of the claims of the Hoyt patent. *Winans* v. *Denmead*, 15 How. 330. Indeed, the ingenuity displayed in this evasion is only equalled by the ingenuity with which it is concealed in the specification of the defendant's patent, and the function of a more thorough mixture of the pulp put forward as the salient feature of the invention. The actual intent to evade is the more manifest from the fact that Horne, under a contract with the plaintiff, made seventeen machines according to the plaintiff's patent, but owing to some disagreement as to the quality of the work done by him, the contract was terminated, and Horne began the production of his own engines, and subsequently took out a patent for his invention.

We are, therefore, of opinion that defendant's machine is an infringement of the first claim of the plaintiff's patent. Whether it be an infringement of the second claim admits of more doubt, since that contemplates a horizontal partition dividing the body of the vat into an upper and lower section or passage. We do not, however, find it necessary to pass upon this question.

The decree of the court below is, therefore,

Reversed, and the case remanded with instructions to enter a decree for the plaintiff upon the first claim, and for further proceedings in conformity with this opinion.

PICKERING *v.* LOMAX.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 342. Argued and submitted April 27, 1892. — Decided May 16, 1892.

The treaty of Prairie du Chien, 7 Stat. 320, made grants of lands to certain Indians, upon condition that they should never be leased or conveyed by the grantees or their heirs, to any persons whatever, without the permission of the President of the United States. One of those grantees conveyed his land in 1858 by a deed which had endorsed upon it the approval of the President, given in 1871. The state court of Illinois held that the Indian had no authority to convey the land without permission from the President previously obtained. *Held*,

(1) That this ruling of the state court raised a Federal question;

(2) That the permission thus given by the President to the conveyance, after its execution and delivery, was retroactive and was equivalent to permission before execution and delivery, as no third parties had acquired an interest in the lands.

THE court stated the case as follows.

This was an action of ejectment brought by Pickering against John A. Lomax and William Kolze to recover two parcels of land in Cook County, Illinois, which had originally been granted by the United States to certain Indians under the treaty of Prairie du Chien of July 29, 1829. A jury was waived, the case tried by the court, and a judgment rendered in favor of the defendants. The plaintiff thereupon sued out a writ of error from the Supreme Court of Illinois, which affirmed the judgment of the lower court.

Upon the trial, in order to establish his title, the plaintiff offered in evidence article 4 of the treaty of Prairie du Chien, (7 Stat. 320, 321,) which, so far as the same is material, reads as follows:

Statement of the Case.

"There shall be granted by the United States, to each of the following persons, (being descendants from Indians,) the following tracts of land, viz.: To Claude Laframboise, one section of land on the Rivière aux Pleins, adjoining the line of the purchase of 1816; . . . to Alexander Robinson, for himself and children, two sections on the Rivière aux Pleins, above and adjoining the tract herein granted to Claude Laframboise. . . . The tracts of land herein stipulated to be granted, shall never be leased or conveyed by the grantees, or their heirs, to any persons whatever, without the permission of the President of the United States."

Plaintiff then offered in evidence a copy of the patent issued December 28, 1843, signed by President Tyler under the provisions of the above treaty, granting the lands, including those in litigation, to Alexander Robinson for himself and children. The patent also contained the provision: "But never to be leased or conveyed by him, them, his or their heirs, to any person whatever, without the permission of the President of the United States."

The next instrument in plaintiff's chain of title was a decree in a suit in partition instituted February 22, 1847, in the Cook County Court of Common Pleas, between Alexander Robinson and his children, and evidence to show that the lands in question were set out to Joseph Robinson, one of the children.

The following deeds were then put in evidence:

Deed dated August 3, 1858, from Joseph Robinson and wife to John F. Horton, which had endorsed upon it the approval of the President of the United States, which approval was dated January 21, 1871.

Deed from Leon Straus, administrator, etc., of the estate of John F. Horton, deceased, to Moses W. Baer, dated October 6, 1863, and made in pursuance of an order of sale by the county court of Cook County for payment of debts.

Several intermediate conveyances of the premises, down to a deed dated November 10, 1866, from Henry H. Dyer and wife to Aquila H. Pickering, the plaintiff.

The defendant introduced no evidence, but at the close of the plaintiff's case moved that the plaintiff's testimony be

excluded, and the case dismissed, upon the ground that the deed of August 3, 1858, from Joseph Robinson and wife to John F. Horton was made in direct violation of the terms of the patent as to obtaining the approval of the President to the conveyance.

This motion was sustained, the court being of the opinion that Robinson had no authority to convey without obtaining the permission of the President beforehand; that the subsequent sanction obtained by persons claiming title under Robinson was invalid; and that even if such sanction would have the effect of giving force to the deed, yet, as the grantee under that deed was dead, the administrator's deed would not carry any title to the purchaser from the administrator, but that, if any title accrued by reason of the sanction of the President, it would be to the heirs of Horton.

Thereupon the court rendered judgment for the defendant, which was affirmed by the Supreme Court of Illinois, (120 Illinois, 293,) and the plaintiff sued out a writ of error from this court.

Mr. William E. Furness (with whom was *Mr. L. H. Bisbee* on the brief) for plaintiff in error.

Mr. Robert Hervey, for defendants in error, submitted on his brief.

I. The title to the lands did not pass to the Indians by the treaty. It only contained an agreement on the part of the government to convey, which did not pass a legal title. It was at most an equitable one. The legal title remained in the United States until the issuing of the patent nearly fifteen years afterwards. And then the limitation on the power of the patentees to convey formed a most important part of it, and this limitation clearly expressed in the patent, the Supreme Court of Illinois construed in the proceeding before it. Inasmuch as the titles to, and the conveyances of real property within any of the States, are exclusively matters for state jurisdiction, and as the Supreme Court of Illinois has in con-

struing the deed from Robinson (the Indian) to Horton, his grantee, decided that no title passed from Robinson to Horton for want of the permission of the President of the United States for the conveyance in apt time, my contention is that the decision of the Supreme Court of Illinois, settling as it does a question of the ownership of land within the State, and within, as I insist, the sole control of the Illinois court, is final and conclusive, and that in a case of this character, this court ought to follow and be bound by it, and that the writ of error in this cause ought to be dismissed for want of jurisdiction in this honorable court.

II. The conveyance from Joseph Robinson to John F. Horton, not having been permitted by the President of the United States before or at the time of its execution, was nugatory and could not be validated by any subsequent attempted approval. *Pickering* v. *Lomax*, 120 Illinois, 289, 293, 295.

If the tardy approval of the President was effective and had relation back to the time of the execution of the deed, that, under the law of Illinois, would not help the plaintiff in error, because the deed from the administrator of Horton, through which he claims, is not a deed purporting to convey the fee simple absolute. If the approval by President Grant in 1871, of a deed made by an Indian in 1858, whose power to convey was limited by the express terms of the patent, had any effect by relation, it was in favor of the heirs of John F. Horton and not of the plaintiff in error.

Mr. Justice Brown delivered the opinion of the court.

This case turns upon the question whether the act of Congress prohibiting Indian lands from being conveyed, except by permission of the President, is satisfied by his approval endorsed upon a deed thirteen years after its execution, and after the death of the grantee and the sale of the land by his administrator.

1. A preliminary question is made by the defendant in error, as to the jurisdiction of this court. By Rev. Stat. sec. 709, our authority to review final judgments or decrees of the highest

courts of a State extends to all cases "where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity." The argument of the defendant in this connection is that as the title to the lands did not pass by the treaty, which contained only an agreement to convey, the proviso ceased to be operative when the patent was issued in 1843; that the same restriction upon alienation contained in the patent was one which the Supreme Court of Illinois had considered; and that their construction, that no title passed from Robinson and Horton for want of permission of the President of the United States, could not be reviewed by this court. There are two sufficient answers to this contention. First, the proviso in the treaty did continue by its express terms to be operative, so long as the land was owned by the grantees or their heirs, and the object of carrying this proviso into the patent was merely to apprise intending purchasers of the restrictions imposed by the treaty upon the alienation of the lands. Second, the case raised the question of the validity of an authority exercised under the United States, viz.: the authority of the President to approve the deed thirteen years after its execution, and the decision of the Supreme Court of Illinois was against its validity; so that the case is directly within the words of the statute.

2. So far as the main question is concerned, we know of no reason why the analogy of the law of principal and agent is not applicable here, viz.: that an act in excess of an agent's authority, when performed, becomes binding upon the principal, if subsequently ratified by him. The treaty does not provide how or when the permission of the President shall be obtained, and there is certainly nothing which requires that it shall be given before the deed is delivered. *Doe* v. *Beardsley*, 2 McLean, 412. It is doubtless, as was said by the Supreme Court of Mississippi in *Harmon* v. *Partier*, 12 Sm. & Marsh. 425, 427, "a condition precedent to a perfect title" in the grantee; but the neglect in this case to obtain the approval of the President for thirteen years, only shows that for that length of time the title was imperfect, and that no action of ejectment

would have lain until the condition was performed. Had the grantee the day after the deed was delivered, sent it to Washington and obtained the approval of the President, it would be sticking in the bark to say that the deed was not thereby validated. A delay of thirteen years is immaterial, provided, of course, that no third parties have in the meantime legally acquired an interest in the lands.

If, after executing this deed, Robinson had given another to another person, with the permission of the President, a wholly different question would have arisen. But so far as Robinson and his grantees are concerned, the approval of the President related back to the execution of the deed and validated it from that time. As was said by this court in *Cook* v. *Tullis*, 18 Wall. 332, 338: "The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. The intervening rights of third persons cannot be defeated by the ratification." See also *Fleckner* v. *Bank of the United States*, 8 Wheat. 338, 363. In *Ashley* v. *Eberts*, 22 Indiana, 55, a similar act of the President approving a deed was held to relate back and give it validity from the time of its execution, so as to protect the grantee against a claim by adverse possession which arose in the interim between its date and the confirmation. "Otherwise," said the court, "a mere trespasser by taking possession after a valid sale and before its consummation, would have power to defeat a *bona fide* purchaser." This case was approved in *Steeple* v. *Downing*, 60 Indiana, 478, 497. In *Murray* v. *Wooden*, 17 Wend. 531, a conveyance of land by an Indian which, subsequent to its date, had been ratified by a certificate of approbation of the surveyor general in the form prescribed by law, was held to be inoperative upon the ground that, previous to the granting of such certificate, the Indian had conveyed to a third person, and the deed to such person had been approved in the mode prescribed by law previous to the endorsement of the certificate of approbation of the deed first executed. This was a clear case of rights intervening

between the execution of the first deed and its approval. In *Smith* v. *Stevens*, 10 Wall. 321, the right to convey the lands reserved for the benefit of the Indians was expressly vested in the Secretary of the Interior, upon the request of any one of the Indians named, and it was held that there being no ambiguity in the act which had provided the way in which the lands could be sold, by necessary implication it prohibited their being sold in any other way. "The sale in question not only contravened the policy and spirit of the statute, but violated its positive provisions." In that case there was no pretence that the requirements of the act had been fulfilled.

Nor do we consider it material that the grantee had in the meantime died, since, if the ratification be retroactive, it is as if it were endorsed upon the deed when given, and enures to the benefit of the grantee of Horton, the original grantee — not as a new title acquired by a warrantor subsequent to his deed enures to the benefit of the grantee, but as a deed imperfect when executed, may be made perfect as of the date when it was delivered. This was the ruling of the court in *Steeple* v. *Downing*, 60 Indiana, 478.

The object of the proviso was not to prevent the alienation of lands *in toto*, but to protect the Indian against the improvident disposition of his property, and it will be presumed that the President, before affixing his approval, satisfied himself that no fraud or imposition had been practised upon the Indian when the deed was originally obtained. Indeed, the record in this case shows that the President did not affix his approval until affidavits had been presented, showing that Pickering was the owner, and that the amount paid to Robinson was the full value of the land, and that the sale was an advantageous one to him.

We are constrained to differ with the Supreme Court of Illinois in its view of the treaty, and to hold that, so far as this question is concerned, plaintiff's chain of title contained no defect.

The judgment of the Supreme Court is, therefore,

Reversed, and the case remanded for further proceedings not inconsistent with this opinion.

FELIX *v.* PATRICK.

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

No. 301. Argued April 14, 1892. — Decided May 16, 1892.

F., a half-breed of the Sioux nation, received in 1857 a certificate of land-scrip under the treaty of July 15, 1830, 7 Stat. 328, and under the act of July 17, 1854, 10 Stat. 304, c. 83, which enacted that "no transfer or conveyance of any of said certificates or scrip shall be valid." In March, 1860, she executed a power of attorney in blank, and a quitclaim deed in blank, the name of the attorney, the description of the land, and the name of the grantee in the deed being omitted. These came into the possession of P., on the payment of $150, who inserted the name of R. as attorney, and his own name as grantee, and a tract of 120 acres in Omaha, of which he was already in possession, but without valid title, as the description. The deed was then delivered to him by R. and was put upon record. P. never informed F. of this location, or of the record of these several instruments, but remained in possession of the located tract, either personally or through his grantees. Congress, on the procurement of P., confirmed his title to the tract. 15 Stat. 186, c. 240; 269, c. 21. The half-breed was ignorant of all this until August, 1887, when the Sioux Indians became citizens of the United States by virtue of article 6 of the treaty of April 29, 1868, 15 Stat. 637. In 1888 the representatives of F., who had deceased, filed a bill in equity against P., setting forth these facts: averring that the power of attorney and quitclaim deed had been fraudulently procured by some persons unknown, and praying that P. should be decreed to have taken the title in trust for F., and that the power of attorney and the quitclaim deed should be declared to be fraudulent and a cloud upon plaintiffs' title, and that the defendants be directed to surrender the estate to plaintiffs. To this the defendants demurred, and the court below dismissed the bill. *Held*,

(1) That P. was chargeable with notice that the power and the quitclaim deed were intended as devices to evade the law against the assignment of the scrip, and that he acquired no title through them;

(2) That he acquired no additional rights through the confirmatory acts of Congress;

(3) That having no right to locate the scrip for his own benefit, he must be deemed to have located it for F. and as her representative;

(4) That this implied trust did not prevent him from taking and holding possession of the land adversely to her and for his own use and benefit;

(5) That, under these circumstances, F. was bound to use reasonable diligence in discovering the fraud, and seeking redress;

Statement of the Case.

(6) That, conceding that plaintiffs were incapable of being affected with laches so long as they maintained their tribal relations, the bill was fatally defective in not setting forth when and how the alleged frauds were discovered, in order that the court might clearly see whether it could not have been discovered before;

(7) That, in view of all the circumstances it would be inequitable to disturb the disposition made of the case below;

(8) That the most which could be justly demanded would be the repayment of the $150, with interest.

This was an appeal from a decree sustaining demurrers to a bill in equity filed by the heirs of Sophia Felix against the defendant Patrick and his grantees, for the purpose of having them declared trustees for the plaintiffs of certain lands in the city of Omaha, which, in 1861, he had caused to be entered in the name of Sophia Felix by virtue of certain scrip issued to her as a member of the Dakota or Sioux nation of Indians.

The allegations of the bill were, in substance, as follows:

1. That in 1854, Sophia Felix, being a half-breed of the Sioux or Dakota nation of Indians, residing in Minnesota, was under the treaty of July 15, 1830, and the act of Congress of July 17, 1854, entitled to have issued to her scrip for the location of 480 acres of land, as provided by that act. That in 1857 scrip was issued to her for 480 acres, and that before the location of said scrip the said Sophia Felix intermarried with one David Garnelle.

2. That on March 31, 1860, certain persons unknown, "by certain wicked devices and fraudulent means," procured the said Sophia with her husband, said David Garnelle, to execute a power of attorney in blank, also a quitclaim deed in blank, a copy of each of which was attached to the bill. The power of attorney omitted the name of the attorney, the number of the scrip and the description of the land, and authorized the person whose name was to be inserted to sell, and convey, and confirm unto the purchaser thereof the following described pieces or parcels of land, "to be located for us, and in our name," etc. The quitclaim deed also omitted the name of the grantee and the description of the land; but both instruments were otherwise in legal form.

3. That the defendant Patrick in November, 1861, pro-

cured from some person unknown possession of said scrip, to the amount of 120 acres, and on November 21 made application to the land office at Omaha to locate such scrip, and thereupon, in the name of said Sophia Felix, located the same upon certain described real estate in the county of Douglas and Territory of Nebraska. (These lands are now admitted to be within the limits of the city of Omaha.) That "at the time of said location, the said Sophia Felix had never parted with the title to or any interest in said scrip, and was the absolute owner thereof and sole beneficiary therein, and these facts the said Matthewson T. Patrick at that time and at all times well knew, and the said location enured wholly to the benefit of the said Sophia Felix," although she had no knowledge that Patrick had procured the possession of the said scrip or located the same. That the said Patrick "in securing possession of said scrip procured the same with the intent to appropriate the scrip to his own use and defraud the said Sophia Felix out of the same, and out of all interest therein, and out of all benefits thereunder, and located the same, designing it for his own use and benefit, and with the fraudulent intent to deprive the said Sophia Felix out of all benefit and interest therein."

4. That in the further prosecution of his scheme to defraud, Patrick secured the blank power of attorney and quitclaim deed, and shortly thereafter caused the power to be filled out with a description of the scrip, and of the property located with it, and caused the name of William Ruth to be inserted as the attorney to sell and convey the property, a description of which was so inserted; that he also caused the quitclaim deed to be filled out with a description of the property, and inserted his own name as grantee, making the instrument purport to be a conveyance by Sophia and David Garnelle to himself; that on September 7, 1863, he caused the said power of attorney and quitclaim deed to be filed for record in the recorder's office of Douglas County; and in furtherance of said wrongful designs caused the said William Ruth, named by himself as attorney, to execute and deliver to him a deed of the property, by virtue of his pretended authority, and caused the same to be filed for record.

5. That at and before the location of such scrip, defendant Patrick was in possession of the premises, and had attempted to acquire title to the same by preëmption, but in that respect was unsuccessful, and that said scrip was procured and located by him for his own benefit, and to acquire a title which he could not acquire under the preëmption acts.

6. That in furtherance of said scheme, the said Patrick procured the enactment of an act of Congress, approved February 2, 1869, confirming the title to the land in question to the parties holding by deed from the patentee.

7. That the said Patrick never informed the said Sophia or her husband, or any one related to her by blood, "that he had procured and located said scrip, or that he had procured said blank instruments and filled them out, or had caused a deed to be executed conveying to himself the real estate hereinbefore described, or that he claimed any ownership therein; but, on the contrary, fraudulently concealed the same and exercised every precaution to prevent said proceedings coming to the knowledge of said parties;" that, recognizing the frailty of his title, he endeavored for several years to secure the execution of a deed by the said Sophia and her husband without letting them know the character of the instrument whereby they would convey to him in fee the said property, and to that end procured his father to write a letter, a copy of which was made an exhibit; that all the acts heretofore stated were in the execution of an unlawful scheme to wrong and defraud said Sophia out of said scrip and property; that the instruments executed as aforesaid by her and her husband were not intended by them to be used for the purpose of conveying the said property to any person whatsoever, or to authorize such conveyance by any other person, and no consideration was received by either of them for the scrip; but that Patrick has claimed and still claims and asserts ownership in the premises ever since the location of said scrip.

8. That a large part of said land has been platted and recorded, divided into lots, and sold by warranty deed to others, who are made defendants as purchasers from him of particular descriptions given in the bill.

9. That these grantees had notice of infirmities, if not actual fraud, attaching to the title of Patrick, since among other things the power of attorney and deed are dated nearly two years prior to the scrip location; that on July 3, 1863, the United States issued to the said Sophia Felix its patent for the premises, which was filed for record on July 25, 1863.

10. That the said Sophia Garnelle died December, 1865, and during her lifetime had no knowledge that Patrick had secured and located said scrip; had no knowledge that the power of attorney and quitclaim deed had been filled out or used in any manner, or placed on record; and had no knowledge as to the disposition made of such scrip, or of the acts of the said Patrick; that the plaintiffs, who are the heirs at law of the said Sophia Felix, had no knowledge whatever of the facts set forth until 1887, when, under a certain treaty with the Sioux Indians, they became citizens of the United States; and that prior to this time they had maintained their tribal relations with the Sioux Indians, and were, by acts of Congress, inhibited and barred from instituting any action in any of the courts, Federal or state, in the United States, were denied access to the said courts, and had no legal standing therein as a party.

11. That Patrick and those claiming under him ought not to be permitted to hold such real estate, but should surrender the same to the plaintiffs, in view of the fact that said scrip, under the treaty of Prairie du Chien, and the act of Congress of July 17, 1854, could not be sold, assigned or transferred directly or indirectly; that Patrick received said scrip in trust for said Sophia, and located the same in trust for her, and holds possession of the land as trustee for her and her heirs, and ought not to be allowed to assume any adverse relation to the plaintiffs; that he ought also to account for the rents, issues and profits of said land for all the time he has had possession thereof, etc.; prayer, that he be declared a trustee; that the power of attorney and quitclaim deed be declared fraudulent and void, and a cloud upon plaintiffs' title, and be cancelled; that the act of Congress confirming Patrick's title to the lands be declared unconstitutional and void; that the defendants

surrender possession of the land to the plaintiffs; and that the said Patrick account for the rents and profits, etc.

There were three separate demurrers filed to this bill by Patrick and several of the other defendants, principally upon the ground of want of equity and laches. Upon hearing in the court below the bill was dismissed, (36 Fed. Rep. 457,) and the plaintiffs appealed to this court.

Mr. William D. Shipman for appellants, on the question of laches said:

The appellees confront us with the claim that, granting the void character of the pretended deeds to Patrick, and the power of attorney in which he inserted the name of Ruth, and the description of the land, still the appellants are entitled to no relief because they delayed their suit for that relief too long. To this defence we answer: (1) This suit was commenced as soon as the fraud practised on these appellants, by the disposition attempted to be made of their property, was discovered by them, and that if the appellants had been white persons, their relief would not be barred on account of lapse of time; (2) That the appellants were, from their birth, down to the 29th of August, 1887, tribal Indians, under such conditions of wardship, pupilage, constraint, dependence and disabilities, that no statute of limitations, or lapse of time, could run against them or bar their right to relief, while those conditions remained.

I. The bill alleges that suit was brought as soon as the fraud was discovered. But the appellees, under the second head of demurrer, claim that the appellants did not use due or reasonable diligence in discovering the fraud. That this defence is without merit or validity will appear by recurring to the statute under which this scrip was issued. 10 Stat. 304, c. 83.

In a transaction like this, if the victims of the fraud had been white persons, especially if they were ignorant, feeble-minded and living far from the place where the land was situated and the fraudulent scheme enacted, they would not be barred of relief by the time which elapsed in this case before suit was brought. *Michoud* v. *Girod*, 4 How. 503.

Mr. Shipman's argument for appellants.

In *Allore* v. *Jewell*, 94 U. S. 506, this court refused to apply a bar of the statute or the doctrine of laches where all the facts were known to the complainant more than six years before he commenced his suit. See also *Griswold* v. *Hazard*, 141 U. S. 260, 288; *Bryan* v. *Kales*, 134 U. S. 126, 135; *Trevelyan* v. *Charter*, 11 Cl. & Fin. 714; *Maloney* v. *L'Estrange*, Beatty, 406; *Carpenter* v. *Canal Co.*, 35 Ohio St. 307; *Oliver* v. *Piatt*, 3 How. 333, 411; *Reynolds* v. *Sumner*, 126 Illinois, 58.

In *Prevost* v. *Gratz*, 6 Wheat. 481, Mr. Justice Story, in delivering the opinion of this court, said: "It is certainly true that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of time during which the fraud has been successfully concealed and practised, is rather an aggravation of the offence, and calls more loudly upon a court of equity to grant ample and decisive relief."

II. I now proceed to consider the condition of the appellants as tribal Indians. This aspect of the case involves grave considerations, which go to the root of the public policy of the United States in its treatment of the aboriginal inhabitants of this continent. This tribunal has, for more than sixty years, dealt with and often defeated the wrongs attempted against the red man. The condition of the latter appeals now with greater pathos, and with a clearer warrant of justice, for protection against the acts, and especially against the frauds of one of the white race. It is true they retain but a remnant of their former number and greatness; but they are still sufficiently numerous and formidable to call for constant oversight, care and protection by the Federal government. Their care and control absorb the time and attention of a large part of the military force of the nation, and their civil affairs require the constant and exclusive oversight of one of the most important administrative bureaus.

The utterances of the courts, both State and National, have so uniformly recognized the disabilities of these people, and

their exemption from the legal rules and responsibilities which govern and affect the dominant race, that they constitute one of the "Trade winds of the law." This court is too familiar with these utterances to require more than the few citations which follow: *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17; *Fellows* v. *Blacksmith*, 19 How. 366; *Kansas Indians*, 5 Wall. 737; *New York Indians*, 5 Wall. 761; *Ex parte Crow Dog*, 109 U. S. 556, 568; *Elk* v. *Wilkins*, 112 U. S. 94, 111; *United States* v. *Kagama*, 118 U. S. 375, 383; *Choctaw Nation* v. *United States*, 119 U. S. 1.

It should be borne in mind that neither Sophia Felix, nor these appellants, could, from the issuing of this scrip to her down to the year 1887, when this suit was brought, have instituted any suit in the courts of the United States for the purpose of having these fraudulent transactions of Patrick set aside, even had they known what he had done. They were neither aliens nor citizens of the United States and, therefore, did not come within the statutes conferring jurisdiction on the latter. *Karrahoo* v. *Adams*, 1 Dillon, 344; *McKay* v. *Campbell*, 2 Sawyer, 118, 135; *Elk* v. *Wilkins*, 112 U. S. 94, 109.

I do not overlook the statement in the opinion below in this case, that Indians sometimes apply to the state courts for redress of their wrongs. It is quite true that, in some peculiar cases, they have done so, when they were compelled to as the only mode left to them by which they could secure protection. As a rule they failed to secure their rights from the state tribunals and had to appeal to this court for redress.

In the face of the condition of these Indians, and the declarations of this court in regard to the subjection to, and dependence on, the government of the United States, and their exemption from the laws of the States, can the doctrine of laches, or that of adverse possession, or the statute of limitations, be held to bar their right to relief, because they did not do what was impossible, viz.: hunt out and discover this fraud, of which they were ignorant, and then bring a suit in the courts of the State of Nebraska?

Mr. John L. Webster for appellees.

Mr. J. C. Cowin (with whom was *Mr. J. H. Parsons* on the brief) closed for appellants.

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

There are really but two questions involved in this case: (1) whether Patrick located this scrip and took these lands under the blank power of attorney and deed, as trustee for Sophia Felix; and (2) whether the plaintiffs are estopped by their own laches and those of Sophia Felix from insisting that Patrick shall be decreed to hold the lands for their benefit.

The facts of the case, briefly stated, are as follows: Sophia Felix, a half-breed Indian, was entitled under an act of Congress of July 17, 1854, 10 Stat. 304, c. 83, to certain scrip which might be located upon any unoccupied land subject to preëmption or private sale, but it was expressly provided in the act that no transfer or conveyance of such scrip should be valid. In pursuance of this act, scrip was issued to her in 1857, to the amount of 480 acres. The scrip itself not being assignable, some person (who it was does not appear) obtained possession of such scrip to the amount of 120 acres from the said Sophia and her husband, (she having in the meantime married,) and also procured from them a power of attorney and quitclaim deed, bearing date March 31, 1860, and executed in blank. Nearly two years thereafter, and in November, 1861, these were turned over (by whom it does not appear) to Patrick, who located the scrip upon the lands in question, of which he had already been in possession for some time, and to which he had endeavored, though unsuccessfully, to acquire title by preëmption, caused the name of William Ruth to be inserted as attorney in the power, and his own name as grantee in the quitclaim deed, after filling in the description of this property; and on July 25, 1863, procured from Ruth under his power of attorney a warranty deed to himself of the same property. The description of

the land in the quitclaim deed seems to have been defective, and in the meantime, viz.: July 3, 1863, a patent had issued to Sophia Felix. Patrick has been in possession of these lands ever since. A large part of the tract has been platted and recorded as an addition to the city of Omaha, and is divided into blocks and lots, intersected by streets, and a large part of the lands have been sold to purchasers, whose only notice of the infirmity in their title appears to have been the fact that the power of attorney and quitclaim deed were dated nearly two years prior to the scrip location.

1. The device of a blank power of attorney and quitclaim deed was doubtless resorted to for the purpose of evading the provision of the act of Congress that no transfer or conveyance of the scrip issued under such act should be valid. This rendered it necessary that the scrip should be located in the name and for the benefit of the person to whom it was issued, but from the moment the scrip was located and the title in the land vested in Sophia Felix, it became subject to her disposition precisely as any other land would be. In order, therefore, for the purchaser of this scrip from Sophia Felix to make the same available, it became necessary to secure a power of attorney or a deed of the land, and as the scrip had not then been located, and the person who should locate it was unknown, the name of the grantee and the description of the land must necessarily be left blank. Had the notary, who took the acknowledgment, observed these blanks, he would doubtless have declined to act until they were filled out, particularly in view of the fact that the grantors were Indians, and the scheme a palpable device to evade the law against the assignment of the scrip. It is pertinent in this connection to note the fact that the secretary of State, whose certificate was made in June, 1861, certified merely to the official character of the notary, while the clerk of the District Court of the county, whose certificate was made August 20, 1863, after the scrip was located, and the blanks in the instrument filled out, certifies that the same were executed and acknowledged according to the laws of the State of Minnesota. As the bill alleges that Patrick

obtained possession of these instruments while still in blank, he is clearly chargeable with notice that they were intended as a device to evade the law against the assignment of scrip.

Having, then, no right to locate the scrip for his own benefit, he must be deemed to have located it for Sophia Felix, and as her representative. It was declared by this court as early as 1810, in the case of *Massie* v. *Watts*, 6 Cranch, 148, that if an agent located land for himself which he ought to locate for his principal, he is in equity a trustee for his principal. In that case the defendant Massie had contracted with one O'Neal to locate and survey for him a military warrant for 4000 acres in his name. Massie located the warrant with the proper surveyor, and, being himself a surveyor, fraudulently made a survey purporting to be a survey of the entry, but variant from the same, so that the land actually surveyed was not the land entered with the surveyor. This was done for the fraudulent purpose of giving way to a claim of the defendant's which he surveyed on the land entered for the plaintiff, whereby the plaintiff lost the land, and defendant obtained the legal title. This court held that Massie held such land as trustee for O'Neal. "But Massie," said Chief Justice Marshall, (p. 169,) "the agent of O'Neal, has entered and surveyed a portion of that land for himself, and obtained a patent for it in his own name. According to the clearest and best established principles of equity, the agent who so acts becomes a trustee for his principal. He cannot hold the land under an entry for himself otherwise than as trustee for his principal." This case was subsequently cited with approval in *Irvine* v. *Marshall*, 20 How. 558. So in *Brush* v. *Ware*, 15 Pet. 93, where an executor obtained a certificate for 4000 acres of land, and afterwards sold and assigned the same, when it appeared under the will that he had no right to sell the land, it was held that the purchaser to whom the patent was subsequently issued, took with notice of the prior title of the heirs, and was bound to make the conveyance asked from him. To the same effect are *Stark* v. *Starrs*, 6 Wall. 402, 419; *Meader* v. *Norton*, 11 Wall. 442, 458. And in *Widdicombe* v. *Childers*, 124

U. S. 400, 405, it was held that a person who had obtained a patent to lands which the patentee knew he had no right to claim, took the legal title subject to the superior equities of the rightful owner. In delivering the opinion, Chief Justice Waite said: "The holder of a legal title in bad faith must always yield to a superior equity. As against the United States his title may be good, but not as against one who had acquired a prior right from the United States in force when his purchase was made under which his patent issued. The patent vested him with the legal title, but it did not determine the equitable relations between him and third persons." See also *Morris* v. *Joseph*, 1 West Va. 256.

The substance of these authorities is that, whenever a person obtains the legal title to land by any artifice or concealment, or by making use of facilities intended for the benefit of another, a court of equity will impress upon the lands so held by him a trust in favor of the party who is justly entitled to them, and will order the trust executed by decreeing their conveyance to the party in whose favor the trust was created. It is of no consequence in this connection that Sophia Felix was ignorant of the defendant's acts, or of the trust thereby created, since she was at liberty, upon discovering it, to affirm the trust and enforce its execution. *Bank of Metropolis* v. *Guttschlick*, 14 Pet. 19, 31; *Moses* v. *Murgatroyd*, 1 Johns. Ch. 119; *Cumberland* v. *Codrington*, 3 Johns. Ch. 229, 261; *Neilson* v. *Blight*, 1 Johns. Cas. 205; *Weston* v. *Barker*, 12 Johns. 276.

It needs no argument to show that no additional right was acquired by Patrick under the acts of July 25, 1868, and February 2, 1869, confirming the title to the lands to the parties holding by deed from the patentee. Such act might estop the government itself from taking proceedings to cancel the patent already issued, or to oust Patrick, but to hold it operative as affecting the rights of third parties would be virtually recognizing judicial power in the legislature. In no possible view of legislative authority, can it be assumed that an act of Congress can declare that lands to which one party is by law entitled, shall belong to another.

Opinion of the Court.

In addition to this, however, Patrick was not a man "holding by deed from the patentee" within the meaning of the law. The power of attorney and quitclaim deed, being in blank when they passed from the possession of Sophia Felix, were inoperative to convey her title to any particular land. Nor, under the allegations of this bill, can it be claimed that she ever authorized these blanks to be filled, since it is averred that the instruments were procured fraudulently and without consideration, and neither the person to whom she delivered them, nor Patrick himself, could be considered her agent for filling out the blanks. Such agency, if it exists at all, must be exercised before the deed is delivered. In order to pass the legal title to lands something more is necessary than the signature of the grantor to a blank instrument. There must be an intent to convey, and the delivery of a deed for the purpose of vesting a present title in the grantee, and a deed delivered without the consent of the grantor is of no more effect to pass title than if it were a forgery. *Hibblewhite* v. *McMorine*, 6 M. & W. 200; *Davidson* v. *Cooper*, 11 M. & W. 778, 793; *Burns* v. *Lynde*, 6 Allen, 305; *Everts* v. *Agnes*, 4 Wisconsin, 343; *S. C.* 6 Wisconsin, 453; *Tisher* v. *Beckwith*, 30 Wisconsin, 55; *Hadlock* v. *Hadlock*, 22 Illinois, 384; *Stanley* v. *Valentine*, 79 Illinois, 544; *Henry* v. *Carson*, 96 Indiana, 412; *Fitzgerald* v. *Goff*, 99 Indiana, 28. At best, the deed, being a quitclaim, conveyed only the interest of the grantor at the date of its delivery, which was nothing. *Nichols* v. *Nichols*, 3 Chandler (Wis.) 189; *Lamb* v. *Davenport*, 1 Sawyer, 604, 638.

2. The most important question in this case, however, the question upon which its result must ultimately depend, is that of laches. While, upon the facts stated, Patrick took these lands as trustee for Sophia Felix, he did not take them under an express trust to hold them for her benefit, (in which case lapse of time would be immaterial,) but under an implied or constructive trust — a trust created by operation of law, and arising from the illegal practices resorted to in obtaining the power of attorney and deed. Patrick did not take possession under any acknowledged obligation to her, but he located

them for his own use and benefit; his possession from the very beginning was adverse to hers. Under such circumstances, the law raises an obligation upon the part of the *cestui que trust* to make use of reasonable diligence in discovering and unearthing the fraud, and in applying to the courts for legal redress. In this case 28 years elapsed from the time the scrip was procured of Sophia Felix, and nearly 27 years from the time it went into the possession of Patrick, before the bill was filed. It admits of no doubt that if Sophia Felix and these plaintiffs had been ordinary white citizens, under no legal disabilities, such as those arising from infancy, lunacy or coverture, this lapse of time would be fatal to a recovery; at least unless it were conclusively shown that knowledge of the fraud was not obtained, and could not by reasonable diligence have been discovered, within a reasonable time after it was perpetrated.

In reply to this defence of laches, plaintiffs rely mainly upon the fact that Sophia Felix and her heirs were at the time, and continued to be until 1887, tribal Indians, members of the Sioux nation, residing upon their reservation in the State of Minnesota, and incapable of suing in any of the courts of the United States. We are by no means insensible to the force of this suggestion. Whatever may have been the injustice visited upon this unfortunate race of people by their white neighbors, this court has repeatedly held them to be the wards of the nation, entitled to a special protection in its courts, and as persons "in a state of pupilage." Congress, too, has recognized their dependent condition, and their hopeless inability to withstand the wiles or cope with the power of the superior race, by imposing restrictions upon their power to alienate lands assigned to them in severalty, either by making their scrip non-assignable, as in this case, or by requiring the assent of the President to their execution of deeds as in the case of *Pickering* v. *Lomax*, *ante*, 310, decided at this term. We fully coincide with what was said by Mr. Justice Davis in the case of the *Kansas Indians*, 5 Wall. 737, 758, that "the conduct of Indians is not to be measured by the same standard which we apply to the conduct of other people." But their very anal-

ogy to persons under guardianship suggests a limitation to their pupilage, since the utmost term of disability of an infant is but 21 years, and it is very rare that the relations of guardian and ward under any circumstances, even those of lunacy, are maintained for a longer period than this. It is practically admitted in this case that, in 1887, when their relations with their tribe were severed by accepting allotments of land in severalty under the treaty of April 29, 1878, they became citizens of the United States; that they were then chargeable with the same diligence as white people in the discovery of this fraud; and, as their bill was filed in 1888, it is claimed that they fulfilled all the requirements of law in this particular. While, as alleged in the bill, their discovery of this fraud may have been contemporaneous with their becoming citizens of the United States there is no palpable connection between the one fact and the other, and we think the bill is defective in failing to show how the fraud came to be discovered, and why it was not discovered before. A simple letter to the Land Department at any time after this scrip was located would have enabled them to identify the land, and the name of the person who had located it; and it is difficult to see why, if they had ever suspected the misuse of this scrip, they had not made inquiries long before they did, or why their emancipation in 1887 should have suddenly awakened their diligence in this particular. There is, it is true, an averment that Patrick never informed the said Sophia or her husband that he had located such scrip, but, on the contrary, fraudulently concealed the same, and exercised every precaution to prevent such proceedings coming to the knowledge of the party. But no acts of his in this connection are averred in the bill, and we are left to infer that his concealment was that of mere silence, which is not enough. *Wood* v. *Carpenter*, 101 U. S. 135, 143; *Boyd* v. *Boyd*, 27 Indiana, 429; *Wynne* v. *Cornelison*, 52 Indiana, 312. Indeed, his concealment is to a certain extent negatived by the fact that he put the power of attorney and deed upon record, in the proper county, shortly after their execution. It was held by this court in *Badger* v. *Badger*, 2 Wall. 94, in speaking of the excuses for laches,

that "the party who makes such appeal should set forth in his bill, specifically, what were the impediments to the earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how, and when, he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, upon his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer." Sophia Felix and her husband must have known that she had parted with the scrip, yet she lived until 1865, and her husband until 1882, without apparently making any attempt to discover what had become of it. Nor did their heirs apparently make any effort to discover it until 1887, when their intelligence seems to have suddenly sprung into activity upon their becoming citizens of the United States. It is scarcely necessary to say in this connection that, while until this time they were not citizens of the United States, capable of suing as such in the Federal courts, the courts of Nebraska were open to them as they are to all persons irrespective of race or color. *Swartzel* v. *Rogers*, 3 Kansas, 374; *Blue Jacket* v. *Johnson County*, 3 Kansas, 299; *Wiley* v. *Keokuk*, 6 Kansas, 94. It was said by this court in *Wood* v. *Carpenter*, 101 U. S. 135, 140, that in this class of cases the plaintiff is held to stringent rules of pleadings and evidence, and especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery was, so that the court may clearly see whether by ordinary diligence the discovery might not have been before made. See also *Stearns* v. *Page*, 7 How. 819, 829; *Wollensak* v. *Reiher*, 115 U. S. 96; *Godden* v. *Kimmell*, 99 U. S. 201, 211. The mere fact that in 1887 these plaintiffs took their lands in severalty and became citizens, does not adequately explain how they so quickly became cognizant of this fraud, or why they had remained so long in ignorance of it.

But, conceding that the plaintiffs were incapable, so long as they maintained their tribal relations, of being affected with

laches, and that these relations were not dissolved until 1887, when they were first apprised of their right to this land, it does not necessarily follow that they are entitled to the relief demanded by this bill. The real question is, whether equity demands that a party, who, 28 years ago, was unlawfully deprived of a certificate of muniment of title of the value of $150, shall now be put in the possession of property admitted to be worth over a million. The disproportion is so great that the conscience is startled, and the inquiry is at once suggested, whether it can be possible that the defendant has been guilty of fraud so gross as to involve consequences so disastrous. In a court of equity, at least, the punishment should not be disproportionate to the offence, and the very magnitude of the consequences in this case demands of us that we should consider carefully the nature of the wrong done by the defendant in acquiring the title to these lands. He is not charged in the bill with having been a party to the means employed in obtaining the scrip from Sophia Felix, or with being in collusion with the unknown person who procured it from her. More than that, the allegations of this bill do not satisfy us that she did not receive full value for the scrip. It is true, there are general averments that the power of attorney and quitclaim deed were obtained "by wicked devices and fraudulent means;" that she never parted with her title to or interest in the scrip, and was the absolute owner thereof; that the blank instruments were not intended to be used for the purpose of conveying this property; and that no consideration was ever received for the scrip. But in view of the fact that she and her husband are long since dead, and the party who procured it from her is unknown, it is very improbable that the plaintiffs could prove these facts, or the nature of the original transaction. It is evident that she intended to part with the scrip to some one, and the recital of a nominal consideration in a quitclaim deed is entitled to very little weight as evidence of the actual consideration.

However this may be, taking all the allegations of this bill together, it is very evident that Patrick bought these

muniments of title as hundreds of others bought them — in violation of the letter and policy of the law, but without actually intending to defraud Sophia Felix or any other person. The law pronounces the transaction a fraud upon her, but it lacks the element of wickedness necessary to constitute moral turpitude. If there had been a deliberate attempt on his part by knavish practices to beguile or wheedle her out of these lands, we should have been strongly inclined to afford the plaintiffs relief at any time during the life of either of the parties; but, as the case stands at present, justice requires only what the law, in the absence of the statutory limitation would demand — the repayment of the value of the scrip with legal interest thereon.

Much reliance is placed upon a certain letter written by the defendant's agent and father to one Otis, bearing date September 21, 1863, authorizing him to procure the signature of Sophia and her husband to certain papers, for which he was to pay $100, and it was intimated that this should be done without giving the parties any particular information. This letter is of little value, except as indicating that defendant desired to strengthen his title by purchasing whatever claim Sophia and her husband might have had to it, if it could be done at a slight expense. It is sufficient answer to it to say that nothing ever appears to have been done under it, or by virtue of it, and it affords too feeble an indication of previous fraud to be entitled to any weight in that connection.

There are other considerations which require to be noticed in this connection. By the foresight and sagacity of this defendant this scrip was located upon lands within the limits of one of the most thriving and rapidly growing cities of the West. That which was wild land thirty years ago is now intersected by streets, subdivided into blocks and lots, and largely occupied by persons who have bought upon the strength of Patrick's title, and have erected buildings of a permanent character upon their purchases. The bill charges all these with notice of the defect in Patrick's title, and prays that the conveyances to them be declared null and void, and

that plaintiffs be admitted into possession of their lands, and that Patrick account for rents, profits and issues, so far as he has received them. If the views put forward in their brief be correct, that these instruments were of no greater effect than if they had been forgeries, it is difficult to see how these transfers can be supported, and it needs no argument to show that the consequences of setting them aside would be disastrous. Certainly, if they were not entitled to the lands themselves, they would be entitled to recover of Patrick what he had received for them. Waiving this question, however, it is scarcely within the bounds of possibility to suppose that Sophia Felix, if she had located this scrip, would have realized a tithe of the sum her heirs now demand of this defendant. The decree prayed for in this case, if granted, would offer a distinct encouragement to the purchase of similar claims, which doubtless exist in abundance through the Western Territories, (Felix herself having received scrip to the amount of 480 acres, only 120 of which are accounted for,) and would result in the unsettlement of large numbers of titles upon which the owners have rested in assured security for nearly a generation.

In view of all the facts of this case we think the decree of the court below dismissing the bill was correct, and it is therefore

Affirmed.

Mr. Justice Field dissented.

THE CORSAIR.

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

No. 344. Submitted April 26, 1892. — Decided May 16, 1892.

Admiralty rules 12 to 20 inclusive allow, in certain cases, a joinder of ship and freight, or ship and master, or alternative actions against ship, master or owner alone; but in no case within the rules can ship and owner

be joined in the same libel: whether they may in cases not falling within the rules is not decided.

A District Court sitting in admiralty cannot entertain a libel *in rem* for damages incurred by loss of life where, by the local law, a right of action survives to the administrator or relatives of the deceased, but no lien is expressly created by the act.

When the collision of two vessels causes great pain and suffering to a passenger on one of them, followed so closely by death as to be substantially contemporaneous with it, a libel *in rem*, where a right of action exists under a state statute, will not lie for those injuries as distinguished from death as a cause of action.

THE court stated the case as follows:

This was an appeal from a decree of the Circuit Court dismissing a libel for damages sustained by the death of Ella Barton, against the steam tug Corsair and her owners. Suit was begun on April 5, 1888, by the filing of a libel by Edward S. Barton and Elizabeth Barton, his wife, against the steam tug Corsair upon two distinct causes of action, viz.: one for damages for the pains and sufferings endured by Ella Barton, a daughter of the said Elizabeth Barton, in a collision caused by the said tug Corsair, on which the said Ella Barton was at the time a passenger, running at full speed into the right bank of the Mississippi River, on the 14th of April, 1887, at a point about ten miles above Algiers, (which is opposite to the city of New Orleans,) in consequence of which said tug filled with water and sank in ten minutes. The other cause for action was for damages sustained by the said Elizabeth Barton in the loss of the life of her said daughter, alleged to have been caused by the negligence of the officers and crew of the tug.

The right to bring this libel was alleged to have accrued under Article 2315 of the Civil Code of Louisiana, as amended in 1884, which reads as follows:

"Article 2315. Every act whatever, of man, that causes damage to another, obliges him by whose fault it happened, to repair it; the right of this action shall survive, in case of death, in favor of the minor children or widow of the deceased, or either of them, and in default of these, in favor of

the surviving father and mother, or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent, or child or husband, or wife, as the case may be."

By virtue of an attachment issued upon this libel, the vessel was arrested April 5, 1888, and was released upon a stipulation given by Samuel S. Brown and Harry Brown, by their duly authorized agent, "claimants and owners of the steam tug Corsair." Upon the same day they filed their claim as owners, averring that "no other persons have any interest therein," and subsequently filed exceptions to the libel upon the ground that it set forth no cause of action cognizable by proceedings *in rem* in admiralty. Upon the hearing of these exceptions, the court, "considering that no action *in rem* lies in this case," "ordered that the exception be sustained to the extent of releasing the tug Corsair from the seizure made under the admiralty warrant issued in the cause, the court being of the opinion that the statute of Louisiana creates no lien upon the vessel." It was "further ordered that libellants be allowed to amend their pleadings and proceed *in personam* against the owners of the vessel within ten days if they see fit." On the following day an amended libel was filed against Samuel S. Brown and Harry Brown *in personam* as "owners of the steam tug Corsair," adopting and reiterating all the allegations contained in the original libel, and praying for a citation against the owners and for an attachment, in case they should not be found, against their goods and chattels, credits and effects wherever found.

Process of arrest and attachment, in the form provided for by Admiralty Rule 2, was allowed by the District Judge, and returned served by the marshal, by seizing and taking into his possession the steam tug Corsair, and placing a keeper in charge, and taking another bond from W. H. Brown & Sons, with a surety, conditioned that if "said owners of the tug Corsair, William H. Brown & Sons, Samuel S. Brown and Harry Brown, shall abide by all orders," etc. On the same day a claim was filed by Samuel S. Brown and Harry Brown

as sole owners of the tug Corsair, etc. Exceptions were filed to the amended libel by the claimants upon the ground that process had not been served upon them; that a warrant of arrest ought not to have issued, under Admiralty Rule 7, without affidavit or other proper proof showing the propriety thereof; that proceedings *in rem* and *in personam* could not be joined in the same libel; that "there was no power in the court to allow the libellants to change this suit from a suit *in rem* to a suit *in personam*; and that the cause of action was barred by the prescription of one year according to the law of the State."

The cause was heard upon these exceptions, and the court "being of the opinion that the suit and the amended libel is an action under a special statute of the State of Louisiana subjecting the owners to liability, whereas the action under the original libel sprang from the general liability of ships arrested as offending things under the admiralty law; that the amendment introduced a new party, and since, at the time of the amendment being made, more than a year had elapsed," the exception was allowed and the suit dismissed.

On appeal to the Circuit Court this decree was affirmed, and an appeal taken by the libellants to this court.

Mr. Richard De Gray for appellant.

As we have seen, two separate and distinct causes of action are set out in the libel; one for the pains and sufferings endured by Ella Barton during her lifetime between the time of the collision and her death; the other for the damages sustained by the libellants directly by the death of Ella Barton.

The present case, as to either cause of action, is not a suit for damages for a death caused by negligence on the high seas, but a suit for damages caused by negligence on the Mississippi River, about one hundred miles above its mouth, and, therefore, under the jurisdiction of the State of Louisiana.

The second cause of action, although occurring in the State of Louisiana, being for the recovery of damages for the death of a human being, may, if the Louisiana statutes did

not apply, be governed by the *Harrisburg* and *Alaska Cases*, 119 U. S. 199 and 130 U. S. 201; but the first cause of action, wherein damages are claimed, for the pains and sufferings Ella Barton sustained, cannot be governed by those cases, for it is in no sense a suit to recover damages for the death of Ella Barton, but is a suit to recover damages which a passenger, during her lifetime, sustained, through the negligence of the officers and crew of the steam tug Corsair.

This brings us to the inquiry as to what is the right of action and the remedy in admiralty of a passenger for damages sustained on a vessel on which such passenger is being carried.

Numerous decisions have been rendered by this court, in proceedings *in rem*, giving passengers damages for injuries sustained on vessels through the fault of their officers. *The Moses Taylor*, 4 Wall. 427; *The New World*, 16 How. 469; *The City of Panama*, 101 U. S. 453.

Now, suppose Ella Barton had survived her injuries and brought her suit in admiralty *in rem* for the pains, injuries and shock which she sustained in this collision, and thereafter died, would that suit have died with her? It certainly would not, because it would pass (if in no other way) by subrogation, under the first part of Art. No. 2375 of the Civil Code of Louisiana, to the parties therein named. In fact, prior to the amendment to the Code in 1884, only the claims for the recovery of such damages as she sustained passed to the parties named.

In *Earhart* v. *New Orleans & Carrollton Railroad*, 17 La. Ann. 243, (which was a suit by the father and mother,) the law of Louisiana on this subject, under the above article of the Code, was stated as follows: "In the words of the statute, it is a legal subrogation in favor of the persons designated, to the right of action, of the deceased sufferer, and in case of suit under that subrogation, the plaintiff should allege his cause of action as derived from the deceased under the statute."

Therefore, we say the right of action *in rem*, which existed in favor of Ella Barton for the injuries and pains she suffered

during her lifetime, by reason of the negligence of the officers and crew of the tug on which she was a passenger, certainly passed, under the Code, to her father and mother, and that the suit by them should have been sustained.

3. In response to the third exception, that proceedings *in rem* and *in personam* cannot be joined in the same action, we say there is nothing in the Admiralty Rules of the United States Supreme Court or those of the District Court of Louisiana prohibiting such a joinder, and the amendment from a proceeding *in rem* to one *in personam*, as we have already shown, is abundantly supported, and by the best of authority.

4. This exception is the one on which the court dismissed the suit, because, as it said, said suit was prescribed, under the state law, by the lapse of one year from the time the disaster occurred, on the 14th of April, 1887.

The suit was filed on April 5, 1888, and seizure was made and appearance was entered on that day by the defendants' filing their claim, and on the same day giving their bond for the release of the property.

The suit, therefore, which began *in rem*, became by the appearance of the defendants, to all intents and purposes, a suit *in personam* on the day the bond was filed, for thereafter no judgment could be rendered against the vessel, (which was discharged from all lien,) but only *in personam* against claimants and sureties.

The effect of such an appearance and giving bond was decided in the Fifth Circuit in *Roberts* v. *The Huntsville*, 3 Woods, 386. There a ship was libelled for salvage, and a decree for salvage was rendered. The sureties for the claimants — the owners — were compelled to pay the salvage decree, and it was held that the sureties, although subrogated to the rights of the libellants, could not seize the vessel as against valid mortgagees. Judge Bradley said: "The salvors themselves ceased to have any lien on the ship after she was claimed and released from their seizure on the stipulation. Their claim then became a personal one against the owners and stipulators. It has been repeatedly held, that except where fraud has been practised in procuring the vessel's

release, the libellants cannot reseize her. By their discharge she becomes free, and all anterior liens stand good against her as before the seizure; so that, if the present libellants were invested with every right of the salvors, they could not have recourse to the ship again for the cause of salvage, except as they would have recourse against any other property of the owner. See also *The Union*, 4 Blatchford, 90; *The White Squall*, 4 Blatchford, 103, and cases there cited by Mr. Justice Nelson.

The practice in England is substantially the same. *The St. Johan*, 1 Hag. Adm. 334; *The Triune*, 3 Hag. Adm. 114.

Mr. Joseph P. Hornor and *Mr. Guy M. Hornor* for appellees.

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

This was a libel *in rem* against the tug Corsair, by the mother of one Ella Barton, to recover for the loss of her life in a collision alleged to have been occasioned by the negligence of those in charge of the tug. Exceptions to this libel were sustained, upon the ground that a suit *in rem* would not lie for injuries resulting in death; but leave was given to amend by proceeding *in personam* against the owners of the tug. Exceptions were also filed to the amended libel upon the ground that the amendment introduced a new party to the suit, and, as against such party, the year had elapsed within which, under the law, the action must be brought.

1. The decree of dismissal so far as it operated upon the amended libel, was proper for two reasons: First, the amendment to the original libel by introducing the owners of the tug as parties defendants was in violation of Admiralty Rule 15, providing that "in all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or owner alone *in personam*." These rules, from 12 to 20 inclusive, were intended to prescribe a remedy appropriate to each class of cases in admi-

ralty, allowing in certain cases a joinder of ship and freight, or ship and master, or alternative actions against the ship, master or owner alone. In no case, however, under these rules, except in possessory suits, can the ship and owner be joined in the same libel, though perhaps they may be in cases not falling within the rules. These rules were adopted in pursuance of an act of Congress of August 23, 1842, (5 Stat. 516,) authorizing this court, amongst other things, to prescribe "the forms and modes of proceedings to obtain relief" in suits in admiralty, and have always been regarded as having the force of law. They are little more than a recognition and formulation of the previous practice of courts of admiralty in this country and in England. They have come before this court in several instances, and have always been treated as obligatory. Thus in *Newell* v. *Norton*, 3 Wall. 257, the District Court, in accordance with the prayer of the libel, issued process *in rem* against the vessel for a collision, and citations *in personam* against the master, owner and pilot. On exceptions being filed for misjoinder, the court ruled that an action against the owner and pilot could not be joined with the proceeding *in rem*, and that the libellant must elect which remedy he would pursue; and, he having elected to proceed *in rem* against the steamboat and *in personam* against the master, the libel was dismissed as to the owners and pilot, and sustained as against the steamboat and master. The allowance of this amendment was held by this court to be proper, Judge Grier observing, however, that the objection that a libel *in rem* against a vessel and *in personam* against the "owner" cannot be joined was properly overruled. The word "owner" here is evidently a misprint for "master," as appears from the syllabus and statement of the case on page 259. Rule 19, prescribing the mode of proceeding in cases of salvage, was discussed by Mr. Justice Clifford in the case of *The Sabine*, 101 U. S. 384, in which he said that there was no authority for holding that salvors may proceed against the ship and cargo *in rem*, and *in personam* against the consignees of the cargo, in the same libel, as the rule gave only an alternative remedy *in rem* against the property saved, or *in personam* against the

party at whose request or for whose benefit the service had been performed. He found there was no well-considered authority which gave any countenance to the theory that the two modes of proceeding *in rem* against the ship and cargo, and *in personam* against the owners of the same, might be joined in the same libel; citing *Schooner Boston*, 1 Sumner, 328, and *The Hope*, 3 C. Rob. 215. He spoke of the nineteenth rule as "expressed throughout in the disjunctive form, and plainly requires the action, if against the property saved or the proceeds thereof, to be *in rem*, the alternative clause clearly referring to a case where the property saved has been sold, and the proceeds of the sale have been deposited in the registry of the court."

A like construction has uniformly been given to this rule by the Circuit and District Courts. *The Richard Doane*, 2 Ben. 111, (Mr. Justice Blatchford;) *The Zodiac*, 5 Fed. Rep. 220, 223, (Judge Choate;) *Atlantic Mutual Insurance Co.* v. *Alexandre*, 16 Fed. Rep. 279, (Judge Brown;) *The Young America*, Brown's Admiralty, 462. Judge Longyear's citations in the last case intimate that a similar practice prevailed in England, at least until the adoption of the Judicature Act. 2 Conkling's Admiralty, 43; 2 Parsons' Shipping and Admiralty, 378.

Second. If the so-called amended libel be considered as an independent libel against the owners *in personam*, then it is clearly defective in failing to aver that the respondents were the owners of the tug at the time of the accident.

2. An important question arises in connection with the dismissal of the original libel, which has never been squarely presented to this court before, and that is as to the power of the District Court to entertain a libel *in rem* for damages incurred by loss of life, where by the local law a right of action survives to the administrator or relatives of the deceased, but no lien is expressly created by the act. A similar question arose in the case of *Ex parte Gordon*, 104 U. S. 515, where a writ of prohibition was applied for to enjoin the prosecution of an action *in rem* for loss of life; but the writ was denied upon the ground that the liability was within the jurisdiction of

the District Court to decide, and any error it might commit in this particular could only be corrected by appeal. Subsequently in the case of *The Harrisburg*, 119 U. S. 199, it was held that in the absence of an act of Congress or a state statute giving a right of action therefor, a suit in admiralty could not be maintained to recover damages for the death of a human being, caused by negligence. This was a mere application to the court of admiralty of a principle which had been announced by this court as applicable to courts of common law in *Insurance Co.* v. *Brame*, 95 U. S. 754. *The Harrisburg* was a Pennsylvania vessel, and the collision occurred in the waters of Massachusetts, both of which States gave a remedy by civil action, with a proviso that such action should be brought within one year after the death; and while the question of the right to sue *in rem* for the recovery of such damages when an action at law had been given therefor by the state statute, was presented in that case, it was not decided, since the suit was not begun until nearly five years after the death, and the case went off upon that ground.

Prior to this decision, a number of libels both *in rem* and *in personam* had been brought for loss of life in the courts of different districts, and, as a rule, the liability was held to exist, but the question whether such liability should be enforced *in rem* or *in personam* does not seem to have been discussed, except in the cases of *The Sylvan Glen*, 9 Fed. Rep. 335, and *The Manhassett*, 18 Fed. Rep. 918, in one of which Judge Benedict, and in the other Judge Hughes, held, that, while the state statute created a right it did not create a lien, and that a libel *in rem* could not be maintained. Since the decision in the *Harrisburg Case*, that no libel can lie, except where a right to sue is given by a local statute, the question has been presented only in the case of *The North Cambria*, 40 Fed. Rep. 655, in which Judge Butler adopted the views expressed in *The Sylvan Glen* and *The Manhassett*. In *The Oregon*, 45 Fed. Rep. 62, a lien was given by the state statute and was enforced in the Admiralty.

A similar question under Lord Campbell's Act allowing damages to be recovered "whensoever the death of a person

shall be caused by wrongful act, neglect or default," has been the subject of much discussion in the courts of England. By the Admiralty Court Act of 1861, sec. 7, jurisdiction was given to the High Court of Admiralty over "any claim for damage done by any ship," and by sec. 35 "the jurisdiction conferred by this act on the High Court of Admiralty may be exercised either by proceedings *in rem* or by proceedings *in personam*." Giving a construction to these provisions, it was held by Sir Robert Phillimore in 1867, in *The Sylph*, L. R. 2 Ad. & Ec. 24, that personal injuries were included by the words "damage done by a ship," and that proceedings *in rem* might be taken for damages occasioned by such injuries. In the subsequent case of *The Guldfaxe*, L. R. 2 Ad. & Ec. 325, the same rule was applied to a suit for damages instituted by the personal representatives of a seaman who had been killed in a collision. This was subsequently affirmed in *The Explorer*, L. R. 3 Ad. & Ec. 289, decided in 1870. The same question came before the Court of Queen's Bench upon an application for a writ of prohibition in the case of *Smith* v. *Brown*, L. R. 6 Q. B. 729, in 1871, wherein it was held that the word "damage" did not include loss of life and personal injury, and that the Admiralty Court Act conferred no jurisdiction upon the High Court of Admiralty to entertain a suit under Lord Campbell's Act. The judgment of the court in this case was delivered by Lord Chief Justice Cockburn, and concurred in with some doubt by Mr. Justice Blackburn. Notwithstanding this prohibition, however, the Court of Admiralty continued to assume jurisdiction of actions *in rem* brought by the personal representatives of a deceased person. This appears from the case of *The Franconia*, 2 Prob. Div. 163, Sir Robert Phillimore being of the opinion that he was bound by the case of *The Beta*, L. R. 2 P. C. 447, in which the judicial committee of the Privy Council had held that the word "damage" referred to injuries to the person as well as to property. On appeal to the Court of Appeal, his judgment was affirmed by a divided court. The question was again raised before the Admiralty Division of the High Court of Justice, in the case of *The Vera Cruz*, 9 Prob. Div. 88, in

which Mr. Justice Butt did not discuss the question, but held, in deference to the previous decisions of Dr. Phillimore, that an action *in rem* would lie by the widow and administratrix of the master of a British schooner against the Vera Cruz, and that the plaintiff should recover a moiety of the damage she had sustained, both vessels being adjudged to be in fault. On appeal the Court of Appeal, 9 Prob. Div. 96, held that it was not bound by its former decision by a divided court in the case of *The Franconia*, and reversed the judgment of the Admiralty Division. The case was again appealed to the House of Lords, and the judgment of the court below was affirmed. 10 App. Cas. 59, 65, 66, 67, 73. Lord Chancellor Selborne in delivering the opinion held that the 35th section of the Admiralty Court Act above cited showed that "while an option to proceed *in rem* or *in personam* is given as to the jurisdiction conferred by the act, yet from the very nature of such an option every case provided for by the act is regarded as a proper case for a proceeding *in rem;* and accordingly the appellant, considering that the 7th section brought cases under Lord Campbell's Act within the purview of the Admiralty jurisdiction, justly upon that hypothesis held it to mean such actions as were capable of being brought by a proceeding like the present *in rem;* and if the action cannot be so brought, then I apprehend it will follow *ex converso* that the 7th section does not extend to this description of claim." "No one can say," said he, "that Lord Campbell's Act relates expressly to claims for damage done by ships; and this section in the act of 1861 relates to that and to nothing else. . . . Every word of that legislation" (Lord Campbell's Act) "being as it appears to me, legislation for the general case, and not for particular injury by ships, points to a common law action, points to a personal liability, and a personal right to recover, and is absolutely at variance with the notion of a proceeding *in rem.*" Lord Watson concurring, said: "I entertain no doubt that a right of action such as is given by Lord Campbell's Act in a case like the present is not a 'claim for damage done by a ship' within the meaning of the 7th section of the Admiralty Court Act, 1861."

Opinion of the Court.

This is the last expression of the highest court of England upon the question of proceeding *in rem* under Lord Campbell's Act, and must be regarded as settling the law of that country that such jurisdiction is not conferred. That, notwithstanding this, an action *in personam* will lie in the Admiralty Division is evident from the case of *The Bernina*, 11 Prob. Div. 31, in which the Admiralty took cognizance of the case, and upon appeal to the Court of Appeal, 12 Prob. Div. 58, and subsequently to the House of Lords, 13 App. Cas. 1, the jurisdiction was sustained, a trial by jury being now permitted in that court, although the main question discussed was as to the principle involved in the case of *Thorogood* v. *Bryan*, 8 C. B. 115, which was overruled. While these cases turn upon the construction of the English acts, the courts have been guided in such construction by principles which are of general application both in this country and in England.

A maritime lien is said by writers upon maritime law to be the foundation of every proceeding *in rem* in the Admiralty. In much the larger class of cases, the lien is given by the general Admiralty law, but in other instances, such for example as insurance, pilotage, wharfage, and materials furnished in the home port of the vessel, the lien is given, if at all, by the local law. As we are to look, then, to the local law in this instance for the right to take cognizance of this class of cases, we are bound to inquire whether the local law gives a lien upon the offending thing. If it merely gives a right of action *in personam* for a cause of action of a maritime nature, the District Court may administer the law by proceedings *in personam*, as was done with a claim for half pilotage dues under the law of New York, in the case of *Ex parte McNiel*, 13 Wall. 236, but unless a lien be given by the local law, there is no lien to enforce by proceedings *in rem* in the Court of Admiralty.

The Louisiana act declares, in substance, that the right of action for every act of negligence, which causes damage to another, shall survive, in case of death, in favor of the minor children or widow of the deceased; and in default of these, in favor of the surviving father and mother, and that such sur-

vivors may also recover the damages sustained by them by the death of the parent, child, husband, or wife. Evidently nothing more is here contemplated than an ordinary action according to the course of the law as it is administered in Louisiana. There is no intimation of a lien or privilege upon the offending thing, which, as we have already held, is necessary to give a court of admiralty jurisdiction to proceed *in rem*.

3. We do not find it necessary to express an opinion whether a libel *in rem* will lie for injuries suffered by the deceased before her death, a right of action for which passes to the immediate relatives, under the Louisiana statute, since there is no proper averment in the libel to show that such damages were suffered. It is true that the seventh paragraph alleges that from the time the "tug struck the bank of the river to the time she sunk," (about ten minutes,) "and the said Ella Barton was drowned, she, said Ella Barton, suffered great mental and physical pains and shock, and endured the tortures and agonies of death." But there is no averment from which we can gather that these pains and sufferings were not substantially cotemporaneous with her death and inseparable as matter of law from it. *Kearney* v. *Boston & Worcester Railroad*, 9 Cush. 108; *Hollenbeck* v. *Berkshire Railroad Co.*, 9 Cush. 478; *Kennedy* v. *Standard Sugar Refinery*, 125 Mass. 90; *Moran* v. *Hollings*, 125 Mass. 93. Had she suffered bodily wounds and bruises, from the result of which she lingered and ultimately died, it is possible that her sufferings during her illness would give a separate cause of action; but the very fact that she died by drowning indicates that her sufferings must have been brief, and, in law, a mere incident to her death. Her fright for a few minutes is too unsubstantial a basis for a separate estimation of damages.

The decree of the court below is, therefore,

Affirmed.

Syllabus.

PEWABIC MINING COMPANY *v.* MASON.

MARCUS *v.* MASON.

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

Nos. 1340, 1416. Argued March 16, 17, 1892. — Decided May 16, 1892.

When a sale of property is decreed by a court of equity as the result of a litigation, it is the policy of the law that it shall not be set aside for trifling causes or matters which the complaining party might have attended to.

When such a sale is attacked the court will scrutinize all previous action of the parties during the litigation, which may throw light upon or explain their action at the sale.

It cannot be tolerated that either party should designedly wait until the property has been struck off to the other, and then open the bidding and defer the sale by an increased offer.

When a corporation owning real estate is wound up by reason of the expiration of the term for which it was incorporated, and its real estate is sold by decree of court under directions of a master, stockholders may purchase it, and there is no fraud on other stockholders if a part of the stockholders combine to purchase it for the benefit of an adjoining property owned by them.

Litigants prolonging litigation to the extent of their ability in a suit in equity seeking the sale of real estate, and prolonging their resistance by having the sale postponed after the decree, cannot complain if it takes place finally in a time of financial depression.

The court decreed in this case that the assets of the mining company should be sold at public vendue, that the debts of the company should be ascertained by a master as a basis for the bid, and that the sale should take place on the confirmation of his report. *Held*, that it was not intended that the sale should be delayed till every claim arising since the commencement of the suit should have passed to final judgment; but that a mere statement of the amount should be presented as a basis for fixing an upset price.

No leave of court is necessary to enable a litigating stockholder to bid at such sale of the assets of the corporation under a decree in the suit in which he is a litigant.

The provisions in equity rule 83 respecting exceptions to a master's report do not apply to a report of a mere ministerial matter like a sale, but only to a report upon matters heard and determined by him.

The master's sale under the decree was advertised to take place in Michigan

Statement of the Case.

on Saturday, January 24. Late in the evening of Friday, January 23, the master received from M. a telegram from Boston, in Massachusetts, stating that he was a holder of nearly 3000 shares of stock, that he had just heard of the sale, that it was to take place on the Jewish Sabbath, that his Jewish friends wished to buy but would not attend on the Sabbath, and asking for a postponement. The sale took place on the 24th as announced, whereupon, on the 26th M. again telegraphed protesting and making an offer in advance of the purchaser's bid. The master reported this in his report of the sale. The sale was confirmed. The day after the confirmation M. asked leave to intervene and have the sale set aside. In the subsequent proceedings no proof was offered that M. was a shareholder, and it appeared affirmatively that he had no financial responsibility. *Held*, that if it had been planned he could not have been more opportunely ignorant before the sale, or more accurately informed after the confirmation, and that his intervention was too late.

THE court stated the case as follows:

These cases spring out of the same litigation and may be considered together. The preliminary facts are these: On April 4, 1853, the Pewabic Mining Company was organized as a corporation for mining copper, under the laws of the State of Michigan. The term of the corporation was for thirty years, and expired April 4, 1883. The capital stock at that time consisted of 40,000 shares, of $25 each. Notwithstanding the termination of the life of the corporation, the directors then in office continued its business without change. On March 26, 1884, at a meeting of the stockholders, by a vote of 27,919 against 6754 shares, the directors were authorized to dispose of the property at a sum not less than $50,000, and a sale was directed to be made to a new corporation, to be organized on the basis of 40,000 shares, the shares in the old to be exchanged in full payment for shares in the new, the stockholders in the old, not electing to join the new, to receive their *pro rata* interest in money. The present appellees were stockholders in the old corporation, owning 2650 shares, and protested against these resolutions. A new corporation was organized, but, before the transfer had been made, the appellees filed their bill in the Circuit Court of the United States for the Western District of Michigan, the purpose of which was to enjoin the proposed transfer of the property of

the old to the new corporation, and to have it sold at public auction, and the proceeds divided ratably among the stockholders. This bill was filed March 31, 1884. On final hearing a decree was entered sustaining the prayer of the bill, and directing a sale of the property at public vendue, for cash, to the highest bidder, and referring the cause to Peter White as special master, with power to ascertain the assets and debts of the mining company, and directing that, after ascertaining and making report thereof to the court, he should proceed to sell the property at public vendue. (25 Fed. Rep. 882.)

From that decree an appeal was taken, and thereafter this court sustained the decree so far as it ordered a sale. In reference to the accounting before the master, it, however, directed that it should be widened so as to include the proceedings of the directors since the dissolution of the corporation. The opinion of this court was announced January 13, 1890. (133 U. S. 50.) The mandate was issued February 6, and was filed in the Circuit Court on March 14, 1890. In the execution of the decree a sale was made by the master on the 24th of January, 1891, more than a year after its affirmance by this court, the purchasers being Thomas Henry Mason and William Hart Smith, two of the original plaintiffs, and the price paid being $710,000. The sale was confirmed; and to set aside the confirmation and to open the sale were the matters sought to be accomplished by the three appeals taken in these two cases.

The specification of errors in the Pewabic Mining Company case was as follows:

"1. That the court below erred in overruling the first exception taken by the appellant to the report of the sale of the special master, viz.: 'That the said sale mentioned in said report was made before the debts and the assets of said defendants, the Pewabic Mining Company, were ascertained as provided for and required in the decree entered in said cause.'

"2. That the court below erred in overruling the fifth exception taken by the appellant to the report of the sale of the special master, viz.: 'Because said property was sold

for an inadequate price or sum, and for much less than it is worth.'

"3. That, under the mandate of this court, nothing less than 'all the assets and property of the said Pewabic Mining Company' 'in one body' could be sold by said master; but that by the order of the court confirming the sale, an exception was made therefrom of the claims against the directors, so that in fact all of said assets and property were not sold in one body.

"4. That in disregard of the rules governing the equity practice of the Circuit Courts of the United States, said report was confirmed within one month from the filing of the report in court.

"5. That promptly and without laches, and before any confirmation of said sale had been made as authorized by the rules governing such practice, and before any confirmation whatever had become absolute, beyond the power of the said Circuit Court to set aside, *bona fide* and well assured offers of a price largely advanced beyond the highest bid at the reported sale were presented to this court in support of an application, from the party so offering and of this appellant, for the setting aside of said reported sale, and the ordering of another sale.

"6. That Thomas H. Mason and William Hart Smith, complainants in this cause, bid at said auction, and that their bid, as the highest bid, was accepted by the special master, and the property exposed to sale was struck off to them as purchasers, when: (*a*) They had not obtained leave from the court to bid at said auction; (*b*) They had advised the court in the matter of the sale, and pressed forward the sale as parties interested only as sellers to obtain the highest price, and not at all as buyers interested to obtain the property for the lowest sum, and that therefore they had no right to bid; (*c*) Before so bidding they had concerted with the Quincy Mining Company a scheme to take the property (if bought) off their hands at a very large personal profit; and they did not disclose this fact to the court, in any of their representations to the court, in the matter of the sale, and they procured

affidavits from officers of the Quincy Company and presented them to the court, in which this fact was not disclosed; (*d*) Neither did they disclose this fact of their having secured a sale of this property to the Quincy Mining Company at a large profit, to the master, their fellow stockholders or the other bidders at said sale, nor allow the same then and there to be disclosed, but concealed the same; (*e*) On the other hand, while they had obtained this contract and agreement with the Quincy Mining Company, in accordance with which they were to buy this property for the purpose of transferring it to that company, they advised the court that said Quincy Mining Company would, at the auction ordered, bid as an independent bidder, in fair and free competition, and pressed forward the sale for this reason, that if deferred the Quincy Company might not bid, concealing from the court this contract and agreement, and all their relations with the Quincy Mining Company in this matter; (*f*) As a matter of fact the scheme was carried out. The complainants were both buyers and sellers. They advised the court, made the sale, purchased the property, and resold it at an advance which they pocketed themselves for their own personal benefit, and in fraud of the other stockholders.

"7. That as against a bid accepted under all these circumstances, the Pewabic Mining Company, having, for a reasonable time, an undoubted right to elect whether to ratify and enforce the sale, and to demand and receive into its own assets the advance upon the sum bid, which was to be paid to the accepted bidders, or to have the accepted bid rejected, and the biddings reopened, has exercised that right entirely within such reasonable time, and is not guilty of laches in the premises.

"8. That the advance price offered to be bid for the property sold, in case a new sale should be ordered, was large enough to induce and require the court to open the biddings and to order such resale, and that such order was amply secured and guaranteed, and was seasonably made for that purpose."

In Marcus's case the following additional specifications were filed.

Argument for Appellants.

"1. Because, as a large stockholder, and as making a *bona fide* offer of a great advance over the amount bid at the sale, he had a right to intervene."

"4. If the sale had not been confirmed prior to the filing of Marcus's petition, the *bona fide* offer of so large an advance price was proper ground for opening the sale and ordering a resale.

"5. Even if the sale had been confirmed prior to the filing of Marcus's petition, the action of the court at the same term in entertaining the petition and in directing order of notice to issue thereon, suspended the operation of the order of confirmation.

"6. But, even if the sale had been regularly confirmed and the decree of confirmation had become of full effect, under all the circumstances of this case the sale should have been opened and a resale ordered.

"7. The petitioner, Marcus, has not been guilty of laches which should defeat the granting of his petition."

Mr. Thomas H. Talbot for the Pewabic Mining Company, and *Mr. Robert M. Morse* and *Mr. J. Lewis Stackpole* for the Pewabic Mining Company and Marcus. *Mr. Russell C. Ostrander* was on the briefs for the company and for Marcus, and *Mr. Charles E. Hellier* on the brief for Marcus.

I. The directions of the mandate have been disregarded, in that the debts and assets of the Pewabic Company were not finally ascertained and adjudicated before a sale of any of the property of the company was ordered and made.

II. The property was sold for an inadequate price.

III. Under the mandate of this court, nothing less than "all the assets and property of the said Pewabic Mining Company in one body" could be sold by said master; but by the order of the court confirming the sale, an exception was made therefrom of the claims against the directors, so that in fact all of said assets and property were not sold in one body.

IV. The report of sale was confirmed, in disregard of the

Counsel for Appellees.

rules governing the equity practice of the Circuit Courts, within thirty days from the filing of the report.

V. Before any valid confirmation of the sale, *bona fide* offers for a largely advanced price were presented to the court below on an application for a resale.

VI. The sale to the complainants, made without leave of the court to bid, in pursuance of a secret scheme entered into with a rival company, in which they were large stockholders, to turn over the property to it at a large private profit, undisclosed to either the court, the master, or other bidders, is contrary to the plainest principles of equity, and must be annulled. *Mason* v. *Pewabic Mining Co.*, 133 U. S. 50; *O'Connor* v. *Richards*, San. & Sc. 246; *Ryder* v. *Gower*, 6 Bro. P. C. 306; *Sidny* v. *Ranger*, 12 Sim. 118; *Byrne* v. *Lafferty*, 8 Ir. Eq. 47; *Guest* v. *Smythe*, L. R. 5 Ch. 551; *Ex parte Lacey*, 6 Ves. 625; *Lister* v. *Lister*, 6 Ves. 631; *Nelthorpe* v. *Pennyman*, 14 Ves. 517; *Downes* v. *Grazebrook*, 3 Meriv. 200; *Michoud* v. *Girod*, 4 How. 555; *Ex parte James*, 8 Ves. 337; *Randall* v. *Errington*, 10 Ves. 423; *Ex parte Bennett*, 10 Ves. 381; *Parkes* v. *White*, 11 Ves. 210, 226; *Hatch* v. *Hatch*, 9 Ves. 292.

VII. The defendants had the right of election between a confirmation of the sale and receipt of the profits of the buyers on the one hand, and of its annulment on the other. This election is a question independent of the date of confirmation by the court below. They have seasonably exercised it and have been guilty of no laches.

VIII. The advance price offered to be bid for the property sold, in case a new sale should be ordered, was large enough to induce and require the court to open the biddings and to order such resale, and such offer was abundantly secured and guaranteed and was seasonably made for that purpose.

IX. The petitioner Marcus, as a large stockholder and as making a *bona fide* offer of a great advance on the amount bid at the sale, had the right to intervene.

Mr. Don M. Dickinson (with whom were *Mr. Thomas B. Dunstan* and *Mr. Alfred Russell* on the brief) for appellees.

Opinion of the Court.

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

The question in this case is whether the master's sale shall stand. It may be stated generally that there is a measure of discretion in a court of equity, both as to the manner and conditions of such a sale, as well as to ordering or refusing a resale. The chancellor will always make such provisions for notice and other conditions as will in his judgment best protect the rights of all interested, and make the sale most profitable to all; and after a sale has once been made, he will, certainly before confirmation, see that no wrong has been accomplished in and by the manner in which it was conducted. Yet the purpose of the law is that the sale shall be final; and to insure reliance upon such sales, and induce biddings, it is essential that no sale be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining party prior thereto. And in this respect regard may properly be had to all that has transpired before, for the conduct of the parties, their acts and omissions, may largely interpret their action at the time of the sale. In order, therefore, to understand fully the merits of these present appeals we must notice the course of the litigation and the conduct of the parties prior to the sale.

In 1883 the Pewabic Mining Company ceased to exist; its property then belonged to the different stockholders as tenants in common. They could not agree among themselves. The minority appealed to the courts, and there the litigation was carried on for years; the minority insisting upon a sale, the majority upon the transfer of the property to a new corporation. At the end of six years the controversy was finally determined by this court; and in January, 1890, a decree of the Circuit Court directing a sale was affirmed. During these years each party was fully aware of the purpose and contention of the other, and, therefore, had ample time to prepare for whatever might be the outcome of the litigation. In January, 1890, as stated, the final decision was announced; at that time each party knew that a sale was to be had, and

that if it intended to buy it must make all its arrangements therefor, and in such arrangement must be included a determination of the full amount it was willing to bid for the property. It cannot be tolerated that it be in the contemplation of either to wait until after the property has been struck off to the other, and then open the bidding and defer the sale by an increased offer. Though the final decision in favor of the sale was announced on January 13, 1890, the sale was not made until January 24, 1891, more than a year thereafter. It was advertised to take place, first on October 30, 1890, but on application of the defendant was postponed till December 20, and again, on like application, to January 24, 1891. It was fully advertised not only in the local, but also in Detroit, New York, Boston and Chicago papers. There can be no pretence, therefore, of haste or a lack of notice, personal and general.

It is insisted by defendant that the plaintiffs were acting in the interest of the Quincy Mining Company, a corporation owning adjoining and rival mining property; that solely in its interest, and not for the benefit of the stockholders in the Pewabic Mining Company, they carried on this litigation, secured the sale, bought at it, and, in final consummation of the wrong to their coöwners, have since their purchase conveyed the property to the Quincy Mining Company. There is a counter-charge by the appellees that the majority of the stockholders who sought to convey the property to the new corporation, and who have been practically the adverse party in this litigation and who may hereafter be considered as described by the term defendant, were acting in the interest of the Franklin Mining Company, another corporation also owning property adjacent to the Pewabic mine. We are inclined to think there is truth in each allegation, and that it is not difficult to read between the lines that the minority of the stockholders were interested in the Quincy and the majority in the Franklin Company, and that these respective corporations were seeking to obtain possession and control of the Pewabic. But there was no wrong or fraud in this, and no deception. Each party evidently knew the interests and

relations of the other. In the answer originally filed by the defendant, in 1884, it was charged upon the plaintiffs that they were acting in the interest of a rival mining company.

It is also contended that the sale was made at a time when a severe financial condition existed in the country, especially affecting mining stocks and mining property. But the sale had once been postponed on this ground at defendant's instance, the affidavits as to such depression were met by counter-affidavits on the part of the plaintiffs, and it is a doubtful question, under those affidavits, whether such depression did in fact exist. Even if it were clear that it did, that would not necessarily be a reason for further postponement. There comes a time in the history of a litigation like this when, though the times may be depressed, there must be a sale. The rights of the one party are to be respected as well as those of the other; and it does not always lie in the mouth of one who, by strenuous and protracted resistance, has delayed for years a sale, to claim still further delay on account of the then depressed financial condition. A speedy end of litigation, as speedy as is consistent with the rights of each party, is to be desired; and they who prolong litigation by appeal from court to court must not complain if sometimes they find themselves, at the end, under burdens which would not have rested upon them but for such delay. We think it must be affirmed that, so far as the general equitable considerations attending these cases are concerned, they make in favor of the appellees, and that a court should not for any light or technical reason disturb a sale consummated at the end of seven years of litigation.

We pass, therefore, to some of the special matters presented. First, it is claimed that under the terms of the decree the sale was prematurely made. That decree directed "that all the assets and property of the said Pewabic Mining Company be sold at public vendue, for cash, to the highest bidder: *Provided, however*, That if at such sale the bid for the aggregate of the property and assets of said company should not be in excess of fifty thousand dollars above the amount of the debts of said company existing at the time of the sale hereinafter

decreed, then that the arrangement for the sale of the property of said company made at the stockholders' meeting in Boston, on the 26th day of March, A.D. 1884, and as set up in the defendant's answer, shall be carried out under the direction of the special master hereinafter designated. . . . It is further ordered, adjudged and decreed that this cause be, and is hereby, referred to Peter White, as special master," for the following purpose and with the following powers, to wit, "That said master proceed to ascertain the assets and property and the amount of the debts of the said Pewabic Mining Company," and "after ascertaining the assets and debts of said company and making a report thereof to this court, as hereinabove provided, and the confirmation thereof, said master shall proceed to sell said property at public vendue, to the highest bidder, in one body, after giving the notices of said sale required by law and the practice of this court, and that he make report thereof, and that said property be offered for sale at the front door of the court-house, in the village of Houghton, in the county of Houghton and State of Michigan." This decree was affirmed by this court, the only modification being in respect to an accounting with the directors for moneys received by them after the expiration of the charter. It is insisted that by these terms no sale could be had until there had been a final ascertainment, a judicial determination, of all debts owing at the time of the sale, as well as of all assets, including therein claims due to the corporation; that by the modification directed by this court, there was also to be had an accounting with the directors, and until that was finished no sale could be had, because it was not as yet judicially ascertained whether they owed the corporation or the corporation owed them; in other words, whether there were more debts or more assets. The master to whom this matter was referred reported that all debts of the corporation which existed at the commencement of the suit had been paid; that all the personal property had been disposed of, leaving only the mine and its appurtenances; and that the total amount of all the claims against the company, added to $50,000, was less than the amount for which he had the pledge of a responsible bid,

secured by a certificate of stock. This report was filed September 18. On November 4 the court confirmed so much of the report as found that the indebtedness due at the time of the commencement of the suit had been paid. Other exceptions to the report were sustained, but the court added these findings and orders:

"Fourth, that for the purpose of fixing the upshot price at the sale the amount of such indebtedness on said day is hereby found and determined by the court to have been the sum of $80,191.20; fifth, that the last-named sum, with interest thereon from the last-named date, plus $50,000, shall be the starting point for the bidding at the sale; sixth, that the sale heretofore decreed in this cause do take place after six weeks' notice thereof subsequent to the date of this order shall have been given by said master, who is hereby directed to postpone sale until after such notice and then to make said sale; seventh, all questions of any of the parties with respect to their dealings with the indebtedness of said company or any part thereof are hereby expressly reserved."

The contention of the appellees is, that the purpose of requiring an ascertainment of the debts prior to the sale was the fixing of an upset price, in order that, if no bid be made in excess of $50,000 above the amount of the debts of said company, the arrangement made in 1884 by the majority of the stockholders for the transfer of the property to the new company should be carried into effect, and that it was not contemplated that the sale should be absolutely postponed until after a final judicial determination of the amount of the several claims against the corporation — a matter which, by reason of possible appeals from the circuit to this court, might delay the sale for many years. They further insist that the conduct of the appellant showed a purpose to promote delay, and, therefore, that, even if a strict construction sustained appellant's claim, the court was justified in modifying the mere order of procedure. They urge, that though all debts due at the time of the commencement of the suit, and when the life of the corporation was ended, were paid, the defendant caused to be presented a series of claims, for services of counsel and

officers of the Pewabic Mining Company, and for money claimed to have been loaned to it, and then, on behalf of that company, filed exceptions to the legality and sufficiency of these claims, and having thus a form of controversy arranged before the master, neglected and delayed in the matter of hearing the same; and in support of this they call attention to a letter written by the master to the trial court in response to inquiries as to why the report was delayed.

With respect to this last matter it is sufficient to say that obviously the defendant was dilatory; and with reference to the construction of the decree, we think the appellees are right. It cannot be that the sale was intended to be the last act of this litigation, and that it must be delayed till every claim arising since the commencement of the suit had been passed to final judgment; for as the property remained in the hands of the appellant, new claims for care and services might arise as fast as old ones were determined; and, indeed, there were at the time of the sale no debts save those arising since the commencement of the suit. The purpose of the decree was a sale, provided such sale would produce more than the plan proposed by the majority of the stockholders; and it was enough, the debts due at the time having all been paid, that a mere statement of the amount of the claims be presented, and upon that the upset price be fixed. It will also be noticed that the court for the purposes of the sale found and determined the amount of the indebtedness, and that ample provision was made in the orders for the rights of all creditors, and the collection of all debts, and a fund was received from the sale large enough to satisfy all possible claims —$710,000, instead of the $50,000 named in the resolution of the company in March, 1884. We think, therefore, this contention of the appellant must fail.

A second contention is, that the sale was made to complainants without leave given by the court to them to bid. But no leave was necessary. The complainants were not the vendors. The English practice does not obtain in this country. A sale made by a special master under the directions of a court of chancery is not a sale made by either of

the parties to a litigation or under his direction. The master is a representative of the court, as a marshal or sheriff is in an action at law. He is not under the control of either party; he is not the agent of either to make the sale. At such public judicial sale, either party as a rule may bid. *Richards* v. *Holmes*, 18 How. 143; *Smith* v. *Black*, 115 U. S. 308; *Allen* v. *Gillette*, 127 U. S. 589; *Smith* v. *Arnold*, 5 Mason, 414, 420. In that case Judge Story said: "In sales directed by the court of chancery, the whole business is transacted by a public officer, under the guidance and superintendence of the court itself. Even after the sale is made, it is not final until a report is made to the court and it is approved and confirmed."

In *Blossom* v. *Railroad Company*, 3 Wall. 196, 208, this court said: "Officers appointed under such decrees, and directed to make such sales, have the power to accomplish the object; but they are usually invested with a reasonable discretion as to the manner of its exercise, which they are not at liberty to overlook or disregard. Acting under the decree, they have duties to perform to the complainant, to the vendor and purchaser, and to the court, and they are bound to exercise their best judgment in the performance of all those duties. Such an officer, in acting under such a decree, if directed to sell the property, should adopt all necessary and proper means to fulfil the directions; but he should, at the same time, never lose sight of the fact that, unless he is restricted by the terms of the decree, the time and manner of effecting the sale are, in the first instance, vested in his sound discretion. Usual practice undoubtedly is, that the officer in selling the property acts under the advice of the solicitor of the complainant; but it cannot be admitted that his advice is, under all circumstances, obligatory upon the officer."

Nor is this a case where the complainants stood in any such fiduciary relations as forbade them to purchase or prevented even their acting for others in bidding. They had litigated with the defendant for years in establishing the right to have that property sold; and when finally they had succeeded in getting a decree that it be sold, they did not then assume a

duty to the defendant and become charged with the care of its interests, or become incapacitated from bidding freely for themselves or for others. None of those matters of a fiduciary character, which sometimes enter into and avoid sales, existed in this case.

Another matter complained of is that the sale was prematurely confirmed. It took place on the 24th of January, 1891, and the report of sale was filed February 4. On the 7th of February an order *nisi* was entered, that, unless cause to the contrary was shown within eight days, the sale would be confirmed. On February 13 reasons why the sale should not be confirmed were filed by the defendant, and on the same day exceptions to the report of sale. On the 2d day of March, upon notice, the objections and exceptions of the defendant were heard by the court and overruled, and the sale confirmed.

In support of this complaint reliance is placed on general equity rule number 83: "The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto, and, if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired." It is worthy of note, however, that exceptions were filed, were heard and determined by the court, and no objection was made by the appellant to the time of the hearing, or any suggestion of a right to longer time in which to file exceptions. It would seem that if there were error in this respect, the appellant was not in a position to avail itself thereof. But there was no error. Rule 83 has no reference to a report by a master of a mere ministerial matter like a sale, but only to his report upon matters heard and determined by him. In *McMicken* v. *Perin*, 18 How. 507, 510, it was observed: "In *Story* v. *Livingston*, 13 Pet. 359, this court decided that no objections to a master's report can be made which were not taken before the master; the object being to save time, and to give him an opportunity to correct his errors and reconsider his opinion." But surely in the matter of a sale

there is no opportunity for objections before the master, or any correction by him of his errors or any reconsideration of his opinion. The course pursued in this case in reference to the confirmation was the correct practice; an order *nisi* followed if no objections were taken in time by an order of confirmation. In 2 Daniell's Chancery Pleading and Practice, page 1274, 4th Am. ed., the author says: "After the report has been filed, and an office copy taken by the purchaser, he must, at his own expense, apply to the court by motion, that the purchase may be confirmed. This motion requires no previous notice, and the order made upon it will be that the purchase may be confirmed *nisi*; *i.e.* unless cause is shown against it within eight days after service of the order. The purchaser must, at his own expense, procure an office copy of this order from the registrar, and he may serve it on the solicitors for all the parties in the cause. If no cause is shown within the eight days, the purchaser must, at his own expense, apply to the court to confirm the order absolutely, which will be ordered of course, on the production of an affidavit of the service of the order *nisi*, and a certificate of no cause having been shown." And, again, on page 1305, in which he thus notes the reason of the rule in respect to a report of sale: "With respect to which it is to be observed, that the object of requiring this report to be confirmed is not to enable the parties to bring the decision of the master under the review of the court, but to afford time between the service of the order *nisi* and the absolute confirmation of the report, to others to come in and open the bidding, so as to secure the sale of the estate to the best possible advantage." And in 8 American and English Encyclopædia of Law, p. 254, the practice is thus stated: "The master or commissioner making the sale should report his action to the court, to the end that the sale may be confirmed. A motion to confirm the sale, with notice to the parties adversely interested to the confirmation, should be made. Confirmation *nisi* will be ordered, to become absolute within a designated time, unless cause is shown against it. If cause is not shown it stands confirmed." See also *Mayhew* v. *West Virginia Oil Co.*, 24 Fed. Rep. 205,

215, and as to the practice in the state courts of Michigan, Jennison's Ch. Pr. p. 157, Rule 79. We think, therefore, that this objection also must be overruled.

The remaining objections made by the appellant can be more conveniently considered in connection with the appeal of Alfred A. Marcus. The first appearance of Marcus in this litigation was in this wise: The sale was made on the 24th of January, and at the village of Houghton, county of Houghton, and State of Michigan. The 24th was Saturday, and late in the evening of January 23 the master received this dispatch:

"BOSTON, MASS., *January* 23, 1891.

"To PETER WHITE, special master:

"Please postpone sale of Pewabic mine; just found out the sale on our Jewish Sabbath; never notified of sale until to-day. We hold nearly three thousand shares. Our Jewish friends in London will buy the mine. There are other Jewish buyers who will not attend sale on Saturday; will most cheerfully pay all expenses for postponement; if not, please announce at sale 'we will protest against this legality.'

"ALFRED A. MARCUS."

On Monday, the 26th, he received the following:

"BOSTON, MASS., *January* 26, 1891.

"To PETER WHITE, special master:

"You ignored my dispatch; sold the Pewabic mine. I protest against the sale, as you were bound to do all to get the highest price. I claim the right now to bid seven hundred twenty-one thousand dollars cash, being twenty thousand dollars more than bid at the illegal sale. I shall claim the mine, being the highest bidder, and protest against any transfer being made to any one except myself, and shall hold you personally responsible.

"ALFRED A. MARCUS."

In his report of sale he gave copies of these dispatches, simply adding that the sender of the dispatches was wholly

unknown to him, and that he paid no attention whatever to them. On the 3d day of March, the day after the sale had been confirmed, and more than five weeks after the sale had been made, Marcus filed a petition for leave to intervene, in which he alleged that "he is the owner of 3017 shares of the capital stock of the Pewabic Mining Company; that he, for himself and other parties, whose names he is willing to disclose, was desirous and fully intended to be present or represented at the sale of the property of the said Pewabic Mining Company by the special master duly appointed by this honorable court in the above-entitled cause; that he was ready to and would have bid at said sale and paid a large amount of money for the property of said company advertised for sale by said special master; that on January 23, 1891, that being the day before the sale of said property took place, your petitioner discovered for the first time that the sale was advertised for Saturday, January 24; that thereupon and immediately your petitioner, using all haste and dispatch possible, sent by telegraph a message to the said special master, a copy whereof is hereto annexed, marked A, asking to have the sale of said property postponed, at his own expense, for the reason that he was never notified of the sale until said date, and that said sale was advertised to take place on the seventh day of the week, which is the Sabbath of your petitioner, and upon which day he is forbidden by his creed to do any business." He further alleged that the master ignored the dispatch and sold the property for an inadequate sum, and for much less than it was worth; that his offer on January 26 was *bona fide;* that he was willing and ready to pay all the expenses of a resale; and that he would start with a bid not less than $800,000, afterwards by amendment raised to $900,000, and would give a bond with satisfactory sureties for his good faith and ability to carry out his offer. On the presentation of this petition the parties were ordered to show cause why it should not be granted. It is a singular fact that his first appearance in the case was the day before the sale, and his first appearance in court the day after the confirmation. If it had all been planned, he could not have

been more opportunely ignorant before and more accurately late after. To this order to show cause the parties appeared, testimony was taken, and a hearing had. It is worthy of note that, outside of the petition of Marcus, there is no evidence of his ownership of stock, and nothing in that tending to show how or when he obtained title to that which he claimed to own; neither is there anything to show what steps he had taken, prior to the sale, to inform himself of what was going on in the affairs of the company. It would seem from the multitude of judgments and attachments against him appearing on the records of the courts in Boston, that he was of no financial responsibility. On the other hand, it is also true that the affidavits of several responsible parties were presented, showing that Marcus was a man of large transactions; that he was an orthodox Jew, who did no business on Saturday; and that the parties named were willing to give the proffered bond if a resale were ordered. It would not be a strained inference from the testimony that Marcus was acting for others, and was really put forward with the idea of introducing a new factor into the litigation. But we deem it unnecessary to inquire into the real character of this intervention. It is enough that it comes too late. Surely no one would suppose that an officer having charge of the sale of property of such value, a sale made at the end of prolonged litigation, should at the last moment, in response to a dispatch from a stranger, postpone the sale. The master's action was unquestionably proper, and if the party desired the intervention of the court, his duty was to apply at once and not wait until after confirmation; for then the rights of the purchaser are vested, and something more than mere inadequacy of price must appear before the sale can be disturbed. Indeed, even before confirmation the sale would not be set aside for mere inadequacy, unless so great as to shock the conscience. See *Graffam* v. *Burgess*, 117 U. S. 180, 191, where the matter is discussed at some length by Mr. Justice Bradley. As the price bid by the appellees, and at which the property was struck off to them, was about $580,000 in excess of the upset price, it is hardly necessary to say that there is no shocking inadequacy of price.

In conclusion, we may add that, after reviewing all the facts disclosed by these records in the light of the prior history of the litigation, it seems to us that the equities of the case are decidedly with the appellees, and the decrees will be

Affirmed.

MR. JUSTICE GRAY did not hear the argument and takes no part in the decision of this case.

GALLIHER *v.* CADWELL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

No. 265. Argued April 1, 1892. — Decided May 16, 1892.

Laches does not, like limitation, grow out of the mere passage of time; but it is founded upon the inequity of permitting the claim to be enforced — an inequity founded upon some change in the condition or relations of the property or the parties.

G. made a homestead entry in Washington Territory in 1872. He died in 1873. The entry was cancelled in 1879 for want of final proof within the seven years. In 1880 the act of June 15, 1880, was passed, 21 Stat. 236, c. 227, authorizing persons who had made homestead entries to entitle themselves to the lands on paying the government price therefor. G.'s widow made application for a patent under this act, and her application was rejected. In 1881 W. entered the tract, and in 1882 received a patent for it. In 1884 the widow made an application for a rehearing under the act of 1880, and her application was rejected in the same year. The land having greatly increased in value by the growth of the city of Tacoma, C., claiming through conveyances from W., filed a bill to quiet title, making the widow a defendant. The widow answered setting up as a prior right the homestead entry. *Held*,

(1) That it was doubtful whether the widow of G. was entitled to the benefit of the act of June 15, 1880: but that, without deciding that question,

(2) In view of the rapid and enormous increase in value of the tract, and her knowledge of all the circumstances, which must be assumed from her near residence to the property, a court of equity would not disturb a title legally perfect, created by the General Government after a decision adverse to any reservation of the homestead right, and on the faith of which costly improvements had been made.

Statement of the Case.

THE court stated the case as follows:

On March 1, 1886, appellee, claiming to be the owner of what is known as Votaw's addition to the city of Tacoma, in the then Territory of Washington, filed her bill in the District Court to quiet her title to such property, making, with several others, as a defendant the present appellant. Such appellant answered, alleging a right prior and superior to that of appellee. Appellee's title was derived by regular conveyances from Francis B. H. Wing, who, on December 20, 1881, entered this land, and on April 20, 1882, received a patent therefor from the United States. Her legal title was, therefore, perfect, and the single question presented was, whether appellant had an equity superior to that legal title. In appellant's behalf these general facts appeared: On August 10, 1872, Silas Galliher, her husband, made a homestead entry of the tract. He died April 18, 1873, and his entry was cancelled December 4, 1879, for want of final proof within the statutory period of seven years. On June 15, 1880, an act was passed by Congress of which the following is the second section:

"SEC. 2. That persons who have heretofore, under any of the homestead laws, entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads may have been attempted to be transferred by *bona fide* instrument in writing, may entitle themselves to said lands by paying the government price therefor, and in no case less than one dollar and twenty-five cents per acre, and the amount heretofore paid the government upon said lands shall be taken as part payment of said price: *Provided*, This shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws." 21 Stat. 236, 237, c. 227.

On November 23, 1880, Mrs. Galliher made application for the land under this act. On June 1, 1881, her application was rejected by the Secretary of the Interior. On June 6, 1884, she petitioned for a rehearing, which, on June 20, 1884, was denied. No other action was taken by her to establish or assert any rights until, in response to the bill in this case, she

filed her answer. Upon the proofs the trial court rendered a decree in favor of the appellee, which was sustained by the Supreme Court of the Territory. From such decision appellant brought her appeal to this court.

Mr. John B. Allen for appellant.

It is charged that appellant has slept upon her rights and is therefore estopped from asserting them. No statutory limitation has been asserted.

It is not alleged either in the complaint or reply that appellee was a purchaser in good faith without notice, but it is expressly alleged that she, and all persons under whom she claims, before the purchase of the land, were fully advised of the entry of Galliher, of the offer of the widow to acquire the land under the act of June 15, 1880, and that their purchase was made with definite knowledge of the fact that the land in dispute was subject to the homestead entry.

The government held it out to any one who might see fit thus to enter it as such land. It is conceded Silas Galliher was a person duly qualified to make such entry. It is conceded he made the entry in all respects conformably to law, and paid the requisite government fees. This makes a *prima facie* case. Fraud is not to be presumed; much less is perjury. Neither are to be established by mere implication, but must be affirmatively and clearly proven.

If it cannot be thus shown that Galliher was guilty of perjury and fraud in making his entry, no subsequent failure to comply with the law or abandonment of the claim can affect appellant if the construction she claims for the statute be correct.

Mr. Joseph W. Robinson filed a brief for appellant.

Mr. John H. Mitchell for appellee.

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

There is a question in this case worthy of consideration, as to whether the homestead entry by the husband of appellant

was made in good faith, or simply for speculative purposes. It is also a question of doubt whether, the homestead right not having been perfected within the time prescribed by the statute, and the entry having been duly cancelled by the department on account thereof, appellant, as widow, was entitled to the benefit of the act of June 15, 1880, which by its language grants to the party making the entry, or the transferee of such party by *bona fide* instrument in writing, certain rights of preëmption. It does not in terms refer to the widow or children of the party making the homestead entry, while sections 2291, 2292 and 2307 of the Revised Statutes, in respect to homestead entries, contain special provision therefor, as did also the act of September 7, 1850, known as the Oregon Donation Act, 9 Stat. 496, 499, c. 76, § 8, which cast a descent of the rights of a settler upon his heirs, including his widow. And the argument is worthy of consideration, that, because in some acts of Congress the widow is specifically named as entitled to rights originally vested in her husband, the omission to specify her in the act in question was an intentional exclusion of her from the privileges named therein, and that Congress did not intend to grant to others than the homesteader, and the persons holding under him by instrument in writing, any rights by reason of his incompleted homestead entry. Sutherland on Statutory Construction, sec. 327, and cases cited therein.

But it is unnecessary to rest our decision upon these matters. The laches of the appellant is such as to defeat any rights which she might have had, even if these prior questions were determined in her favor; and in this respect it is worthy of notice that there has been in a few years a rapid and vast change in the value of the property in question. It is now an addition to the city of Tacoma. The census of 1880 showed that to be a mere village, the population being only 1098. The census of 1890 discloses a city, the population being 36,006. Of course such a rapid increase during this decade implies an equally rapid and enormous increase in the value of property so situated as to be an addition to the city. And the question of laches turns not simply upon the number of years which

have elapsed between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during that lapse of years. The cases are many in which this defence has been invoked and considered. It is true, that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them.

A reference to a few of the cases in our own reports may not be out of place. In *Harwood* v. *Railroad Co.*, 17 Wall. 78, a delay of five years on the part of stockholders in a railroad company in bringing suit to set aside judicial proceedings, regular on their face, under which the railroad property was sold, was held inexcusable. In *Twin-Lick Oil Company* v. *Marbury*, 91 U. S. 587, a director of a corporation who had loaned money to it and subsequently bought its property at a fair public sale by a trustee, was protected in his title as against the corporation, suing four years thereafter to hold him as trustee of the property for its benefit, it appearing that in the meantime the property purchased had increased rapidly in value. In *Brown* v. *County of Buena Vista*, 95 U. S. 157, a county was held barred by its laches from maintaining at the end of seven years a suit to set aside a judgment fraudulently obtained against it; and that, too, though it did not affirmatively appear that the supervisors of the county had knowledge of the existence of the judgment till about twenty months before the commencement of the suit. In *Hayward* v. *National Bank*, 96 U. S. 611, a party who had borrowed money of a bank and deposited with it as collateral security certain mining stocks, which were sold by the bank upon his failure to repay the loan, was held barred by his laches in a

bill to redeem, filed four years thereafter, the stocks in the meantime having greatly increased in value. In *Holgate* v. *Eaton*, 116 U. S. 33, a married woman who, on being informed of a contract made by her husband for the sale of an equitable interest in real estate held by her in her own right, repudiated it and refused for two years to perform it, was not permitted thereafter to maintain a bill for specific performance of the contract, the value of the property having depreciated. In *Davison* v. *Davis*, 125 U. S. 90, a bill to compel the specific performance of a contract to sell personal property upon the payment of a promissory note, payable at a date after the making of the contract, was dismissed on the ground of the laches of the complainant in waiting five years after the maturity of the note before filing his bill, the property in the meanwhile having increased in value. In *Société Foncière* v. *Milliken*, 135 U. S. 304, a delay of two years in the commencement of proceedings to set aside a judgment for usury was adjudged fatal, the amount of the usury being small, and the judgment having been enforced in the meantime by the sale of real estate.

But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced — an inequity founded upon some change in the condition or relations of the property or the parties. In order to appreciate the force of these suggestions as applicable to the case before us a little further detail of the facts is necessary. And, going back to the commencement, it appears that the tract was a small one, the soil poor, and the land valuable chiefly for timber. Obviously the place was not one which a party would take and occupy with the idea of making a living off of and from it. Galliher was living at Olympia, a city about forty miles distant, engaged in running a hotel, and having children there being educated. He continued his business at Olympia, and, during the few months he lived after the entry, all that he did upon the land was to lay the foundation of a log cabin, and make a slight clearing. After his death his widow completed a

small house, and for two or three years she and her family lived at intervals, alternately, on the tract and in Olympia. In 1876 she took up her permanent abode at Olympia, abandoned the land, and never again had a residence thereon. In 1879 the homestead entry was legally cancelled. At that time and by that act all her rights of every kind and nature were ended, and the land was fully restored to the public domain, as free for occupation and purchase by any other citizen as though there had never been any semblance of occupation or entry. In June, 1880, months after all her rights in the land had been terminated, an act was passed by Congress granting certain privileges in respect to lands which had been theretofore entered for homestead. She was not one of either of the two classes of persons named in the act as entitled to its benefits. Nevertheless, she applied to the Land Department to purchase the land under its provisions. Her application was, by the Land Department, finally by its highest official on appeal, rejected; this decision being announced on the first of June, 1881. That same year another party entered the land, and, on April 20, 1882, received a patent therefor. At that time, if not before, she was in a position to establish her rights, if any, to the land. Six years before she had abandoned its occupation. She had asserted rights under an act not naming her as a beneficiary, and her application had been finally rejected by the proper authorities. Another, and a perfect legal title, had been created, in reliance upon the absolute termination of any interest or claim on her part. The very fact that upon the face of the statute she had been given no rights, and that her claim had been denied, demanded that she challenge the patent at the first opportunity. Counsel for appellant, arguing against an estoppel by reason of laches, says that the patentee and those claiming under him were chargeable with notice of her claim, because it had been duly filed in the local and General Land Office of the government, and that they therefore knowingly took all the chances of its validity. But if they knew that she had once made a claim, they also knew that it had been decided by the Department to be worthless, and had a right to assume from her inaction

that she acquiesced in that decision, and on that assumption to invest their money in the property and its improvement. The land was contiguous to a city beginning to grow rapidly in population; the courts were open to her for any assertion of rights; she was living but forty miles from the land, and must be presumed to have known something of the changes going on around it; the patentee died, and the title passed, by three or four conveyances, through as many different persons, at a constantly increasing price; and the tract was surveyed and platted as an addition to the city of Tacoma. More than four years after the entry by Wing, and nearly four years after the issue of the patent, the owner of this addition filed a bill, making several parties defendant, in order to quiet her title thereto, and, among these various defendants, summoned Mrs. Galliher. It is stated, in the opinion of the Supreme Court, that it was admitted in the argument, that, at the time this action was commenced, the appellee, and others holding under the patent, had made improvements upon the land of great value, and that the land and improvements upon it were worth $20,000. In this suit Mrs. Galliher appeared, and answered, and, for the first time in a court of justice, asserted any rights to the land.

Putting all these things together: her actual abandonment of the tract in 1876; the cancellation of the entry in 1879, which terminated all rights in the land which she then had; the omission of the "widow" from the act of 1880, and the doubt whether she was a beneficiary under that act, or could claim any rights thereunder; the rejection by the Land Department of her application in 1881; the entry of Wing in the same year, and the issue of a patent to him in 1882; the several conveyances at increasing prices; the improvements put on the land by the parties holding under the patentee; the rise in the value of the land; the platting of it as an addition to the city of Tacoma; her residence so near to Tacoma, with the knowledge she must have possessed of the changes going on in that city; — it seems to us that equity forbids that that homestead right, created fourteen years before, for which Land Office fees only were paid, which was once absolutely

terminated, and which may never have been resurrected, should, at this late day, be permitted to disturb a title, legally perfect, created by the general government after a decision adverse to any resurrection of such right, for which full value was paid, and on the faith of which costly improvements have been made, and which now represents enormous value, to the creation of which appellant has, apparently, contributed nothing.

The decree is affirmed. The mandate will issue to the Supreme Court of the State of Washington.

COX *v.* HART.

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

No. 828. Submitted January 4, 1892. — Decided May 16, 1892.

The granting or refusing of an application for continuance by the court below is not subject to review here.

Whether an affidavit that one of the deeds relied on in the chain of title is forged, filed in an action of trespass to try title in Texas, for the purpose of obtaining a continuance, is such an affidavit as would, under Rev. Stats. Texas, art. 2257, affect its admissibility in evidence, *quære.*

When both parties in an action to try title to real estate claim under a common source of title, it is unnecessary to consider whether the deed under which the common grantor claimed was valid.

Every reasonable inducement will be made in favor of a judicial sale, so as to secure, if it can be done consistently with legal rules, the object they were intended to accomplish.

Where it is doubtful to which of two tracts of land in the same neighborhood, both the property of the execution debtor, the description in the marshal's deed applies, extrinsic evidence may be admitted to show which was intended, and the question left to the jury under proper instructions.

The Texas statutes making provision for an allowance for improvements, in actions of trespass to try title, are intended to secure to the possessor in good faith compensation for his improvements, either by direct payment therefor by the owner of the land, or by giving him an opportunity to take the land at its assessed value, where the plaintiff elects not to pay for the improvements and keep the land; but they do not confer upon such possessor the right to an execution for the assessed value of the improvements at the expiration of a year.

Opinion of the Court.

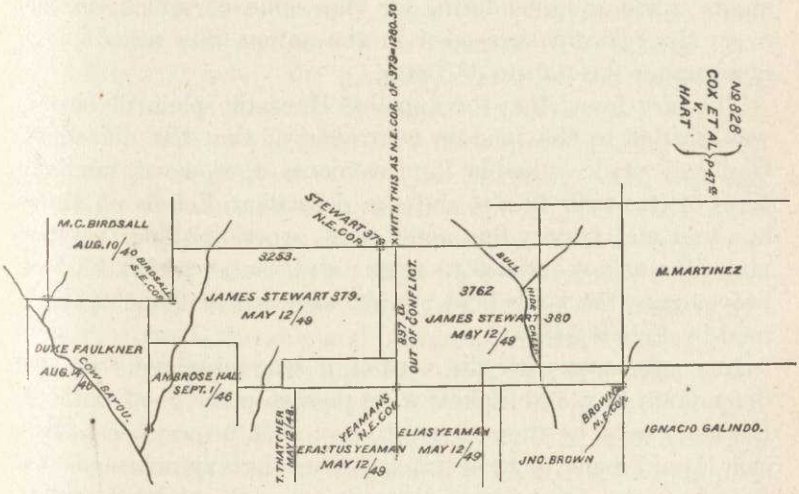
THE case is stated in the opinion.

Mr. J. B. Scarborough and *Mr. Eugene Williams* for plaintiffs in error.

Mr. W. Hallett Phillips for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This was an action of trespass to try the title to certain lands in McLennan County, Texas, the boundaries of which are fully given in the pleadings and in the judgment. They are also described generally as "being the same tract of land patented by the State of Texas to the heirs of James Stewart, on the 2d day of July, 1849, by patent No. 379, volume 5."



On the 2d day of July, 1849, the State issued "to the heirs of James Stewart, deceased, their heirs and assigns," two patents, each for 960 acres of land, in McLennan County; patent "No. 379, vol. 5," describing the land embraced in it as "being in Milam district, on the waters of Bull Hide Creek and Cow Bayou, about 12½ miles S. W. from Waco village, by virtue of bounty warrant No. 308, issued to James Stewart

by William G. Cook, Adjutant General, on the 9th day of August, 1847," etc.; and patent "No. 380, vol. 5," describing the land embraced in it as being in "Milam district on Bull Hide Creek, about eleven miles S. W. by S. from Waco village, by virtue of bounty warrant No. 308, issued by William G. Cook, Adjutant General, on the 9th day of August, 1847," etc. The relative situation of the two tracts to each other appears from the above copy of a map proven to be a correct draft from a report of survey made under the order of court:

The defendant J. P. Williams filed a disclaimer of any title to the lands here in dispute, but alleged that he held a portion of them under a certain lease from the defendant Cox. Other defendants answered by demurrer, general denial, pleas of not guilty, and limitation, and some of them suggested improvements made in good faith, for the value of which, in the event the plaintiff succeeded in the action, they asked judgment under the statute of Texas.

The jury found that the appellee Hart, the plaintiff below, was entitled to the land in controversy; that the defendant Cox had made valuable improvements upon seven hundred acres of it, worth $6250, and the defendant Echols on three hundred and twenty-five acres of it, worth $3750; that the plaintiff was not entitled to rents; and that, without the improvements, the lands held by Cox were worth $10,500, those held by Echols $4875.

In conformity with the verdict, it was adjudged that the defendants Cox and Echols were possessors in good faith of the lands held by them, respectively; that no writ of possession should issue for those tracts before the expiration of one year from the date of the judgment unless the plaintiff paid to the clerk of the court for Cox the sum of $6250, and for Echols the sum of $3750, with interest; that, if he neglected for one year to pay such sums, with interest from the date of the judgment, and, if Cox and Echols, within six months after the expiration of the year, paid to the clerk — Cox, the sum of $10,500, and Echols the sum of $4875 — then the plaintiff should be forever barred of his writ of possession as against

the defendant so paying, and from maintaining any action whatever against Cox and Echols, respectively, for the above described tracts; that if Cox and Echols did not within six months after the expiration of one year from the judgment pay to the clerk the above respective sums for the plaintiff as above provided, writs of possession might issue in his favor against Cox and Echols or against the defendant so failing for the lands recovered by plaintiff in this action; and that writs of possession issue, as provided by law in ordinary cases, in favor of the plaintiff against all of the defendants for the lands recovered by him in this action, except the tracts adjudged to be held in good faith by Cox and Echols.

Motions for new trial and in arrest of judgment having been overruled, a severance was had, upon notice, between the defendants, so that Cox, Tinsley and Echols might prosecute this writ of error separately from their codefendants. The writ of error has been heretofore dismissed as to Echols.

At the trial below the plaintiff, Hart, for the purpose of showing title in himself, introduced in evidence a copy of patent No. 379 to the heirs of James Stewart, followed by proof, in the deposition of Mrs. Catharine Stewart, that the only heirs of James Stewart, on the 12th of April, 1854, were William H. Stewart and John T. Stewart, and that they were dead, Mrs. Stewart surviving them; a certified copy from the clerk's office of McLennan County of a deed by William H. Stewart, John T. Stewart and Catharine Stewart, wife of William H. Stewart, dated April 12, 1854, purported to convey to John De Cordova the land embraced in patent No. 379, which deed was filed for record May 8, 1854, and recorded two days afterwards; the original of a deed, dated September 7, 1858, by the marshal of the United States for the Western District of Texas to Edmond J. Hart, Barnett B. Hart and Isaac N. Marks, which, it was claimed, conveyed all the right, title and interest of De Cordova, in the land in dispute; a deed by B. B. Hart to E. J. Hart, of date July 30, 1874, conveying to the latter all the right, title and interest of the grantor in the partnership property, including real estate, personal property and assets of every description; and a deed from I. N.

Marks to E. J. Hart, of date August 19, 1874, conveying to the latter all the grantor's real estate in Texas or elsewhere.

For the purpose of showing a common source of title with the defendants under De Cordova, the plaintiff also introduced a deed, dated May 29, 1884, from L. B. Davis, administrator of the estate of De Cordova, purporting to convey to Cox 960 acres of land patented to the heirs of James Stewart by patent No. 379; a deed from Cox to Tinsley, dated December 31, 1884, conveying an undivided half interest in the same land; and deeds to Echols from Cox and Tinsley dated September 4, 1885, for 320 acres of the land in controversy.

The defendants introduced in evidence the original of a deed from Mrs. Catharine Stewart, Mrs. Fannie Finnerson, joined by her husband, William H. Finnerson, Virginia Sexton and Josh. H. McAllister to the defendants Cox and Tinsley, acknowledged November 16, 1889, (which was after the institution of this action,) before a notary public in Baltimore, conveying to the grantees therein the land described in patent No. 379; the above deed of 1884, from De Cordova's administrator to Cox, for the purpose, the bill of exceptions states, "of showing in themselves the defendants' title and good faith improvements made on the land since defendants had possession thereof;" the deed from Cox to Tinsley of December 31, 1884, conveying an undivided half of the land; and the deeds from Tinsley and Cox to Echols, of September 4, 1885.

When this case was called for trial there was on file a deposition of Mrs. Catharine Stewart, taken by the plaintiff, as well as a copy of the above deed to De Cordova of April 12, 1854. The defendants moved for a continuance in order that they might take the depositions of Mrs. Stewart and E. J. Hart, Jr.; the motion being based upon two affidavits made by Tinsley. One of those affidavits stated that Tinsley had, then recently, held a conversation with Mrs. Stewart, during which "affiant by her statement was led to believe, and does believe, said deed to be a forgery, and that her evidence concerning the same will be material." The application for a continuance was denied, and that action of the court is assigned for error. But the granting or refusing of such an application

was in the discretion of the court, and its action, in that regard, cannot be reviewed on error. And it is here referred to only because of the supposed bearing upon other assignments of error of Tinsley's affidavit relating to the alleged deed to De Cordova.

The certified copy of what purported to be the deed of April 12, 1854, to De Cordova set out the specific boundaries of the lands in controversy, and, also, described them as lands containing "nine hundred and sixty acres of land situated and being in Milam District, on the waters of Bull Hide Creek and Cow Bayou," and as "the same which were granted to the heirs of James Stewart, deceased, by virtue of bounty land warrant No. 308, issued to James Stewart by William G. Cook, adjutant general, under a patent from the State of Texas, No. 379, issued from the General Land Office upon the twenty-eighth day February, one thousand eight hundred and fifty-four, as by reference thereunto had will more fully and at large appear."

That deed appears to have been signed, sealed and delivered in the presence of two witnesses named, and was certified by E. R. Sprague, commissioner of deeds for the State of Texas, resident in Baltimore, to have been personally acknowledged before him by the several grantors, to be their act and deed, (they being known to him as the individuals described as and professing to be the parties of the first part,) and that Catharine Stewart, being examined out of the presence and hearing of her husband, stated that she executed the same freely, voluntarily and without being induced to do so by fear, threats, ill usage or the displeasure of her husband. On the copy introduced there was no scroll or character showing that the commissioner affixed his seal to the original.

To the introduction of the copy the defendants objected, in different forms, and at various stages of the trial, substantially upon these grounds: 1. There was on file an affidavit of forgery, meaning Tinsley's affidavit used on the application for a continuance of the case. 2. It was not proven as an ancient instrument, because there was no evidence of possession, payment of taxes, or other act by any claimant under the deed, or

by any one else, to free it from just grounds of suspicion or to lead the minds of the jury or the court to a conclusion of its genuineness, nor was there any accounting for the absence of the seal from the certificate of the commissioner, Sprague, before whom it purported to have been executed. 3. The proof does not show its execution as required under the affidavit of forgery.

After the evidence on both sides was concluded, but before the final submission of the case to the jury, the court stated its view of the law to be that, as no proof had been offered of any act or assertion of ownership under the deed from the heirs of James Stewart to De Cordova, that deed could not be read as an ancient document; in which event the defendants were entitled to a verdict. But, at a subsequent stage of the trial, the court announced that, on further consideration, it was of opinion that "where a common source was shown a party could not go back of the common source to impeach a deed for forgery," and that "the defendants having themselves offered the deed from De Cordova's administrator to Cox, and Cox to Tinsley, and from both to Echols, were concluded on the question of common source and estopped to deny the genuineness of the deed from James Stewart's heirs to De Cordova, or it was immaterial whether said deed was genuine or not."

Upon the subject of title, the court charged the jury: "This is a suit to recover land as described in plaintiff's petition. He has introduced in evidence a chain of title from the government to him in support of his claim. If the description in the marshal's deed to Hart and his partners named in the deed described the land that the plaintiff has sued for, the plaintiff is entitled to recover. The only question as to their title in issue before you is whether the land they sue for is the land described in the marshal's deed. The description, you will bear in mind, is 'a certain tract or parcel of land containing, by estimation, 898 acres, lying in Milam district, in McLennan County, on Cow Bayou and Bull Hide streams, patented to the heirs of James Stewart for 960 acres.' The proof develops that there are two tracts of land patented to

the heirs of James Stewart, each for 960 acres. The position of defendants is that this description applies as well, if not better, to the eastern James Stewart No. 380, but plaintiff contends that it does not. Whether the marshal's deed is a deed to No. 379 is the question for you to determine; whether it is described with sufficient distinctness, taking the description in the patent and deed; it conveys the whole grant, if it conveys any. The amount of land, the number of acres, being different in the deed from that in the patent, you are only to consider as a circumstance in connection with all the other proof in your inquiry as to whether the description in the marshal's deed does describe either one of the two James Stewart surveys. The burden is on the plaintiff. You must be satisfied from the proof given that No. 379, the western Stewart grant, is the land described in the marshal's deed before you can find for the plaintiff. If the proof satisfies you that the land the marshal describes in his deed as lying on Bull Hide and Cow Bayou streams is the western Stewart No. 379, then the plaintiff is entitled to recover; if otherwise, the plaintiff cannot recover and your verdict must be for the defendants," etc. To this charge the defendants excepted.

Was the deed to De Cordova of April 12, 1854, admissible as evidence in behalf of the plaintiff? The statutes of Texas provide that every instrument of writing which is permitted or required by law to be recorded in the office of the clerk of the county court, and which has been or may be so recorded after being proven or acknowledged in the manner provided by the laws in force at the time of its registration, shall be admitted as evidence without the necessity of proving its execution, *provided* "the party who wishes to give it in evidence shall file the same among the papers of the suit in which he proposes to use it, at least three days before the commencement of the trial of such suit, and give notice of such filing to the opposite party or his attorney of record; and unless such opposite party, or some other person for him shall, within three days before the trial of the cause, file an affidavit that he believes such instrument of writing to be forged." Rev. Stats. Texas, 1879, Art. 2257, p. 330.

The only affidavit in the record was that of Tinsley filed in support of the application for a continuance. It may well be doubted whether that was such an affidavit as the statute requires in order to impeach a deed. It was not filed for the specific purpose of attacking the genuineness of the deed of 1854, when it should be offered in evidence, but only to obtain a postponement of the trial. There is ground for holding that after being used for that purpose the affidavit had fully performed its functions, and could not be regarded further as attacking that deed. *Stribling* v. *Atkinson*, 79 Texas, 162, 164.

But without deciding this point, we pass to the consideration of another question which seems to be controlling. The statutes of Texas regulating the pleadings and practice in actions of trespass to try title provide: "It shall not be necessary for the plaintiff to deraign title beyond a common source, and proof of a common source may be made by the plaintiff by certified copies of the deeds showing a chain[1] of title to the defendant emanating from and under such common source; but before any such certified copies shall be read in evidence they shall be filed with the papers of the suit three days before the trial and the adverse party served with notice of such filing as in other cases; *provided*, that such certified copies shall not be evidence of title in the defendant unless offered in evidence by him, and the plaintiff shall not be precluded from making any legal objection to such certified copies or the originals thereof when introduced by the defendants." Rev. Stats. Texas, 1879, Title 96, c. 1, Art. 4802. In *Keys* v. *Mason*, 44 Texas, 140, 142, 143, the court refers to the different modes in which the plaintiff may make a *prima facie* case as against the possession of the defendant, among which is to prove "that defendant and himself claim the land under a common source of title and that his is the better right or superior title under such

[1] In Sayles's Texas Civil Statutes, vol. 2, p. 636, and in some of the decisions of the Supreme Court of Texas, referring to this statute, this word is "claim;" but the original act of September 28, 1871, used the word "chain." Texas Laws 1871, p. 3.

common source. Proof of title by the plaintiff in either mode may not conclusively establish his right to the land against the defendant, but it overcomes the presumption of right from his possession, and throws upon him the burden of disproving the plaintiff's case or showing a superior title in himself; as, for example, that he holds a title from the sovereignty of the soil of older date or superior right to that of the plaintiff; that by a subsequent possession to that on which plaintiff counts he has title by prescription, or has barred the plaintiff's right of recovery; or, though he has a title under a common source with plaintiff, he also has, or there is outstanding in a third party, a superior title to that which they claim from the common source, which it must not appear that he is estopped from setting up." In *Crabtree* v. *Whiteselle*, 65 Texas, 111, 115, which was an action of trespass to try title to land which had been partitioned among a mother and her children, the part in controversy falling to the mother, the court said: "If there was a mistake in the partition, by which she got more than her share, still what she got was the land in controversy, and by agreeing that she was the common source of title, the appellant is precluded from claiming any interest in the land not derived from her." Again, in *Burns* v. *Goff*, 79 Texas, 236, 239: "The rule which renders it unnecessary for a plaintiff to deraign title beyond the common source is one of convenience, and does not deprive a defendant of the right to show that he has the superior right through the common source or otherwise. The statute provides that 'proof of a common source may be made by the plaintiff by certified copies of a deed *showing a claim of title to the defendant* emanating from and under such common source.' When a deed is introduced which shows such a claim by a defendant, that is sufficient, although the deed may be for some cause inoperative. If a defendant claims through a purchaser under execution against a plaintiff, the sheriff's deed may not for some cause pass the title, yet such a deed will be sufficient evidence of common source, and the plaintiff need not deraign title beyond himself as common source. . . . If defendant has superior right to the land, whether

this arises from adverse possession or other fact, this he is not precluded from showing; but, in the absence of some evidence on his part, tending to show such superior right, the plaintiff would be entitled to recover on proof of claim of title emanating from and under the common source, made in the manner prescribed by the statute." See also *Pearson* v. *Flanagan*, 52 Texas, 266, 279; *Stegall* v. *Huff*, 54 Texas, 192, 197; *Sellman* v. *Hardin*, 58 Texas, 86; *Calder* v. *Ramsey*, 66 Texas, 218, 219.

These adjudications make it clear that it was not necessary for the plaintiff — even if Tinsley's affidavit for continuance was sufficient as an affidavit of forgery under Art. 4802 — to prove the genuineness of the alleged deed of April 12, 1854, to De Cordova. He claimed under De Cordova, by virtue of the marshal's deed conveying all his right, title and interest in the lands in dispute. The plaintiff introduced the deed from De Cordova's administrator to Cox for the purpose of showing a common source of title with the defendants. The defendants introduced the same deed without disclaiming the title conveyed by it, for the purpose, the bill of exception distinctly states, (and this court must accept that statement as conclusive,) of showing title in themselves, as well as good faith in making improvements. So that, upon this branch of the case — it appearing that the parties claimed under a common source — the law was clearly for the plaintiff, unless the defendants had established a superior right in themselves, or unless the plaintiff had failed to acquire by the marshal's deed the right, title and interest of De Cordova.

In reference to the deed to Cox and Tinsley from Mrs. Stewart and others of November 16, 1889, which was introduced to show a superior title in the defendants — they assuming that the deed of April 12, 1854, was a forgery — it need only be said that there is an entire absence of proof that the grantors in that deed were the heirs either of the patentee, James Stewart, or of William H. Stewart and John T. Stewart. Moreover, we do not find from any of the defendants' numerous requests for instructions that anything was claimed by them, at the trial, on account of the deed of November 16, 1889, obtained just before the commencement of the trial.

So that the vital question in the case is as to the validity of the marshal's deed of September 7, 1858; for that deed, if valid, passed to the plaintiff, before the date of the deed from Davis, administrator, to Cox, the entire interest of De Cordova the common source of title; but if, for any reason it was void, and if the deed of April 12, 1854, could not have been read in evidence as an ancient document, the plaintiff must fail for want of sufficient proof that he acquired that interest.

The marshal's deed recites a judgment, rendered on the 24th day of March, 1856, in favor of Edmond J. Hart, Isaac N. Marks and Barnett B. Hart, for $1061.50, and costs, in the District Court of the United States for the Eastern District of Texas, against J. De Cordova, execution upon which was August 16, 1858, levied on (the deed containing no other description of the premises) "a certain tract or parcel of land as the property of said J. De Cordova, containing, by estimation, eight hundred and ninety acres of land, lying in Milam Land District and County of McLennan, aforesaid, on Cow Bayou and Bull Hide streams, patented to the heirs of James Stewart for nine hundred and sixty acres." It recites, also, the sale of the land at public auction to the plaintiffs in the execution, and conveys to them, their heirs and assigns forever, all the right, title and interest of De Cordova in the land levied on and sold.

The defendants objected to the admission of the marshal's deed as evidence upon the ground that it did not sufficiently describe any land, and, if any, not the land embraced by patent No. 379. We are of opinion that the charge to the jury in reference to this deed was unobjectionable. In *White* v. *Luning*, 93 U. S. 514, 523, this court said: "The policy of the law does not require courts to scrutinize the proceedings of a judicial sale with a view to defeat them. On the contrary, every reasonable intendment will be made in their favor, so as to secure, if it can be done consistently with legal rules, the object they were intended to accomplish." And we do not understand that any different rule prevails in Texas. In *Kingston* v. *Pickens*, 46 Texas, 99, 101, the court says: "The

construction of a deed, being a matter of law, is for the court. If, therefore, the land intended to be conveyed by it be so inaccurately described that it appears, on an inspection of the deed, the identity of the land is altogether uncertain and cannot be determined, the court should pronounce it void; but when the uncertainty does not appear upon the face of the deed, but arises from extraneous facts, as in other cases of latent ambiguity, parol evidence is admissible to explain or remove it. In such cases the deed should not be excluded from the jury, but should go to them along with the parol evidence, to explain or remove such ambiguity; and the identity of the land is then a mixed question of law and fact, to be determined by the jury under the instructions of the court." So, in *Wilson* v. *Smith*, 50 Texas, 365, 369, the court, referring to a sheriff's deed of land, said: "Certainly the deed cannot be pronounced void upon mere inspection; for it cannot be said that it appears from the face of the deed that the land conveyed cannot be identified by the aid of extrinsic evidence."

The case of *Brown* v. *Chambers*, 63 Texas, 131, 135, is cited by the defendants in support of their contention. While the court says that no presumption will be indulged in favor of a sheriff's deed for land, that case is not in conflict with previous decisions; for the court says that "the conveyance must contain such a description as will enable the purchaser to find and identify the land," and "if, from the description contained in the sheriff's deed, or deeds or instruments therein referred to, the land can be found and identified with reasonable certainty, then the conveyance will be sustained." It cites with approval the language of a text-writer, who says that "when a deed refers to another deed, or a map, or a survey, it has the effect to incorporate such deed, map or survey into the description, the same as if copied into the deed itself, and what is therein described will pass." Martindale on Conveyances, § 108. See also *Flannegan* v. *Boggess*, 46 Texas, 330, 335; *Norris* v. *Hunt*, 51 Texas, 609, 614; *Steinbeck* v. *Stone*, 53 Texas, 382, 386; *Ragsdale* v. *Robinson*, 48 Texas, 375, 395; *Knowles* v. *Torbitt*, 53 Texas, 557.

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The court below could not have said that the marshal's deed was void, upon its face, for uncertainty in the description of the land conveyed. It conveyed 898 acres, by estimation, of land lying in a named land district and county, on "Cow Bayou and Bull Hide streams," which was "patented to the heirs of James Stewart for 960 acres." It could not be assumed, as matter of law, that this land could not be identified. It was for the jury to say, upon all the evidence, whether the land, so conveyed, was that levied upon by the marshal, and described, in patent No. 379 to James Stewart's heirs for 960 acres, as being "in Milam district, on the waters of Bull Hide Creek and Cow Bayou, about twelve and a half miles S. W. from Waco Village," or the 960 acres described in patent No. 380, as being "in Milam district, on Bull Hide Creek, about eleven miles S. W. by S. from Waco Village." An ingenious argument was made to show that the description in the marshal's deed best suited the lands embraced in patent No. 380. But the whole matter was fairly submitted to the jury under the injunction that the plaintiff could not recover unless the proof showed that the land described in patent No. 379, the western Stewart grant, was that conveyed by the marshal's deed. In order to identify the land the jury were entitled to look at the written documents, in connection with the parol evidence. "It is undoubtedly essential," Chief Justice Marshall said, "to the validity of a grant that there should be a thing granted which must be so described as to be capable of being distinguished from other things of the same kind. But it is not necessary that the grant itself should contain such a description as, without the aid of extrinsic testimony, to ascertain precisely what is conveyed." *Blake* v. *Doherty*, 5 Wheat. 359, 362. See also *Reed* v. *Proprs. Merrimack Locks &c.*, 8 How. 274, 288, 289.

For the reasons stated, we think that the marshal's deed was admissible in evidence, and established the plaintiff's right to the lands in dispute as against the defendants.

The defendants asked that if their motions for new trial and in arrest of judgment were overruled, the judgment be amended so as to give them a direct execution against the

plaintiff for the value of their respective improvements, in the event the plaintiff failed to pay for the same within one year from the date of the judgment, and in the event they failed, within six months after the expiration of such year, to pay the plaintiff the assessed value of the land. This motion was denied, and the action of the court thereon is assigned for error.

The statutes of Texas making provision for an allowance for improvements in actions of trespass to try title are as follows:

"ART. 4813. The defendant, in any action of trespass to try title, may allege in his pleadings that he and those under whom he claims have had adverse possession in good faith of the premises in controversy, for at least one year next before the commencement of such suit; and that he and those under whom he claims have made permanent and valuable improvements on the lands sued for during the time they have had such possession, stating the improvements and their value respectively; and stating also the grounds of such claim.

"ART. 4814. Where the defendant has filed his claim for an allowance for improvements in accordance with the preceding article, if the court or jury find that he is not the rightful owner of the premises sued for, but that he and those under whom he claims have made permanent and valuable improvements thereon, being possessors thereof in good faith, the court or jury shall at the same time estimate from the testimony —

"1. The value at the time of trial of such improvements as were so made before the filing of the suit, not exceeding the amount to which the value of the premises is actually increased thereby:

"2. The value of the use and occupation of the premises during the time the defendant was in possession thereof, (exclusive of the improvements thereon made by himself or those under whom he claims,) and also, if authorized by the pleadings, the damages for waste or other injury to the premises committed by him, not computing such annual value for a longer time than two years before suit, nor damages for waste or injury done before said two years:

"3. The value of the premises recovered, without the improvements made as aforesaid.

"ART. 4815. If the sum estimated for the improvements exceed the damages estimated against the defendant and the value of the use and occupation as aforesaid, there shall then be estimated against him, if authorized by the testimony, the value of the use and occupation and the damages for injury done by him, or those under whom he claims, for any time before the said two years, so far as may be necessary to balance the claim for improvements, but no further; and he shall not be liable for the excess, if any, beyond the value of the improvements.

"ART. 4816. If it shall appear from the finding of the court or jury, under the two preceding articles, that the estimated value of the use and occupation and damages exceed the estimated value of the improvements, judgment shall be entered for the plaintiff for the excess and costs in addition to a judgment for the premises; but should the estimated value of the improvements exceed the estimated value of the use and occupation and damages, judgment shall be entered for the defendant for the excess.

"ART. 4817. In any action of trespass to try title when the lands or tenements have been adjudged to the plaintiff, and the estimated value of the improvements in excess of the value of the use and occupation and damages has been adjudged to the defendant, no writ of possession shall be issued for the term of one year after the date of the judgment, unless the plaintiff shall pay to the clerk of the court for the defendant the amount of such judgment in favor of the defendant, with the interest thereon.

"ART. 4818. If the plaintiff shall neglect for the term of one year to pay over the amount of said judgment in favor of the defendant, with the interest thereon, as directed in the preceding article, and the defendant shall, within six months after the expiration of said year, pay to the clerk of the court for the plaintiff the value of the lands or tenements without regard to the improvements, as estimated by the court or jury, then the plaintiff shall be forever barred of his writ of posses-

sion, and from ever having or maintaining any action whatever against the defendant, his heirs or assigns, for the lands or tenements recovered by such suit.

"ART. 4819. If the defendant or his legal representatives shall not, within the six months aforesaid, pay over to the clerk for the plaintiff the estimated value of the lands or tenements, as directed in the preceding article, then the plaintiff may sue out his writ of possession as in ordinary cases.

"ART. 4820. The judgment or decree of the court shall recite the estimated value of the premises without the improvements, and shall also include the conditions, stipulations, and directions contained in the three preceding articles, so far as they may be applicable to the case before the court." Rev. Stats. Texas, 1879.

We are of opinion that the motion of defendants Cox and Echols for an execution against the plaintiff was based upon an erroneous interpretation of the statute, the object of which was to concentrate in one person the ownership of the land and of the improvements. The plaintiff, as holder of the title, was given one year within which to pay for such improvements. If he did not do so within that time, then the defendant could take the land, at its assessed value, and forever bar the plaintiff of his writ of possession. If the defendant did not exercise that privilege within the time prescribed, then the plaintiff was entitled to his writ of possession. Under the construction for which the defendants contend, the owner of the land could be improved out of his title by ameliorations for which he did not desire to pay, or for which, perhaps, he was unable to pay. What the statute intended to effect was, to secure to the possessor in good faith compensation for his improvements, either by direct payment therefor by the owner of the land, or by giving him an opportunity to take the land at its assessed value where the plaintiff elected not to pay for the improvements and keep the land. The requirement that, if the defendant or his legal representatives should not, within the time prescribed, pay over to the clerk for the plaintiff the value of the lands or tenements, estimated without regard to the improvements, the plaintiff could sue out his writ of pos-

session as in ordinary cases, necessarily means that, in such a case, (the defendants having elected not to take the land at its assessed value,) the legal title must prevail, and, therefore, the plaintiff should recover the land without paying for the improvements. The statute, so construed, gives a possessor in good faith, who has made valuable improvements, all that he is equitably entitled to demand.

There are no other questions in the case involving the substantial rights of the defendants, or that we deem it necessary to notice in this opinion. We find no error in the judgment, and it must be

Affirmed.

ST. LOUIS, VANDALIA AND TERRE HAUTE RAILROAD COMPANY *v.* TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY.

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

No. 42. Argued April 24, 27, 28, 1891. — Decided May 16, 1892.

The statute of Illinois of February 12, 1855, empowering all railroad corporations incorporated under the laws of the State to make "contracts and arrangements with each other, and with railroad corporations of other States, for leasing or running their roads," authorizes a railroad corporation of Illinois to make a lease of its road to a railroad corporation of another State; but confers no power on a railroad corporation of the other State to take such a lease, if not authorized to do so by the laws of its own State.

A railroad corporation of Indiana is not empowered to take a lease of a railroad in another State by the statute of Indiana of February 23, 1853, c. 85, authorizing any railroad corporation of that State to unite its railroad with a railroad constructed in an adjoining State, and to consolidate the stock of the two companies; or to extend its road into another State; or "to make such contracts and agreements with any such road constructed in an adjoining State, for the transportation of freight and passengers, or for the use of its said road, as to the board of directors may seem proper."

A lease for nine hundred and ninety-nine years by one railroad corporation

Statement of the Case.

of its railroad and franchise to another railroad corporation, which is *ultra vires* of one or of both, will not be set aside by a court of equity at the suit of the lessor, when the lessee has been in possession, paying the stipulated rent, for seventeen years, and has taken no steps to repudiate or rescind the contract.

THIS was a bill in equity, filed July 6, 1887, by the St. Louis, Vandalia and Terre Haute Railroad Company, a corporation of Illinois, against the Terre Haute and Indianapolis Railroad Company, a corporation of Indiana, to set aside and cancel a conveyance of the plaintiff's railroad and franchises to the defendant for a term of nine hundred and ninety-nine years. The bill contained the following allegations:

That the plaintiff was incorporated by a statute of Illinois of February 10, 1865, amended by a statute of February 8, 1867, to construct and maintain a railroad from the left bank of the Mississippi River opposite St. Louis eastward through the State of Illinois to a point on the Wabash River, convenient for extending its road to Terre Haute in the State of Indiana; and was not authorized by its charter, or by any law of Illinois, to lease its railroad, or by any other contract or conveyance to part with the entire possession, control and use of its property and franchises, or to deprive itself of and vest in others the power of control in the management of its said road and other property and in the exercise of its franchises, including the right to impose and collect tolls for the transportation of passengers and freight, indefinitely or for any fixed period of time.

That the defendant was incorporated by a statute of Indiana of January 26, 1847, amended by a statute of March 6, 1865, to construct and maintain a railroad from some point on the western line of the State of Indiana eastward through Terre Haute to Indianapolis; and was not authorized by its charter, or by any law of Indiana, to make or accept any lease, contract or other conveyance by which it should acquire or obtain, either indefinitely or for a fixed time, the ownership, management or control of any railroad located beyond the limits of Indiana.

That the plaintiff proceeded to construct, and on or about

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July 1, 1870, completed the construction and equipment of its road; that in order to obtain money for this purpose, on April 6, 1867, it executed a mortgage or deed of trust of all its railroad, property and franchises, to secure the payment of bonds amounting to $1,900,000, and agreeing to set apart annually from its earnings the sum of $20,000, as a sinking fund for payment of the bonds; that on March 13, 1868, it executed a second mortgage to secure the payment of additional bonds to the amount of $2,600,000; that all the bonds aforesaid were sold, and outstanding and unpaid; and that no sinking fund had been created, as provided for in the first mortgage.

That on February 10, 1868, the plaintiff and the defendant executed a pretended lease, (set forth in the bill, and copied in the margin,[1]) of the plaintiff's railroad, property and franchises

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[1] Whereas a contract for the construction and equipment of the St. Louis, Vandalia and Terre Haute Railroad, belonging to a corporation of the State of Illinois, has been entered into this day, by which arrangements have been made to complete and equip said road between East St. Louis and the State line of Indiana in the manner set forth in said contract:

And whereas the Terre Haute and Indianapolis Railroad Company, a corporation of the State of Indiana, has proposed to construct without delay a first-class railroad, being an extension of their present road from Terre Haute to the state line of Indiana, upon such location as will connect properly and directly with the St. Louis, Vandalia and Terre Haute Railroad at the state line of Illinois:

And whereas it is desirable that the said lines when connected should be operated by the Terre Haute and Indianapolis Railroad Company as one road between Indianapolis and St. Louis, and the said Terre Haute and Indianapolis Railroad Company having proposed to lease and operate the said St. Louis, Vandalia and Terre Haute Railroad for a period of nine hundred and ninety-nine years: It is therefore agreed, first —

That upon the completion of the road between East St. Louis and the state line of Indiana, the Terre Haute and Indianapolis Railroad Company shall take charge of and operate the same with its equipment for a period of nine hundred and ninety-nine years, for which they shall be allowed sixty-five per cent of the gross receipts from all traffic moved over the line, or business done thereon, and from the property of the company, as a consideration for working and maintenance expenses, the remaining thirty-five per cent to be appropriated as follows: 1st. To the payment of interest on the first and second mortgage bonds of the St. Louis, Vandalia and Terre Haute Railroad Company according to their legal priority. 2d. All the surplus of said thirty-five per cent to be paid over to the

to the defendant for nine hundred and ninety-nine years, the defendant retaining sixty-five per cent of the gross receipts, and the rest to be applied to the payment of interest on the mortgage bonds, and any surplus paid to the plaintiff.

That on January 12, 1869, the plaintiff's board of directors passed a resolution, undertaking to authorize its president to change the terms of said lease so that the defendant should be allowed seventy, instead of sixty-five per cent of the gross receipts, "but if the working and maintenance expenses of said road shall be less than seventy per cent of the gross receipts aforesaid, then all of such excess shall be paid over to" the plaintiff.

That by a statute of Illinois of February 16, 1865, in force at the time of the execution and delivery of the pretended lease, it was not lawful for any railroad company of Illinois,

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St. Louis, Vandalia and Terre Haute Railroad Company semi-annually, to be disposed of by it for the benefit of its stockholders.

If the thirty-five per cent should from any cause not be sufficient in amount to protect the interest on mortgage bonds and sinking funds therefor as they mature from time to time, together with the payment of taxes and proper cost of maintaining organization, so that the rights of stockholders may be preserved, then and in that event the lessee shall advance for the company whatever amounts may be needed, to be accounted for under the yearly averages of this lease during this contract.

It is further agreed that the Terre Haute and Indianapolis Railroad Company as lessee shall enjoy all the rights, powers and privileges of the St. Louis, Vandalia and Terre Haute Railroad Company, so far as the same may be needful to maintain and operate said railroad; also to impose and collect tolls and rates for transportation, and do all other acts and things, as fully and as effectually as the said St. Louis, Vandalia and Terre Haute Railroad Company could do if operating said line, it always being understood and agreed that the gross proceeds from through or joint traffic or business shall be divided on the *pro rata* basis per mile for distance moved on the road of each party.

In witness whereof the parties have respectively hereunto affixed, this the tenth day of February, 1868, their official signatures and seals under authority of their boards of directors.

THE ST. LOUIS, VANDALIA AND TERRE HAUTE RAILROAD COMPANY,
[SEAL.] By J. F. ALEXANDER, *President.*

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY,
[SEAL.] By W. R. MCKEEN, *President.*

or its directors, to consolidate its railroad with any railroad out of the State, or to lease its railroad to any railroad company out of the State, or to lease any railroad out of the State, without the written consent of all its stockholders residing within the State; and that fifty-nine of the plaintiff's stockholders residing in Illinois never consented to or ratified the lease.

That, on the completion of the plaintiff's road, the defendant took possession of and had ever since operated it, and had received, in tolls and otherwise, more than $21,600,000; that the pretended lease was void, for want of lawful power in either party to enter into it; that the defendant, by taking possession of the plaintiff's railroad and property without right, became in equity a trustee of the plaintiff, and liable to account to it for the property and for all tolls and emoluments which the defendant had, or ought to have, collected and received therefrom, and to restore the property to the plaintiff; that the defendant had refused, though requested, to turn over to the plaintiff the road and property, or the income thereof, and had thus rendered the plaintiff unable to establish a sinking fund, as required by the first mortgage; and that great and irreparable injury would be done to the plaintiff and its stockholders unless it was restored to the possession and control of the railroad, property and franchises.

That at the time when the lease was executed by the plaintiff its officers supposed that it had lawful power to do so; but that it had recently been advised by counsel that it had no such power, that it was its duty at once to repudiate this pretended lease and to resume the possession, control and use of its property and franchises, and that it had rendered itself liable to have its charter forfeited by the State; that the present income was more than sufficient to pay the interest on the bonds and to establish a sinking fund; and that, by reason of the failure to establish a sinking fund, proceedings might at any time be instituted to foreclose the first mortgage.

That the taking of long and complicated accounts, covering a period of nearly seventeen years and involving a great many items, was necessary for the protection and enforcement of

the plaintiff's rights; that the pretended lease was a cloud on the plaintiff's title; that a court of law had no jurisdiction adequate to take the account or to cancel the lease; and that the defendant was daily withdrawing large sums of money from the jurisdiction of the court to the irreparable injury of the plaintiff.

The bill, as originally framed, prayed for a cancellation and surrender of the lease, for a return of the railroad and other property held under it, for an injunction against disturbing the plaintiff in the possession and control thereof, and for an account of the sums which the defendant had received, or with due diligence might have received, from the use and operation of the railroad and property; or, if the lease should be held valid, for an account of the sums due under the lease; and for further relief.

The defendant demurred to the bill, for want of equity, for laches, for multifariousness, and because the plaintiff had an adequate remedy at law. The Circuit Court sustained the demurrer on all these grounds, as stated in its opinion reported in 33 Fed. Rep. 440. The plaintiff thereupon, by leave of court, amended the bill, by striking out the prayer for alternative relief in case the lease should be held valid. The defendant demurred to the amended bill, on the same grounds as before, except multifariousness. The court, delivering no further opinion, sustained the demurrer, and dismissed the bill; and the plaintiff appealed to this court.

Mr. Lyman Trumbull and *Mr. John M. Butler* (with whom were *Mr. Henry S. Robbins* and *Mr. Perry Trumbull* on the brief) for appellant.

I. The execution of the lease by the appellee was *ultra vires* and for this reason void. *Pennsylvania Railroad* v. *St. Louis &c. Railroad*, 118 U. S. 290; *Oregon Railway Company* v. *Oregonian Railway*, 130 U. S. 1; *Tippecanoe County* v. *Lafayette &c. Railroad*, 50 Indiana, 85; *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Canada Southern Railway* v. *Gebhard*, 109 U. S. 527; *Starkweather* v. *Am. Bible Society*, 72 Illinois,

Citations for Appellant.

50; *St. Clara Female Academy* v. *Sullivan*, 116 Illinois, 375; *Thompson* v. *Waters*, 25 Michigan, 214; *Diamond Match Co.* v. *Powers*, 51 Michigan, 145.

II. The appellant could not, by its charter, yield up the control of its road, as attempted by this lease, and it is for this reason void. *Railroad Co.* v. *Vance*, 96 U. S. 453; 3 Starr & Curtis (Ill.) Stat. 447; *Eagle* v. *Kohn*, 84 Ill. 292; *Richeson* v. *People*, 115 Illinois, 450; *Farmers' Loan & Trust Co.* v. *St. Joseph & Denver Railroad*, 1 McCrary, 247; *S. C.* 2 Fed. Rep. 117; *Archer* v. *Terre Haute &c. Railroad Co.*, 102 Illinois, 493; *Great Northern Railway* v. *Eastern Railway*, 9 Hare, 306; *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Pennsylvania Railroad* v. *St. Louis, Alton &c. Railroad*, 118 U. S. 290; *Stevens* v. *Pratt*, 101 Illinois, 206; *Carroll* v. *Carroll*, 16 How. 275; *Foxcraft* v. *Mallett*, 4 How. 353; *Thomas* v. *Hatch*, 3 Sumner, 170; *Lauriat* v. *Stratton*, 6 Sawyer, 339; *Pease* v. *Peck*, 18 How. 595.

III. The lease being *ultra vires*, and void, it could not be made valid by any lapse of time, acquiescence or ratification by the parties. *York &c. Railroad* v. *Winans*, 17 How. 39; *Black* v. *Delaware & Raritan Canal Co.*, 22 N. J. Eq. 130, 399; *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Pennsylvania Railroad* v. *St. Louis, Alton &c. Railroad*, 118 U. S. 290; *Oregon Railway* v. *Oregonian Railway*, 130 U. S. 1; *Newcastle Northern Railway* v. *Simpson*, 21 Fed. Rep. 533; *Tippecanoe County* v. *Lafayette &c. Railroad*, 50 Indiana, 85.

IV. The lease being void, it was the right as well as the duty of complainant to recover its property, and thus place itself again in a position to discharge its public duties. *Thomas* v. *Railroad Co.*, 101 U. S. 71; Story's Eq. Jur. § 298; Pomeroy's Eq. Jurisprudence, § 941; *Debenham* v. *Ox*, 1 Ves. Sr. 276; *Smith* v. *Bruning*, 2 Vern. 392; *Drury* v. *Hooke*, 1 Vern. 412; *St. John* v. *St. John*, 11 Ves. 526; *O'Conner* v. *Ward*, 60 Mississippi, 1025; *Morris* v. *McCullock*, 1 Amb. 432; *Newcastle Northern Railroad* v. *Simpson*, 21 Fed. Rep. 533; *Atlantic & Pacific Telegraph Co.* v. *Union Pacific Railroad*, 1 Fed. Rep. 745; *Western Union Telegraph Co.* v. *St. Joseph & Western Railroad*, 3 Fed. Rep. 430.

V. This bill makes a case for chancery jurisdiction, and appellant is not obliged to resort to a court of law. Constitution of Illinois, 1870, art. 11, sec. 10; *Iron Mountain &c. Railroad* v. *Johnson*, 119 U. S. 608; Pomeroy's Eq. Jur. § 941; Story's Eq. Jur. § 298; *Debenham* v. *Ox*, 1 Ves. Sr. 276; *Drury* v. *Hooke*, 1 Vern. 412; *St. John* v. *St. John*, 11 Ves. 526; *Smith* v. *Bruning*, 2 Vern. 392; *Morris* v. *McCulloch*, 1 Amb. 432; *New Castle Northern Railroad* v. *Simpson*, 21 Fed. Rep. *supra*; *Telegraph Co.* v. *Union Pacific R. R. Co.*, 1 Fed. Rep. 745; *Western Union Telegraph Co.* v. *St. Joseph & Western Railroad*, 3 Fed. Rep. 430; *Railway Companies* v. *Keokuk Bridge Co.*, 131 U. S. 389; *Parkersburg* v. *Brown*, 106 U. S. 487; Green's Brice's Ultra Vires, 717; *Farmer's Loan & Trust Co.* v. *St. Joseph & Denver City Railroad*, *ubi supra*; *Spring Co.* v. *Knowlton*, 103 U. S. 49; *White* v. *Franklin Bank*, 22 Pick. 181; *Day* v. *Spiral Springs Buggy Co.*, 57 Michigan, 146; *Foulke* v. *San Diego Railroad*, 51 California, 365; *Harriman* v. *First Baptist Church*, 63 Georgia, 186; *Davis* v. *Old Colony Railroad*, 131 Mass. 258; *Hardy* v. *Metropolitan Land Co.*, L. R. 7 Ch. 427; *Ernest* v. *Croysdill*, 2 De G. F. & J. 175, 197; *Bryson* v. *Warwick Canal Co.*, 4 De G. M. & G. 711, 731; *Salomons* v. *Llaing*, 12 Beav. 377.

VI. The right to maintain this suit is not barred by laches. *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Kent* v. *Quicksilver Mining Co.*, 78 N. Y. 159, 183; *Alton* v. *Illinois Transportation Co.*, 12 Illinois, 38; *S. C.* 52 Am. Dec. 479; *Brown* v. *Buena Vista County*, 95 U. S. 157; Rev. Stats. Illinois, c. 83, § 1; *Medley* v. *Elliott*, 62 Illinois, 532.

Mr. George Hoadly for appellee.

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

The object of this suit between two railroad corporations, as stated in the amended bill, is to have a contract, by which the plaintiff transferred its railroad and equipment, as well as

its franchise to maintain and operate the road, to the defendant for a term of nine hundred and ninety-nine years, set aside and cancelled, as beyond the corporate powers of one or both of the parties.

The contract, dated February 10, 1868, recites that the plaintiff is a corporation of Illinois, and the defendant a corporation of Indiana; that their railroads connect at the line between the two States; that it is desirable that the two roads should be operated by the defendant as one road; and that the defendant has "proposed to lease and operate" the plaintiff's road for a period of nine hundred and ninety-nine years. "It is therefore agreed" that, upon the completion of the plaintiff's road to the state line, the defendant "shall take charge of and operate the same with its equipment" for that period, and "shall be allowed sixty-five per cent of the gross receipts from all traffic moved over the line, or business done thereon, and from the property of the company, as a consideration for working and maintenance expenses," and shall appropriate the rest of such receipts to the payment of interest on the plaintiff's mortgage bonds, and pay any surplus to the plaintiff, for the benefit of its stockholders. Within a year afterwards, the contract was modified by providing that the defendant should be allowed seventy (instead of sixty-five) per cent of the gross receipts, "but if the working and maintenance expenses of said road shall be less than seventy per cent of the gross receipts aforesaid, then all of such excess shall be paid over to the" plaintiff. It is further agreed in the contract that the defendant "shall enjoy all the rights, powers and privileges of the" plaintiff, "so far as the same may be needful to maintain and operate said railroad," and may "impose and collect tolls and rates for transportation, and do all other acts and things, as fully and as effectually as the" plaintiff "could do if operating said line."

In short, by this contract one railroad corporation undertook to transfer its whole railroad and equipment, and its privilege and franchise to maintain and operate the road, to another railroad corporation for a term of nine hundred and ninety-nine years, in consideration of the payment from time

to time by the latter to the former of a certain portion of the gross receipts. This was, in substance and effect, a lease of the railroad and franchise for a term of almost a thousand years, and was a contract which neither corporation had the lawful power to enter into, unless expressly authorized by the State which created it, and which, if beyond the scope of the lawful powers of either corporation, was unlawful and wholly void, could not be ratified or validated by either or both, and would support no action or suit by either against the other. *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Pennsylvania Railroad* v. *St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 630; *Oregon Railway* v. *Oregonian Railway*, 130 U. S. 1; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24.

Upon the question whether this contract was *ultra vires* of either corporation, this case cannot be distinguished in principle from *Pennsylvania Railroad* v. *St. Louis, Alton & Terre Haute Railroad*, above cited.

By the statute of Illinois of February 12, 1855, all railroad companies incorporated under the laws of the State were empowered to make "contracts and arrangements with each other, and with railroad corporations of other States, for leasing or running their roads, or any part thereof." Illinois Private Laws of 1855, p. 304; Rev. Stat. of 1874, c. 114, § 34. By the grammatical and the natural construction, the words "their roads" include roads of Illinois corporations, as well as roads of corporations of other States, and the power conferred on corporations of Illinois to make contracts "for leasing" such roads includes making, as well as taking, leases thereof. Such was the opinion expressed in the case just cited, at page 309, and we see no reason for departing from it.

The plaintiff relies on the statute of Illinois of February 16, 1865, (in force at the date of this contract, but since repealed by the Revised Statutes of 1874,) by which it was enacted that "it shall not be lawful for any railroad company of Illinois, or for the directors of any railroad company of Illinois, to consolidate their road with any railroad out of the State of Illinois, or to lease their road to any railroad company

out of the State of Illinois, or to lease any railroad out of the State of Illinois, without having first obtained the written consent of all of the stockholders of said roads residing in the State of Illinois, and any contract for such consolidation or lease which may be made without having first obtained said written consent, signed by the resident stockholders in Illinois, shall be null and void;" and it was provided "that nothing in this act shall be so construed as to authorize the consolidation of any of said railroads with railroads out of the State of Illinois." Illinois Public Laws of 1865, p. 102.

Although this statute, in terms, declares that any such lease, made without the written consent of the Illinois stockholders, "shall be null and void," it would seem to have been enacted for the protection of such stockholders alone, and intended to be availed of by them only. It did not limit the scope of the powers conferred upon the corporation by law, an excess of which could not be ratified or be made good by estoppel; but only prescribed regulations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped, by lapse of time, or otherwise, to deny. *Zabriskie* v. *Cleveland &c. Railroad*, 23 How. 381, 398; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 42, 60; *Davis* v. *Old Colony Railroad*, 131 Mass. 258, 260; *Beecher* v. *Marquette & Pacific Co.*, 45 Michigan, 103; *Thomas* v. *Citizens' Railway*, 104 Illinois, 462.

The decision of the Supreme Court of Illinois in *Archer* v. *Terre Haute & Indianapolis Railroad*, 102 Illinois, 493, cited by each party at the argument, does not appear to have any important bearing upon this case. The point there decided was that the contract now in question, not being satisfactorily proved in that case to have been either assented to or ratified by the stockholders residing in Illinois, had no effect, as a lease, to convey title to the defendant, and could be sustained, if at all, only as a contract for the connection of the two railroads, and, in either aspect, did not confer on the defendant any right to maintain a bill in equity against collectors of taxes to restrain the collection of taxes assessed to the present plaintiff. Upon questions discussed in the opinion and not neces-

sary to the judgment, or not considered at all, the case cannot be regarded as a decision, because, as observed by Mr. Justice Curtis speaking for this court, "to make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties." *Carroll* v. *Carroll*, 16 How. 275, 287.

It is unnecessary, however, to express a definitive opinion upon the question whether the contract between these parties was beyond the corporate powers of the plaintiff, because, as is established by the decisions of this court, already cited, a contract beyond the corporate powers of either party is as invalid as if beyond the corporate powers of both, and the contract now in question was clearly beyond the corporate powers of the defendant.

The case in this respect is governed by the direct adjudication of this court in the case of *Pennsylvania Railroad* v. *St. Louis, Alton & Terre Haute Railroad*, above cited, which was much considered, both upon argument at the bar, and upon petition for a rehearing. The only differences between that case and this are that the contract in that case was for ninety-nine years, whereas in this it is for nine hundred years more; that the rent is computed in a different way, which does not alter the nature and effect of the transaction; and that in that case the two roads did not connect at the state line, but a few miles east of it, which was held to be immaterial. 118 U. S. 295–297.

The plaintiff in that case, like the defendant in this, sought to support the validity of the contract under the statute of Indiana of February 23, 1853, c. 85, of which section 1 authorized any railroad company of Indiana "to intersect, join and unite its railroad with any other railroad" constructed in an adjoining State, at any point on the state line or elsewhere to which the charters of the two companies authorized their roads to go, and to consolidate the stock of the two companies; section 2 authorized any railroad company of Indiana whose road went to the state line "to extend its said railroad into or through any other State," under such regulations as might be prescribed by the laws thereof; and section 3 authorized any

railroad company of Indiana, whose road met and connected at the state line with a railroad in an adjoining State, "to make such contracts and agreements with any such road constructed in an adjoining State, for the transportation of freight and passengers, or for the use of its said road, as to the board of directors may seem proper." Indiana Rev. Stats. of 1881, §§ 3971–3973.

At the argument of that case, indeed, the third section, being the one affording the most plausible ground, was principally relied on, and was the only section of this statute discussed in the original opinion. 118 U. S. 312. But in that opinion reference was made to *Tippecanoe Commissioners* v. *Lafayette &c. Railroad*, in which the Supreme Court of Indiana held that this statute did not authorize one railroad corporation to lease its railroad to another with a right of perpetual renewal, and said: "To connect one road with another does not fairly mean to lease or sell it to another." 50 Indiana, 85, 110; 118 U. S. 312. And upon the petition for rehearing all three sections of the statute in question, as well as other statutes of Indiana, were cited by counsel and examined by the court, although its conclusions were briefly stated, according to its usage in an opinion delivered on a petition for rehearing. 118 U. S. 633, 634.

It is argued for the defendant that this suit is distinguished from the former one in being brought, not, as that was, in Indiana, but in Illinois, and must therefore be controlled by the law and policy of Illinois; and it is contended that the statute of Illinois of 1855, above cited, empowered the defendant, though an Indiana corporation, to take a lease of a railroad in Illinois. But such a suit as this is governed, so far as regards the validity of the contract, not by the law of the forum, but by the law of the contract; and the statute of Illinois was manifestly intended to confer power on domestic corporations only, leaving the powers of corporations incorporated elsewhere to be determined by the laws by and under which they were incorporated, even if a State could confer on a foreign corporation powers which it did not have by the laws of its own State. *Canada Southern Railway* v. *Gebhard*, 109

U. S. 527, 537; *Christian Union* v. *Yount*, 101 U. S. 352; *Starkweather* v. *American Bible Society*, 72 Illinois, 50; *Santa Clara Academy* v. *Sullivan*, 116 Illinois, 375, 385.

It may therefore be assumed, as contended by the plaintiff, that the contract in question was *ultra vires* of the defendant, and therefore did not bind either party, and neither party could have maintained a suit upon it, at law or in equity, against the other.

It does not, however, follow that this suit to set aside and cancel the contract can be maintained. If it can, it is somewhat remarkable that, in the repeated and full discussions which the doctrine of *ultra vires* has undergone in the English courts within the last fifty years, no attempt has been made to bring a suit like this. The only cases cited in the elaborate briefs for the plaintiff, or which have come to our notice, approaching this in their circumstances, are in American courts not of last resort, and present no sufficient reasons for maintaining this suit. *Auburn Academy* v. *Strong*, Hopkins Ch. 278; *Atlantic & Pacific Telegraph Co.* v. *Union Pacific Railway*, 1 McCrary, 541; *Western Union Telegraph Co.* v. *St. Joseph & Western Railway*, 1 McCrary, 565; *Union Bridge Co.* v. *Troy & Lansingburgh Railroad*, 7 Lansing, 240; *New Castle Railway* v. *Simpson*, 21 Fed. Rep. 533.

The English cases relied on by the plaintiff were either suits to set aside marriage brokage bonds, as in *Drury* v. *Hooke*, 1 Vernon, 412, and *Smith* v. *Bruning*, 2 Vernon, 392; *S. C. nom. Goldsmith* v. *Bruning*, 1 Eq. Cas. Ab. 89; or to recover back money paid for the purchase, without leave of the Crown, of a commission in the military or naval service, as in *Morris* v. *McCullock*, Ambler, 433; *S. C.* 2 Eden, 190. Those cases have sometimes been justified upon the ground that, the agreement being against the policy of the law, the relief was given to the public through the party. *Debenham* v. *Ox*, 1 Ves. Sen. 276; *St. John* v. *St. John*, 11 Ves. 526, 536; *Cone* v. *Russell*, 3 Dickinson (48 N. J. Eq.) 208. But Sir William Grant explained them as proceeding upon the ground that the plaintiff was less guilty than the defendant. *Osborne* v. *Williams*, 18 Ves. 379, 382. And *Morris* v. *McCullock* can hardly be

reconciled with his decision in *Thomson* v. *Thomson*, 7 Ves. 470, or with the current of later authorities.

The general rule, in equity, as at law, is *In pari delicto potior est conditio defendentis;* and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas* v. *Richmond*, 12 Wall. 349, 355; *Spring Co.* v. *Knowlton*, 103 U. S. 49; Story Eq. Jur. § 298.

While an unlawful contract, the parties to which are *in pari delicto*, remains executory, its invalidity is a defence in a court of law; and a court of equity will order its cancellation only as an equitable mode of making that defence effectual, and when necessary for that purpose. Adams on Eq. 175. Consequently, it is well settled, at the present day, that a court of equity will not entertain jurisdiction to order an instrument to be delivered up and cancelled, upon the ground of illegality appearing on its face, and when, therefore, there is no danger that the lapse of time may deprive the party to be charged upon it of his means of defence. Story Eq. Jur. § 700 *a*, and cases cited; *Simpson* v. *Howden*, 3 Myl. & Cr. 97; *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275, 282.

When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. *Thomas* v. *Richmond*, above cited; *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275, 284. For instance, property conveyed pursuant to a contract made in consideration of the compounding of a crime, and the stifling of a criminal prosecution, and therefore clearly illegal, cannot be

recovered back at law, nor the conveyance set aside in equity, unless obtained by such fraud or oppression on the part of the grantee, that the conveyance cannot be considered the voluntary act of the grantor. *Worcester* v. *Eaton*, 11 Mass. 368, and 13 Mass. 371; *Atwood* v. *Fisk*, 101 Mass. 363; *Bryant* v. *Peck & Whipple Co.*, 154 Mass. 460; *Williams* v. *Bayley*, L. R. 1 H. L. 200; *Jones* v. *Merionethshire Society*, 1892, 1 Ch. 173, 182, 185, 187.

In the case at bar, the contract by which the plaintiff conveyed its railroad and franchise to the defendant for a term of nine hundred and ninety-nine years was beyond the defendant's corporate powers, and therefore unlawful and void, of which the plaintiff was bound to take notice. The plaintiff stood in the position of alienating the powers which it had received from the State, and the duties which it owed to the public, to another corporation, which it knew had no lawful capacity to exercise those powers or to perform those duties. If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case, the plaintiff was *in pari delicto* with the defendant. The invalidity of the contract, in view of the laws of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant; and the defendant has held the property, and paid the stipulated consideration from time to time, for seventeen years, and has taken no steps to rescind or repudiate the contract.

Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to protect their interests, it and they are barred by laches. *Harwood* v. *Railroad Co.*, 17 Wall. 78; *Graham* v. *Birkenhead &c. Railway*, 2 Hall & Twells, 450; *S. C.* 2 Macn. & Gord. 146; *Ffooks* v. *Southwestern Railway*, 1 Sm. & Gif. 142, 164; *Gregory* v. *Patchett*, 11 Law Times (N. S.) 357.

Syllabus.

This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him and had no right to retain. *Spring Co.* v. *Knowlton*, 103 U. S. 49; *Logan County Bank* v. *Townsend*, 139 U. S. 67, and cases there cited.

But the case is one in which, in the words of Mr. Justice Miller in a case often cited in this opinion, the court will not disturb the possession of the property that has passed under the contract, but will refuse to interfere as the matter stands. *Pennsylvania Railroad* v. *St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 316, 317. See also *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434, 468, 469; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 56, 57, 61.

Decree affirmed.

HANCOCK *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY.

SHELBY RAILROAD COMPANY *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY.

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

Nos. 325, 326. Argued April 21, 22, 1892. — Decided May 16, 1892.

The act of the legislature of Kentucky of January 22, 1858, authorizing any railroad company to lease its road to another railroad company, provided its road so leased should be so connected as to form a continuous line, permits the lessee company to take leases of branches by means of which it establishes continuous lines from their several termini to each of its own.

Under the legislation of the State of Kentucky, the right to receive and vote upon the shares of stock in the Shelby Railroad Company which were issued upon the subscription of a part of Shelby County became vested in the Shelby Railroad District of Shelby County as a corporation *quoad hoc*.

THE case is stated in the opinion.

Mr. B. F. Buckner for appellant. *Mr. T. L. Burnett* and *Mr. John L. Dodd* were with him on the brief.

Mr. J. C. Beckham for appellees.

MR. JUSTICE BREWER delivered the opinion of the court.

These two cases were argued together, the object of attack in each being the same, to wit, a lease made by the Shelby Railroad Company, on July 16, 1879, to the Louisville, Cincinnati and Lexington Railway Company, and subsequently transferred by the latter to the Louisville and Nashville Railroad Company. Each seeks the same relief, the cancellation of that lease. Hancock, the appellant in one case, was a stockholder in the Shelby Railroad Company, the appellant in the other, and sues for the benefit of that company, the allegations of his bill being intended to bring the case within the requirements of equity rule number 94. His bill was filed on the 3d day of December, 1886, and in it he alleges in substance that he notified and requested the Shelby Railroad Company to institute an action for the cancellation of said lease, but that the directors of said company at a meeting held to consider the matter resolved not to institute such action. He charges that the lease was made without legislative authority, and was therefore *ultra vires* and void; and also that it was not ratified by a majority of the stockholders of the Shelby Railroad Company. The Shelby Railroad Company filed its bill on the 4th day of August, 1888, but rested its attack on the validity of the lease on the ground that it had not been ratified by a majority of its stockholders.

In disposing of these cases, therefore, two questions must be considered. First, was there legislative sanction for such a lease; and second, if so, was it ratified by a majority of the stockholders of the Shelby Railroad Company. With reference to the first: On January 22, 1858, the legislature of Kentucky passed a general statute which in terms gave to all

railroad companies in the Commonwealth "power and authority to make, with each other, contracts of the following character: . . . 2d, for the leasing of one company to another, provided the road so leased shall be so connected as to form a continuous line; . . . *provided, however*, that all such contracts shall be approved by a majority in interest of all the stockholders of each of the contracting companies, at some stated or called meeting of the same." 1 Sess. Laws, 1857–58, 10.

It is claimed that the lessor's and lessee's roads do not form a continuous line, within the meaning of this statute, and that, therefore, the condition upon which a valid lease could be made was wanting. The main line of the lessee's road extends in a northeasterly direction from Louisville to Cincinnati. At Anchorage, about twelve miles east of Louisville, the Shelbyville road touches it. At the time of the lease the latter road was completed from the place of junction to Shelbyville, a distance of about eighteen miles, the general course being a trifle south of east. There was a physical connection between the two roads at Anchorage, the latter being the western terminus of the Shelbyville road. From this place the main line of the lessee road extends northeasterly, and the Shelbyville road southeasterly, making two forks of the letter "V." Shelbyville is nearly due east from Louisville, and the Shelbyville road, together with the twelve miles of the lessee's road, make a continuous line between Shelbyville and Louisville, in a route about as straight as the average railroad. But Anchorage is not a terminus of the lessee road, and the contention is, that under the statute the leased line must touch one of the termini of the lessee's road, so as to make an extension of it. As counsel expresses it: "Where two roads are in such connection or juxtaposition with each other as that the leasing of one by the other will extend or lengthen the line and create a new terminus, the act applies, and it applies only in such a case." In reference to this contention, the learned judge of the Circuit Court observed: "This construction would authorize the Shelby Railroad Company to lease the L. C. & L. railroad from its junction near Anchorage to Louisville, but not the L. C. & L. R. R. Com-

pany to lease the Shelby railroad from the junction to Shelbyville."

We think this suggestion pertinent, and that the contention of appellant, Hancock, cannot be sustained. It is enough that by the lease the connected roads form a continuous line, and it is not essential that the leased line be an extension from either terminus of the lessee's road. The evil which was intended to be guarded against by this limitation was the placing of parallel and competing roads under one management, and the control by one company of the general railroad affairs of the State through the leasing of roads remote from its own, and with which it has no physical or direct business connection. It was not intended to prevent a company with a long road, like the lessee company, from leasing branches by means of which it establishes continuous lines from their several termini to each of its own. By this lease a direct and continuous line from Louisville to Shelbyville was created, and neither the letter nor the spirit of the statute was thwarted.

But the chief reliance of counsel is on the other question. The Shelby Railroad Company is a corporation created by an act of the general assembly of Kentucky, of date March 15, 1851. 2 Sess. Laws 1850–51, 364, c. 431. That act was amended March 10, 1854, 2 Sess. Laws 1853–54, 453, c. 913; February 15, 1858, 2 Sess. Laws 1857–58, 158, c. 554; and February 3, 1869, 1 Sess. Laws 1869, 260, c. 1393. By the last amendment a part of Shelby County, the boundaries being specifically prescribed in the act, was authorized to subscribe $300,000 to the stock of the company, if a majority of the votes cast at an election should favor such subscription. The result of the election was to be entered on the records of the county court, and if favorable the county judge was to cause the subscription to be made in the name of said portion of Shelby County, and to issue bonds in its name in payment thereof. In pursuance of this act an election was had, and, being in favor of the subscription, it was made, and bonds to the amount of $300,000 were executed and delivered to the railroad company on June 1, 1869. The original charter

authorized the county of Shelby to subscribe for stock, the subscription to be made payable at such times and upon such terms as should be agreed upon, with no provision for the issue of the bonds, but with authority to levy and collect taxes for the purpose of paying such subscription. Section 26 of the act reads:

"That each and every person who pays any part of said tax shall be entitled to his *pro rata* share of said stock in the respective companies authorized and contemplated in this act, and into the treasury of which said tax is paid, and shall be entitled to demand and receive a certificate so soon as he shall have paid for a full, half or quarter share, or shall produce transfers from those who have paid portions, so as to entitle him to a full, half or quarter share."

The amendment of 1869, which authorized the issue of bonds, also directed a tax to pay the interest and principal of such bonds; and in section 9, provided:

"The several counties and portions of counties shall not vote the stock for which certificates may be issued to the taxpayers, but the same shall be voted by the individual stockholders."

After the issue of these bonds, and on March 11, 1870, an act amending the charter was passed, 2 Sess. Laws 1869–70, 248, c. 626, section 3 of which is as follows:

"That when any county or part of a county, city, town, or precinct, shall have delivered its bonds in payment for stock subscribed, it shall be entitled to representation and to vote the amount of such stock in any meeting of the stockholders of said company. The stock owned by a county shall be represented by the county judge and all of the justices of the peace of the county; stock owned by a part of a county or a precinct, by the county judge and by the justices of the peace residing in the district or precinct taxed."

And on February 26, 1873, a further amendment provided that the part of Shelby County which subscribed stock and issued bonds should have "the corporate name of 'The Shelby Railroad District of Shelby County,' and by that name may sue and be sued."

Now the bills allege that $267,775 of stock was voted at the meeting authorizing the lease, by the representatives of the "Shelby Railroad District of Shelby County," under the authority of the last two acts of the general assembly, and that without such vote the majority of the stockholders did not approve the lease. At that time this amount of the bonds, issued in payment of the subscription, was outstanding. It is true there had been an exchange of the old for new bonds at a lower rate of interest, but the principal of the indebtedness to that amount still remained. The question, therefore, is whether this stock was properly voted by the representatives of the "Shelby Railroad District of Shelby County."

This precise question was presented to the Court of Appeals of Kentucky, in a consolidated action to which certain taxpayers, the Shelby Railroad Company, and the "Shelby Railroad District of Shelby County" were parties, *Kreiger* v. *Shelby Railroad Co.*, 84 Kentucky, 66, and by that court decided in favor of the right of the district to vote the stock. An attempt was made to have the judgment of that court reviewed by this, but the case was dismissed for want of jurisdiction, on the ground that no Federal question was involved. *Kreiger* v. *Shelby Railroad Co.*, 125 U. S. 39. While that case may not work an estoppel by judgment, by reason of a difference of parties, it is an authority to be respected, if not followed.

But, passing that matter, what are the merits of these cases? The contention is, that, by the acts of 1851 and 1869, rights in the stock were vested in the taxpayer, which could not be divested after the issue of the bonds, though attempted to be, by the legislature, in the acts of 1870 and 1873, or as more fully expressed in the brief:

"The acts of 1851 and 1869 confer on the individual stockholders rights which are impaired by the acts of 1870 and 1873; that is, that the exclusive right to vote at stockholders' meetings, and the sole right to receive dividends given by the acts of 1851 and 1869, to the individual stockholders and those who should become so by the payment of taxes, is im-

paired by the acts of 1870 and 1873, which grant the right to the Shelby Railroad District of Shelby County to vote at stockholders' meetings."

With respect to the matter of dividends, we have, in this case, no need of inquiry. The single question is, as to the right to vote this stock. The Court of Appeals held that a corporation was in fact created by the act of 1869, granting authority to a defined portion of Shelby County to subscribe stock and vote bonds; that that corporation, by virtue of the subscription and issue of the bonds, became the owner of the stock; and that the acts of 1870 and 1873 simply prescribed who should represent the corporation, and by what name it should be known. Counsel criticise this ruling severely, asserting that corporations are never created by implication, and that there is in the act of 1869, in terms, no attempt to create one. But this is a matter of a purely local nature. A corporation may be formed in any manner that a State sees fit to adopt; and when the highest court of a State decides that, by certain legislation, a corporation has been created, such decision concludes not only the courts of the State, but also those of the United States. It is a matter over which we have no review, and in respect to which the decision of the state court is final. If it were an open question, it would be difficult to avoid reaching the same conclusion. By the act of 1869, this prescribed portion of Shelby County was authorized to issue bonds and subscribe stock. The bonds when issued were not the obligations of Shelby County, nor of the individual taxpayers; and still there must be some debtor. That debtor was this portion of Shelby County. Giving to it power to issue bonds and create indebtedness, is the creation of an entity with power to act, and if this entity has power to create a debt, it becomes subject to suit. That this entity was not, in terms, named a corporation is not decisive. It is enough that an artificial entity was created, with power to exercise the functions of a corporation. It was, though not named, a corporate entity, and the acts of 1870 and 1873, as well said by the Court of Appeals, simply designate who should act for this corporate entity and give it a name. As a corporate en-

tity, it issued bonds and subscribed for the stock. It became thereby the owner of the stock, and, as owner, it was entitled to exercise all the rights and privileges of ownership, including the right to vote the stock, unless the legislature creating it and prescribing its powers had, in terms, vested such control of the stock in other hands.

But it is said that the acts of 1851 and 1869, in substance, gave to each taxpayer at the time of paying his tax an equal amount of the stock; that an amount of taxes had been paid prior to this lease nearly equal to the entire issue of the bonds; and that, therefore, there was substantially no stock left in the district which it had a right to vote. But the original act authorized no bonds; and did not provide for the payment of the subscription by the issue of bonds, but by taxes levied in amount and at times necessary to pay it according to its terms. When the taxpayer paid his taxes he, in effect, paid to the railroad company a proportionate amount of the subscription; and the provision was in substance that he should take the stock which he had then paid for. There was, therefore, an equality between the stock and the taxes, and the county was simply an agent to collect the taxes and pay them over to the company, and receive the stock and transfer it to the taxpayer. But the act of 1869 authorized a radical change; and this newly created corporation was not merely the conduit through which money passed from the taxpayer to the company, but it became an independent subscriber, making its own subscription and issuing its own bonds in payment therefor. Those bonds represent and are the equivalent of the stock, and until the taxpayer pays those bonds he has equitably no right to the stock. It is true the terms of the original charter were not changed by the amendment of 1869; but to hold that the parties thus far paying taxes — taxes which mainly have gone to the payment of the interest on the bonds — are entitled to the stock works this unreasonable result: Though $300,000 and over of interest has now been paid, the bulk of the bonds remain outstanding, and are yet to be paid, as well as several hundred thousand dollars of interest. Shall the whole issue of stock be absorbed by those who pay the

first interest on the bonds, leaving to those who thereafter pay taxes for account of future interest and to discharge the principal, no right to any stock; or shall the railroad company be compelled to issue stock in excess of the $300,000? Nothing of the latter kind is provided for; nothing to indicate that the district can, by extending the bonds and paying interest, compel an additional issue of stock. All the stock that the railroad company was called upon to issue by the terms of its contract was the $300,000, and that was paid for by the bonds; and the taxpayer's equity in the stock only arises as he pays the bonds, and not as he simply pays interest on them.

The character of the transaction contemplated by the act of 1851 and the difference created by the amendment of 1869, as above indicated, is made clearer by section 20 of the former act, providing "that said company shall not issue certificates of stock until the same shall be paid for." In other words, payment of taxes paid the subscription, and of course worked a right to the stock then paid for. This provision was not changed by the amendment of 1869, but the subscription made by the district was paid for at the time by the issue of its bonds; and having been paid for, it was the duty of the company to issue its stock; and to whom should it be issued but to the party who had made the payment, to wit, the district? Having paid for and owning and possessing the stock, who should vote it? Obviously the owner; and its right to vote should not be diminished until and except when the amount which it has paid for the stock in bonds is made good to it by the taxpayers. Such was the construction placed upon this matter by the Court of Appeals; and we think that construction, notwithstanding some little obscurity in the language of the various statutes, is correct.

With reference to the suggestion made by the counsel for the appellees, that the delay in bringing these suits is such laches as defeats any rights which existed in the first instance, we refer to the case of *The St. Louis, Vandalia & Terre Haute Railroad Company* v. *The Terre Haute and Indianapolis Railroad Company*, *ante*, 393.

The decrees are *Affirmed.*

AERKFETZ *v.* HUMPHREYS.

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

No. 355. Submitted April 29, 1892. — Decided May 16, 1892.

The obligation upon an employé of a railroad company to take care and exercise diligence in avoiding accidents from its trains, while in the performance of his duties about the tracks, is not to be measured by the obligation imposed upon a passenger when upon or crossing them.

In an action by a track repairer against the receiver of a railroad to recover damages for injuries received from a locomotive and train while at work repairing the track in a station yard, it is held that the servants of the receiver were guilty of no negligence; and that if they were, the plaintiff's negligence contributed directly to the result complained of.

On May 17, 1887, William Aerkfetz, being under twenty-one years of age, by Frederick Aerkfetz, his next friend, commenced this action in the Circuit Court of the United States for the Eastern District of Michigan against the defendants in error, receivers duly appointed and in possession of the Wabash Railroad, to recover damages for personal injuries caused, as alleged, by their negligence. The defendants answered, and on a trial before a jury the verdict and judgment were for the defendants. To reverse such judgment this writ of error has been sued out.

Mr. C. E. Warner and *Mr. L. T. Griffin*, for plaintiff in error, submitted on their brief.

Mr. W. H. Blodgett, for defendants in error, submitted on the printed record.

Mr. Justice Brewer delivered the opinion of the court.

Plaintiff was in the employ of the defendants in the yard of the railroad company at Delray, working on one of the tracks therein, and, while so engaged, was run over and injured by a freight car, moved by a switch engine.

Opinion of the Court.

The defences presented were three: First, the receivers were guilty of no negligence; second, even if they were, plaintiff was guilty of contributory negligence; and, third, whatever negligence there was, if any, was that of a fellow-servant. The trial court directed a verdict for the defendants on the ground of contributory negligence. Much might be said in favor of each of the three propositions advanced by the defendants. We rest our affirmance of the judgment upon the grounds that under the circumstances there was no negligence on the part of the defendants, and that the accident occurred through a lack of proper attention on the part of the plaintiff.

There is little dispute in the testimony, and the facts, as disclosed are plainly these: The Delray yard is in the western part of the city of Detroit. In it were twelve tracks and side-tracks, and the yard was used for the making up of trains. A switch engine was employed therein, and, as might be expected, was constantly moving forwards and backwards, changing cars and making up trains. Plaintiff was a repairer of tracks. He had been employed there about eighteen months, and was familiar with the manner in which the work was done. The yard was about a quarter of a mile in length. The tracks were in a direct line east and west, with nothing to obstruct the view in either direction. At the time of the accident plaintiff was working near the west end of the yard, when a switch engine pushing two cars moved slowly along the track upon which he was at work, the speed of the engine being about that of a man walking. Plaintiff stood with his back to the approaching cars, and so remained at work without looking backward or watching for the moving engine until he was struck and run over by the first car.

Upon these facts we observe that the plaintiff was an employé, and, therefore, the measure of duty to him was not such as to a passenger or a stranger. As an employé of long experience in that yard, he was familiar with the moving of cars forward and backward by the switch engine. The cars were moved at a slow rate of speed, not greater than that which was customary, and that which was necessary in the

making up of trains. For a quarter of a mile east of him there was no obstruction, and by ordinary attention he could have observed the approaching cars. He knew that the switch engine was busy moving cars and making up trains, and that at any minute cars were likely to be moved along the track upon which he was working. With that knowledge he places himself with his face away from the direction from which cars were to be expected, and continues his work without ever turning to look. Abundance of time elapsed between the moment the cars entered upon the track upon which he was working and the moment they struck him. There could have been no thought or expectation on the part of the engineer, or of any other employé, that he, thus at work in a place of danger, would pay no attention to his own safety. Under such circumstances, what negligence can be attributed to the parties in control of the train or the management of the yard? They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employé, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employés in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach. The engine was moving slowly, so slowly that any ordinary attention on the part of the plaintiff to that which he knew was a part of the constant business of the yard would have made him aware of the approach of the cars, and enabled him to step one side as they moved along the track. It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employés who had all the time knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of the defendants, and if by any means negligence could be imputed to them, surely

the plaintiff by his negligent inattention contributed directly to the injury.

The judgment was right, and it is

Affirmed.

MILLER *v.* AMMON.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

No. 283. Argued April 11, 12, 1892. — Decided May 16, 1892.

The Supreme Court of Illinois having held that the ordinance of the city of Chicago that "no person, firm or corporation shall sell or offer for sale any spirituous or vinous liquors in quantities of one gallon or more at a time, within the city of Chicago, without having first obtained a license therefor from the city of Chicago, under a penalty of not less than $50 or more than $200 for each offence," is valid, this court follows the ruling of that court; and further holds that a contract made in violation of it creates no right of action which a court of justice will enforce.

The general rule of law is, that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover.

THE court stated the case as follows:

On March 16, 1887, the plaintiff in error, defendant below, then a citizen and resident of Wisconsin, purchased of the plaintiff, in Chicago, 1125 gallons of sherry wine, and 1100 gallons of port wine, at an agreed price of $5287. The purchase was on ninety days' credit, and the wine was delivered to defendant in that city. Thereafter the defendant having failed to pay for these goods, plaintiff commenced this action in the Circuit Court of the United States for the Southern District of Iowa to recover the purchase price. The defendant pleaded as a defence, that by chapter 24 of the Revised Statutes of Illinois of 1882 it was provided that: "The city council in cities . . . shall have the following powers: . . . To license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, the license not to extend beyond the municipal year in

which it shall be granted, and to determine the amount to be paid for such license;" that this statute was in force at the time of the alleged purchase; that Chicago was a city of that State; that the city council of that city had passed the following ordinance:

"An ordinance concerning the licensing of wholesale liquor dealers.

"SEC. 1. No person, firm or corporation shall sell or offer for sale any spirituous or vinous liquors in quantities of one gallon or more at a time, within the city of Chicago, without having first obtained a license therefor from the city of Chicago, under a penalty of not less than $50 or more than $200 for each offence. But no distiller who has taken out a license as such, and who sells only distilled spirits of his own production at the place of manufacture, shall be required to pay the license herein prescribed on account of said sale.

"SEC. 2. All such licenses shall be issued in accordance with the general ordinances of the city governing licenses, and for every such license there shall be charged at the rate of $250 per annum;"

that plaintiff was then a wholesale liquor dealer in the city of Chicago; that he was not a distiller, and had not a distiller's license; that the wine mentioned in the petition was vinous and intoxicating liquor, within the meaning of said ordinance; and that the sale of the wine mentioned was in violation of said law and ordinance. A demurrer to this answer was filed, and, after argument, was sustained; and the defendant electing to stand by his answer, judgment was rendered against him for the amount claimed in the petition. To reverse such judgment the defendant sued out this writ of error.

Mr. C. C. Cole for plaintiff in error.

Mr. Edgar C. Blum for defendant in error. *Mr. Louis J. Blum* was on the brief.

MR. JUSTICE BREWER delivered the opinion of the court.

Two questions are presented: first, is the ordinance valid?

second, if so, can the plaintiff recover for liquor sold in violation of its terms?

The first question must be answered in the affirmative. The precise question, on the very ordinance, was presented to the Supreme Court of Illinois, and determined by it in the case of *Dennehy* v. *Chicago*, 120 Illinois, 627. Counsel for defendant in error strenuously insist that that decision is not controlling on this court in this case, because it was not announced until May, 1887, and after this purchase had taken place. They say that this is a controversy between citizens of different States, in which the parties have a right to the independent judgment of the Federal tribunals; that, prior to such decision, there had been no determination by the courts of Illinois of the validity of the ordinance; and that the decision in the *Dennehy Case* was in disregard of the general course of the legislation of the State of Illinois in respect to the liquor traffic, and of the spirit of at least two decisions of that court, *Strauss* v. *Pontiac*, 40 Illinois, 126, 301, and *Wright* v. *The People*, 101 Illinois, 133. They refer us to the cases of *Pease* v. *Peck*, 18 How. 595; *Chicago* v. *Robbins*, 2 Black, 418; *Butz* v. *Muscatine*, 8 Wall. 575; *Burgess* v. *Seligman*, 107 U. S. 20; *Carroll County* v. *Smith*, 111 U. S. 556; *Gibson* v. *Lyon*, 115 U. S. 439; and *Anderson* v. *Santa Anna Township*, 116 U. S. 356, as instances in which this court did not consider itself concluded by the decision of the state court.

While not disposed to limit or qualify in any respect what has been said so frequently as to the right and duty of independent judgment, we think that this is a case in which the decision of the Supreme Court of Illinois should control. The question is one of a particularly local character, affecting solely the internal police of the State, in respect to which we have no reviewing power, and in which is involved no matter of a Federal character, or of general commercial law. The question as to what licenses shall or shall not be required of those who engage in the liquor traffic, is a matter properly submitted to the States for determination. There is no natural or Federal right claimed to have been trespassed upon by this ordinance, and the regulations as established and upheld by

the state legislature and state tribunals should not be disregarded in the Federal courts. The decision in the *Dennehy Case* determines for the people of the State of Illinois that at the time of the transaction in controversy there was this valid ordinance in the city of Chicago requiring a license. Why should not such decision conclude this plaintiff, as all other citizens of the State, in all their dealings within the State? It will be noticed that this is not a case in which a citizen of another State calls upon the Federal courts to ignore the judgment of the state court, because of some supposed infringement by it upon his rights. It is a citizen of Chicago, and Illinois, who is asking us to disregard the decision of the highest court of his own State. If it be said that there is not simply a question of municipal or police regulation, but also one of contract rights, the reply is that no question of contract rights can arise till after that of the validity of the ordinance is determined; and also that the party who now seeks to raise the question is one who, as a citizen of the State, ought to be concluded by the decisions of its highest court upon this local matter.

There has been no change in the rulings of the Supreme Court on this question. The prior cases referred to contain nothing inconsistent with the *Dennehy Case*. In *Strauss* v. *Pontiac*, the court held that authority in the charter to prohibit "tippling-houses and dram-shops," did not sustain an ordinance to prohibit generally the sale of spirits or beer. In other words, the charter power was directed towards the character of the house, and not to the matter of sales; and the ruling was, that the former did not include the latter. In *Wright* v. *The People*, it was held that the dram-shop act applied to sales made by a druggist in good faith and for medical purposes. There is no force in the argument, that because the court in the course of its opinion said that the city council had authority under the charter to grant permits to druggists to sell intoxicating liquors by the retail — it is to be implied that the court intended to decide that the council had no power to grant like permits to sell at wholesale. The statement was simply by way of argument to show that the drug-

gists were within the scope of the dram-shop act, and was by no means a decision that the city council had no other authority than to permit sales by druggists at retail. So that without any contradiction in its rulings, the first and only time that this question was presented to the Supreme Court it held that this ordinance was within the powers granted to the city council; and as this decision was rendered only two months after this sale, and was in affirmance of the decisions of the trial and intermediate appellate court, it is but fair to presume that the decisions of those lower courts had been rendered before this transaction.

It must not be implied from what we have said, that we differ from the Supreme Court of Illinois as to the validity of this ordinance. The charter authority is given in broad and comprehensive terms, "to license . . . the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor." There is no limitation or qualification as to the manner of sale, whether at wholesale or retail, or as to the character of the house at which the business is to be carried on, whether a dram-shop, a grocery or a drug store. If it was intended, and doubtless it was, to give to the city council full authority over the sale of intoxicating liquors, words more broad or comprehensive could not easily have been selected. There is no doubtful language in either the charter or the ordinance. Plainly as words can express is full power given by the one to the city council, and as plainly a license of a wholesale dealer demanded by the other.

We do not, however, place our decision so much on this latter ground, nor do we care to follow counsel in their ingenious effort to read into this section of the charter words of limitation. It is enough that the language being upon its face clear, full, and comprehensive, the Supreme Court of the State has decided that it gave power to the council to pass this ordinance, and that it is valid. That decision concluded this plaintiff, a citizen of the State, not only in criminal prosecutions, but also in civil actions, not only in the state, but also in the Federal courts.

Passing to the other question, that must be answered in the

negative. The general rule of law is, that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover. Pollock's Principles of Contracts, pp. 253 to 260; *Pernn* v. *Bornman*, 102 Illinois, 523; *Alexander* v. *O'Donnell*, 12 Kansas, 608; *Gunter* v. *Leckey*, 30 Alabama, 591; *Kennedy* v. *Cochrane*, 65 Maine, 594; *Bank of the United States* v. *Owens*, 2 Pet. 527, 539; *Pangborn* v. *Westlake*, 36 Iowa, 546, 549; *Harris* v. *Runnels*, 12 How. 79, 84. In *Bank* v. *Owens*, this court said: "There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal." There are some exceptions to this general rule, and the last two cases cited furnish instances thereof. These exceptions are based upon a supposed intent of the legislature. In *Pangborn* v. *Westlake*, it was thus stated how the exception should be determined: "We are, therefore, brought to the true test, which is, that while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold, and construe the statute accordingly." And in *Harris* v. *Runnels*, this court, after noticing some fluctuations in the course of decision, and observing "that we have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, that the statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so," added: "It is true that a statute, containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it.

When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void."

In the light of these authorities the solution of the present question is not difficult. By the ordinance, a sale without a license is prohibited under penalty. There is in its language nothing which indicates an intent to limit its scope to the exaction of a penalty, or to grant that a sale may be lawful as between the parties, though unlawful as against its prohibitions; nor when we consider the subject matter of the legislation, is there anything to justify a presumed intent on the part of the lawmakers to relieve the wrongdoer from the ordinary consequences of a forbidden act. By common consent the liquor traffic is freighted with peril to the general welfare, and the necessity of careful regulation is universally conceded. Compliance with those regulations by all engaging in the traffic is imperative; and it cannot be presumed, in the absence of express language, that the lawmakers intended that contracts forbidden by the regulations should be as valid as though there were no such regulations, and that disobedience should be attended with no other consequence than the liability to the penalty. There is, therefore, nothing in the language of the ordinance or the subject matter of the regulations, which excepts this case from the ordinary rule that an act done in disobedience to the law creates no right of action which a court of justice will enforce.

For these reasons the judgment of the Circuit Court will be

Reversed, and the case remanded, with instructions to overrule the demurrer to the answer.

Names of Counsel.

BENSON MINING AND SMELTING COMPANY *v.* ALTA MINING AND SMELTING COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 347. Argued and submitted April 28, 1892. — Decided May 16, 1892.

When the judgment in the Supreme Court of a Territory exceeds $5000 this court has jurisdiction of an appeal, although the judgment in the trial court may have been for a less sum and the jurisdictional amount is reached in the appellate court by adding interest to that judgment.

When the price of a mining claim has been paid to the government, the equitable rights of the purchaser are complete, and there is no obligation on his part to do further annual work in order to obtain a patent.

A person who wrongfully works a mine, takes out ores therefrom, removes them, and converts them to his own use is not entitled, in an action to recover their value, to be credited with the cost of mining the ores.

THE court stated the case as follows:

On July 25, 1884, appellee, plaintiff below, commenced its action in the District Court of the First Judicial District of the Territory of Arizona to recover of defendant the sum of $25,000 for 210 tons of silver-bearing ore, mined and removed from the Alta mine, situated in the Harshaw mining district, in Pima County, Arizona. A jury having been waived, the case was tried before the court, and a judgment was entered for the plaintiff, on March 22, 1886, for the sum of $4590.06, with interest from that time until paid at the rate of ten per cent per annum. Defendant took the case to the Supreme Court of the Territory, which, on February 17, 1888, affirmed the judgment. From such judgment of affirmance defendant appealed to this court.

Mr. Nathaniel Wilson, for appellant, submitted on his brief.

Mr. T. M. Norwood for appellee. *Mr. J. A. Anderson* filed a brief for same.

Opinion of the Court.

MR. JUSTICE BREWER delivered the opinion of the court.

The amount due, as determined by the judgment of the Supreme Court of the Territory, was over $5000, being the sum of $4590.06, as awarded by the judgment of the District Court, with interest from its date, March 22, 1886, at ten per cent per annum, to February 17, 1888, the date of the judgment of affirmance. This court, therefore, has jurisdiction of the appeal. *Zeckendorf* v. *Johnson*, 123 U. S. 617.

On the merits of the case two questions are presented. It appears that in 1879, Fagan, Harshaw and others were the owners of the Alta mine, and at that time made application to the proper land office for a United States patent thereto, paid the price required by law, and obtained the ordinary certificate of purchase. Thereafter they sold and conveyed the property to the plaintiff. The plaintiff continued to do a large amount of work on the mine up to the year 1882; but having failed in that year to do as much as $100 worth of work thereon, one J. K. Luttrell relocated it about June 1, 1883, and called it the "Ben Butler mining claim," and under this relocation and possession taken in consequence thereof, the ore in controversy was mined and removed. On January 10, 1884, the patent was issued to the original locators, Fagan, Harshaw and others. Upon these facts appellant claims that, although the mine was fully paid for by the locators in 1879, and a certificate of purchase received, inasmuch as the patent did not issue until January 10, 1884, and because the plaintiff failed to do a hundred dollars' worth of work in the year 1882, its rights ceased, and the relocation by Luttrell was valid and vested in him the property. This claim is based upon section 2324, Revised Statutes, which provides among other matters:

"On each claim located after the tenth day of May, eighteen hundred and seventy-two, 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, . . . and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred

shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location."

This language, standing by itself, apparently sustains the contention of the appellant; but a consideration of the provisions of all the statutes respecting mining claims makes it obvious that such is not the true construction. The precise question has never been presented to this court; but the import of several decisions is against appellant's contention. The uniform ruling of the Land Department has been against it, the question having been presented at an early day and fully examined. In the case of the *American Hill Quartz Mine*, reported in Sickels' Mining Laws and Decisions, pages 377 and 385, and also in Copp's U. S. Mineral Lands, page 254, are well-considered opinions by the Commissioner of the General Land Office and the Secretary of the Interior, each holding that, when the price of a mining claim has been paid the equitable rights of the purchaser are complete, and there is no obligation on his part to do further annual work, the delay in issuing the patent being a mere matter occurring in the administration of the Land Department, and the patent when issued by relation taking effect as of the date of the purchase. In the consideration of this question the Secretary of the Interior opens with these pertinent suggestions: "At the outset it is proper to remark that by the mining laws of the United States three distinct classes of titles are created, viz.: 1. Title in fee simple. 2. Title by possession. 3. The complete equitable title. The first vests in the grantee of the government an indefeasible title, while the second vests a title in the nature of an easement only. The first, being an absolute grant by purchase and patent without condition, is not defeasible, while the second, being a mere right of possession and enjoyment of profits without purchase and upon condition, may be defeated at any time by the failure of the party in possession to comply with the condition, viz.: to perform the labor or make the annual improvements required

by the statute. The equitable title accrues immediately upon purchase, for the entry entitles the purchaser to a patent, and the right to a patent once vested is equivalent to a patent issued."

Obviously section 2324 does not provide for the acquisition of title to the land. Its scope and purport are expressed in the opening words, as follows: "The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements:" and then follow several provisions in the nature of limitations on the general authority thus given to miners. Among them is that quoted. That evidently does not refer to the "location," or "manner of recording," but to the "amount of work necessary to hold possession of a mining claim," that is, to continue the mere possessory title. As Congress by section 2319, Rev. Stat. had enacted that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase by citizens of the United States, etc.," it is not strange that it gave the sanction of law to the regulations which the miners in any locality might establish for their several occupation and working of mining claims; but it is not to be expected that it would also give to them authority to determine how the title to the land itself might be acquired. And so we find that section 2325 provides that "a patent for any land claimed and located for valuable deposits may be obtained in the following manner," and gives thereafter the various steps necessary to be taken to purchase the land. Near its close is this, as to the patent: "If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists." In other words, when the price is paid the

right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the Land Department causes delay. But such delay, in the mere administration of affairs, does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties.

The opinion of the Secretary of the Interior has received judicial endorsement in the cases of *Aurora Mining Co.* v. *85 Mining Co.*, in the Circuit Court of the United States for the District of Nevada, 34 Fed. Rep. 515, and *Deno* v. *Griffin*, 20 Nevada, 249. It is a general rule, in respect to the sales of real estate, that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the Land Department of the government; and the ruling has been uniform, that whenever, in cash sales, the price has been paid, or, in other cases, all the conditions of entry performed, the full equitable title has passed, and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership. Thus in the case of *Carroll* v. *Safford*, 3 How. 441, it was held that, after the price of the land had been paid and the purchaser held the receiver's certificate therefor, it was subject to state taxation, although the patent was not then issued. In the opinion, page 461, the court said that "lands which have been sold by the United States can, in no sense, be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are considered, they are protected under the patent certificate as fully as under the patent. . . . The government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser." In *Lessee of French* v. *Spencer*, 21 How. 228, it appeared that a military land warrant had been located on the tract, and the land sold thereafter, but before the issue of the patent, the act under

which the land warrants were granted providing that no claim for military bounties should be assignable or transferable until after the patent had been issued, and that all sales, mortgages or contracts made prior thereto should be void. In that respect it will be seen that the language is not dissimilar to that used in the section before us in the present case. It was held that the patent related back to the time of the location, and that the conveyance intermediate the location and the patent was valid and transferred the title. In *Witherspoon* v. *Duncan*, 4 Wall. 210, there was a donation entry instead of a cash purchase; but the entry having been completed, it was held that the title passed, and that the land was subject to taxation, although the patent did not issue until years thereafter. In *Stark* v. *Starrs*, 6 Wall. 402, 418, this court observed that "the right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants." In *Worth* v. *Branson*, 98 U. S. 118, it was held that "a party who has complied with all the terms and conditions which entitle him to a patent for a particular tract of public land, acquires a vested interest therein, and is to be regarded as the equitable owner thereof." And in *Deffeback* v. *Hawke*, 115 U. S. 392, the court gave to a certificate of purchase of mineral lands the same effect that had been theretofore given to cash and donation entries of agricultural lands. In the opinion, on page 405, is found this language: "No adverse claim was ever filed with the register and receiver of the local land office, and the entry was never cancelled nor disapproved by the officers of the Land Department at Washington. The right of the government, therefore, passed to him; and though its deed, that is, its patent, was not issued to him until January 31, 1882, the certificate of purchase, which was given to him upon the entry, was, so far as the acquisition of title by any other party was concerned, equivalent to a patent. It was not until the 28th of July following that the probate judge entered the town site. The land had then ceased to be the subject of sale by

the government. It was no longer its property; it held the legal title only in trust for the holder of the certificate. *Witherspoon* v. *Duncan*, 4 Wall. 210, 218. When the patent was subsequently issued, it related back to the inception of the right of the patentee."

There is no conflict in the rulings of this court upon the question. With one voice they affirm that when the right to a patent exists, the full equitable title has passed to the purchaser, with all the benefits, immunities and burdens of ownership, and that no third party can acquire from the government interests as against him. The decision of the trial court was correct. The attempted relocation by Luttrell was void, and gave him no rights of possession or otherwise.

The only other question is as to the measure of damages. The trial court found that the value of the ores, at the time of their conversion by the defendant, was $11,716.65; that after the ores had been mined, and become chattels there had been expended by the defendant and others, in removing the ores from the mine, in assorting the same from the worthless rock, and in transferring the same to the smelter, the sum of $7985.83; and gave judgment for the difference, to wit, $3730.82, and interest. It also found that the entries and trespasses upon the Alta mine were with knowledge of plaintiff's ownership thereof, and that the defendant at the time it received the ores had knowledge that they came from the Alta mine, and were the property of the plaintiff; and there was testimony to support these findings. *Walnut* v. *Wade*, 103 U. S. 683, 688; *Jessup* v. *United States*, 106 U. S. 147, 150.

The contention of the appellant is, that there was error in not crediting it also with the cost of mining the ores. But as it received and converted them with knowledge that they belonged to the plaintiff, the ruling of the trial court was, within the decision in *Wooden-ware Company* v. *United States*, 106 U. S. 432, as liberal to the appellant as it had a right to expect.

The judgment is affirmed

KISSAM *v.* ANDERSON.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 202. Argued March 11, 14, 1892. — Decided May 16, 1892.

The 3d National Bank in New York was the correspondent of the Albion Bank, a country bank. W., during part of the time in which the transactions in controversy took place, was cashier, and during the remainder was president of the Albion Bank. During all the time W. practically managed that bank, and his co-directors and other officers had little or no oversight of its affairs. He was engaged in stock speculations on his own account in New York, and drew from time to time for his own purposes in favor of K. & Co., his brokers, on the bank balance with the 3d National Bank. K. & Co. from time to time returned to that bank sums to be credited to the Albion Bank. The latter bank eventually became insolvent, being ruined by fraudulent operations of W. who disappeared, and was put in the hands of a receiver, who brought suit against K. & Co. to recover the sums so paid to them by W. out of the balance to the credit of the bank with the 3d National. K. & Co. claimed to offset the return payments made by them to the 3d National; but the trial court ruled that they were not entitled to do it, and no question in respect of them was submitted to the jury. *Held*, that the defendants were entitled to have it submitted to the jury whether the other directors and officers of the Albion Bank might not, in the exercise of reasonable and proper care, have ascertained that these moneys had been deposited to the credit of the Albion Bank, and whether they would or would not have accepted such deposits as the return of the moneys to the bank.

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

The First National Bank of Albion was organized under the national banking law December 22, 1863, with a capital stock of $50,000, consisting of five hundred shares of $100 each, with a privilege of increase, and in fact afterwards increased to $100,000. It was reorganized under the act of July 12, 1882, by amended articles of association filed January 12 and approved February 24, 1883. On August 21, 1884, it closed its doors, and the defendant in error was appointed receiver, and took possession August 28, 1884. On January 7, 1885, as such receiver he commenced this action against the plaintiffs in error in the Circuit Court of the United States for

the Southern District of New York. On April 25, 1888, the case was tried before a jury, and a verdict rendered in favor of the plaintiff for $147,759.71. A judgment was rendered on the verdict, and to reverse such judgment defendants sued out this writ of error.

The proposition upon which this suit was maintained was that A. S. Warner, the cashier of the Albion Bank, wrongfully withdrew the funds of that bank for the purpose of a personal speculation in stocks; and that the defendants, Kissam, Whitney & Co., received those moneys with knowledge that they were thus withdrawn, and used them for the benefit of Warner in his stock speculations. The defendants, among other things, pleaded that the most of the money received from Warner had been returned to the bank; and herein lies the principal question for our consideration, and to a clear understanding of all that is involved in it, a detail of the facts is necessary.

Prior to March 29, 1879, R. S. Burrows was president of the Albion Bank; Alexander Stewart, his son-in-law, vice-president; and Warner, cashier. At that date Burrows died. Stewart became president, and so remained until he died, November 20, 1881, Warner in the meantime remaining cashier. Thereafter Warner became president, and W. R. Burrows, a son of R. S. Burrows, cashier, and both continued as such until shortly before the failure of the bank. The bank really belonged to R. S. Burrows in his lifetime, he owning all but twenty shares. The directors, pending the transactions hereafter to be reviewed, were L. Burrows, Alexander Stewart, W. R. Burrows, Louise C. Burrows and Warner. With the exception of L. Burrows, who was a brother of R. S. Burrows, the other four were the executors and executrix of R. S. Burrows; Warner, as appears, being the managing executor as well as the real official head of the bank. Through his defalcations, which ran up into the hundreds of thousands, the bank ultimately failed, and a receiver was appointed. The firm of Kissam, Whitney & Co., the defendants, was formed in May, 1880. Prior to that time the firm of Chase & Atkins had been in existence for some years, and that firm had bought and sold

stocks for Warner. Whitney and Washburn, who, with Kissam, composed the firm of Kissam, Whitney & Co., had been clerks in the employ of Chase & Atkins, and a few months before had received small interests therein as partners. Kissam had no connection with that firm. When Chase & Atkins sold out to Kissam, Whitney & Co. the latter took among other things the account with Warner. At that time, and among the assets transferred, were stocks to the amount of $348,086.19, held for Warner, and for which Kissam, Whitney & Co. paid Chase & Atkins. Thereafter, and between that time and August 26, 1881, Warner sent to defendants 12 checks, the dates and amounts thereof being as follows:

May 11, 1880	$10,000
June 9, "	5,000
Dec. 23, "	8,000
Jan. 10, 1881	5,000
" 11, "	10,000
" 13, "	15,000
" 17, "	10,000
" 24, "	10,000
Feb. 1, "	5,000
Mch. 25, "	5,000
Aug. 9, "	10,000
" 26, "	10,000
Total	$103,000

These checks were drawn by him as "cashier," on the Third National Bank of New York City, the regular correspondent of the Albion Bank: the first checking being in this form:

"No. —. NEW YORK, *May* 11, 1880.

"Third National Bank of the City of New York pay to the order of Kissam, Whitney & Co. ten thousand dollars.

"$10,000. A. S. WARNER,

"*Cash. First Nat. B'k of Albion, N. Y.;*"

and the others substantially like it. The Albion Bank was a country bank, with, as heretofore stated, a capital stock of $100,000, and an average deposit of about $200,000. On these checks, Kissam, Whitney & Co. drew from the Third National Bank the sums named, and used the same in their customers' stock transactions. Afterwards, and from time to time, they returned to the Third National Bank certain sums of money, which were entered by that bank to the credit of the Bank of Albion, and notice thereof was sent in the regular course of business by the former to the latter bank; but by reason of facts hereafter to be noticed, not all of these deposits were entered on the books of the Albion Bank. The following is a statement of the details of such deposits:

Date.	Entered in Ledger of Albion Bank.	Not entered in Ledger of Albion Bank.
April 4, 1881	.....	$8,000 00
" 14, "	.....	5,590 00
" 23, "	.....	9,200 00
April 3, 1882	.....	10,000 00
March 7, 1883	.....	5,000 00
April 17, "	$6,000 00	
November 15, "	4,000 00	
" " "	.....	5,000 00
" 21, "	8,000 00	
December 31, "	7,850 00	
March 7, 1884	.....	5,000 00
April 11, "	.....	5,000 00
July 28, "	.....	8,000 00
" " "	.....	2,562 50
Totals	$25,850 00	$63,352 50

It will be noticed that three of these deposits were made before the last two checks were sent to defendants. It will be noticed, also, that the moneys represented by these various deposits were returned to the same place from which the

Counsel for Plaintiffs in Error.

money was received on the checks sent to the defendants, to wit, the Third National Bank. In other words, the defendants received money belonging to the Albion National Bank from the Third National Bank; they returned to the Third National Bank a large portion of the money they had received. That money was accepted by the Third National Bank, passed to the credit of the Albion Bank, and the latter notified thereof in the regular way, to wit, by monthly statements. It is true that many of these credits were not entered by the latter on its books. The Albion Bank was at that time managed by Warner, he being the cashier. There was a book-keeper in constant attendance, the president occasionally present, and five directors to supervise; but the active man was Warner, who was also the real manager of the Burrows estate, which owned substantially all the stock. The monthly reports from the Third National Bank, when opened at all, were apparently opened by Warner alone. Indeed, after the receiver was appointed, in 1884, some of these monthly reports were found in the vaults of the bank still unopened. There was no direct evidence of any conspiracy between defendants and Warner to take money from the Albion Bank. On the contrary, it appears that the defendants bought out the business of Chase & Atkins, at that time buying as a part thereof stocks to the amount of over $300,000 held for Warner; and it was in carrying on this business already established, and to make good the required margins, that Warner sent these checks to defendants. His account was a steadily diminishing account from the time they bought out Chase & Atkins. The court held them responsible for the amounts thus obtained from the Albion Bank, on the ground that a cashier has no right to use the funds of the bank of which he is cashier for his private business; and that under the circumstances, and in view of the size of the account and the form of the checks, the defendants must have known that he was using the funds of the bank for his private business.

Mr. Joseph H. Choate and *Mr. George Zabriskie* for plaintiffs in error. *Mr. John E. Burrill* was with them on the brief.

Argument for Defendant in Error.

Mr. Benjamin H. Bristow for defendant in error.

The defendants were not entitled to credit for the sums paid by them to the Third National Bank. They requested the court to instruct the jury that

"(1) The defendants are entitled to be credited with the amounts of money which were deposited by them in the Third National Bank to the credit of the Bank of Albion;

"(2) The defendants were entitled to be credited with such of the amounts so deposited by them in the Third National Bank to the credit of the Bank of Albion, as were entered in the books of the latter bank and thereon debited to the former bank;

"(3) In case they find a verdict for the plaintiff it cannot exceed the difference between the accounts between the two banks as contained on their respective books and interest;

"(4) If the jury find a verdict for the plaintiff, it cannot be for any sum in excess of the difference between the checks in suit and the sums paid by the defendant into the Third National Bank and not entered in the books of the Albion Bank;

"(5) The plaintiff cannot recover any of the checks in suit which have been paid out of moneys deposited in the Third National Bank to the credit of the Albion Bank by Warner or by his direction."

The court refused these requests, saying further, "I have ruled during the course of the trial that the fact that the defendants paid in under Warner's direction to the Third National Bank the large sums of money which were paid in is of no materiality as affecting the legal rights of the parties."

The question raised by all these requests is, in brief, whether any amounts paid into the Third National Bank to the credit of the Bank of Albion by Warner, or by the defendants under his instructions, are to be regarded as reducing the damages recoverable from the defendants.

It is settled by abundant authority that where one has taken the property of another damages are not mitigated by showing

merely that the wrongdoer returned the property without the consent of the owner or applied it upon the owner's debts. It must appear still further that the owner consented to such action or that the proceeds were so applied under legal process without connivance of the wrongdoer. "A stranger could not take the property of his neighbor, have it sold under process, and apply the proceeds in discharging the debts of his neighbor, and then claim the right to have such payments received as a set-off, or in mitigation of the damages done by the trespass." *McAfee* v. *Crofford*, 13 How. 447, 456; *Hanmer* v. *Wilsey*, 17 Wend. 91; *Otis* v. *Jones*, 21 Wend. 394; *Wehle* v. *Butler*, 61 N. Y. 245; *People* v. *Bank of North America*, 75 N. Y. 547; *McMichael* v. *Mason*, 13 Penn. St. 214; *Barnard* v. *Jennison*, 27 Michigan, 230; *Edmondson* v. *Nuttall*, 17 C. B. (N. S.) 279; *Higgins* v. *Whitney*, 24 Wend. 379; *Livermore* v. *Northrup*, 44 N. Y. 107; *Lyon* v. *Yates*, 52 Barb. 237; *Sprague* v. *McKenzie*, 63 Barb. 60; *East* v. *Pace*, 57 Alabama, 521.

Mr. Justice Brewer stated the case as above, and delivered the opinion of the court.

We shall not stop to inquire as to the propriety of the rulings, so far as they went to charge the defendants with liability for the moneys obtained from the Albion Bank; for, on the other ground we think a new trial must be ordered, and it is impossible to foresee what the developments may be on that trial.

The court distinctly ruled, as matter of law, that the defendants were not entitled to credit for the moneys deposited in the Third National Bank to the credit of the Albion Bank, and submitted no question to the jury in respect thereof. The principle upon which the court acted is thus stated by counsel for plaintiff in his brief:

"It is settled by abundant authority that where one has taken the property of another damages are not mitigated by showing merely that the wrongdoer returned the property without the consent of the owner or applied it upon the

owner's debts. It must appear still further that the owner consented to such action or that the proceeds were so applied under legal process without connivance of the wrongdoer. 'A stranger could not take the property of his neighbor, have it sold under process, and apply the proceeds in discharging the debts of his neighbor, and then claim the right to have such payments received as a set-off, or in mitigation of the damages done by the trespass.' *McAfee* v. *Crofford*, 13 How. 447, 456."

We think that principle does not control in this case. Defendants returned this money to the Albion Bank. They deposited it with the Third National Bank, the correspondent of the Albion Bank, and the bank from which they received the money on the checks from the Albion Bank. In fact, therefore, the money was placed where it was before it was taken — in the possession and under the control of the Albion Bank. Not only that, the Third National Bank, in its due course of business, by monthly reports, informed the Albion Bank that they had received this money, and held it subject to its order; and it was subsequently used by the Albion Bank in drafts drawn by it in favor of other parties. If it be said that no officer of the Albion Bank knew of these deposits except Warner, the wrongdoer, and that he subsequently drew out most of these moneys in drafts to further other wrongs, the reply is, that the other officers and directors of the Albion Bank were chargeable with knowledge of these deposits. If, through their negligence, they did not in fact know, that is a matter for which the Albion Bank, and not the defendants, were responsible. Kissam, Whitney & Co. had no supervision over its affairs, no knowledge as to how those affairs were managed. They were not called upon to go to Albion and hunt up the various officers and directors, and inform them, one by one, personally, that these moneys had been deposited to their credit in the Third National Bank. It was enough that they deposited them, and that that bank, in the regular course of business, by monthly statements, informed the Albion Bank that it received and held those moneys. The learned Circuit Judge seemed to be

of the opinion, that as they had assisted Warner in withdrawing these funds from the bank, they could not escape responsibility, unless the sum total of his defalcations was reduced by their deposits to an amount less than that received from him. In his opinion overruling the motion for a new trial, he thus expressed himself: "Here all the money returned by Warner was insufficient to replace his defalcations by an amount much larger than the sum sought to be recovered of the defendants, and the bank had no knowledge that he had returned anything to replace what he had misapplied until he had again misappropriated it. It is not unjust or unreasonable to compel the defendants to restore such of the funds of the bank as they received when they are unable to prove that the bank was not directly or ultimately a loser in consequence of their acts. It may be that Warner would have misappropriated the money of the bank in other ways if they had refused to receive the checks, but certainly one temptation would not have been in his path if he had found that he could not use the paper of the bank for his speculations with the same facility as though it were his own money." But surely they cannot be held for his subsequent wrong-doing. If they have returned a part of that they assisted him in wrongfully withdrawing, they are *pro tanto* relieved from responsibility, and are not to be chargeable with his after misconduct, in respect to which they had no part. It will not do to say that they put the money where he could check it out, and therefore are responsible for what he did with it. They deposited it to the credit of the Albion Bank, and it was for the officers and directors of that bank to take care of its deposits. The rule might be different if Warner, the cashier of the Albion Bank, was the only officer authorized to draw on the Third National Bank, or charged with knowledge of the state of the account; but the president and teller had equal authority, and were equally chargeable with knowledge; in fact, it appears that these officers did draw drafts on the New York bank and thus diminished the total amount of deposits, and the other directors, also, were under some obligation to know the affairs of the bank; and it will not do

to say that the bank can ignore the negligence of all its officers and profit by their omission of duty. At the least, it was a question to go to the jury whether the officers of the bank, other than Warner, in the exercise of reasonable and proper care, could have ascertained that these moneys had been deposited to the account of the Albion Bank, and would or would not have accepted such deposits as the return of the moneys to the bank.

For the error in this respect, the judgment must be

Reversed, and the case remanded for a new trial.

SHAW *v.* QUINCY MINING COMPANY.

ORIGINAL.

No. 13. Original. Argued March 8, 1892. — Decided May 16, 1892.

Under the act of March 3, 1887, c. 373, § 1, as corrected by the act of August 13, 1888, c. 866, a corporation, incorporated in one State only, cannot be compelled to answer, in a Circuit Court of the United States held in another State, in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different State.

THIS was a petition for a writ of mandamus to the judges of the Circuit Court of the United States for the Southern District of New York to command them to take jurisdiction against the Quincy Mining Company upon a bill in equity, filed in that court on September 3, 1891, by the petitioner, described in the bill as a citizen of Massachusetts, in behalf of himself and other stockholders of the Quincy Mining Company, against "the Quincy Mining Company, a corporation duly organized under the laws of the State of Michigan, and having a usual place of business in the city, county and State of New York," and against certain individuals described in the bill as citizens of the State of New York. Upon that bill a subpœna was issued, directed to the Quincy Mining Company, and, as appeared by the marshal's return thereon, was

Names of Counsel.

served upon it within the Southern District of New York by exhibiting to its secretary the original subpœna and leaving with him a copy. The Quincy Mining Company appeared specially, and moved for an order to set aside the service.

At the hearing of the motion, it appeared that the Quincy Mining Company was a corporation organized for the purpose of mining in the county of Houghton in the Upper Peninsula of the State of Michigan, under the statute of Michigan of May 11, 1877, c. 113, by section 30 of which "it shall be lawful for any company associating under this act to provide in the articles of association for having the business office of such company out of this State, and to hold any meeting of the stockholders or board of directors of such company at such office so provided for, but every such company having its business office out of this State shall have an office for the transaction of business within this State, to be also designated in such articles of association;" and that this company, in its articles of association, did provide as follows: "The business office of the company hereby constituted and formed shall be in the city, county and State of New York, and another business office is hereby established at the Quincy mine, in the county of Houghton and State of Michigan."

The order to set aside the service was granted by the court, upon the ground (as stated in its return to the rule to show cause why the writ of mandamus should not issue) "that said Quincy Mining Company is a corporation created and existing under the laws of the State of Michigan, and is an inhabitant of the Western District of Michigan, and not an inhabitant of the Southern District of New York."

Mr. Michael M. Cardozo for the petitioner.

Mr. Don M. Dickinson (with whom was *Mr. Alfred Russell* on the brief) opposing.

Mr. Solicitor General, by leave of court, filed a brief in support of the petition.

Mr. John F. Dillon and *Mr. J. Hubley Ashton*, by leave of court, filed a brief against it.

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

The single question in this case is whether under the act of March 3, 1887, c. 373, § 1, as corrected by the act of August 13, 1888, c. 866, (the material parts of which are copied in the margin,[1]) a corporation incorporated in one State of the Union, and having a usual place of business in another State in which it has not been incorporated, may be sued, in a Circuit Court of the United States held in the latter State, by a citizen of a different State.

This question, upon which there has been a diversity of opinion in the Circuit Courts, can be best determined by a review of the acts of Congress, and of the decisions of this court, regarding the original jurisdiction of the Circuit Courts of the United States over suits between citizens of different States.

In carrying out the provision of the Constitution which declares that the judicial power of the United States shall extend to controversies "between citizens of different States,"

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[1] "The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid." "But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 25 Stat. 434.

Congress, by the Judiciary Act of September 24, 1789, c. 20, § 11, conferred jurisdiction on the Circuit Court of suits of a civil nature, at common law or in equity, "between a citizen of the State where the suit is brought and a citizen of another State," and provided that "no civil suit shall be brought" "against an inhabitant of the United States," "in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." 1 Stat. 78, 79.

The word "inhabitant," in that act, was apparently used, not in any larger meaning than "citizen," but to avoid the incongruity of speaking of a citizen of anything less than a State, when the intention was to cover not only a district which included a whole State, but also two districts in one State, like the districts of Maine and Massachusetts in the State of Massachusetts, and the districts of Virginia and Kentucky in the State of Virginia, established by § 2 of the same act. 1 Stat. 73. It was held by this court from the beginning that an averment that a party resided within the State or the district in which the suit was brought was not sufficient to support the jurisdiction, because in the common use of words a resident might not be a citizen, and therefore it was not stated expressly and beyond ambiguity that he was a citizen of the State, which was the fact on which the jurisdiction depended under the provisions of the Constitution and of the Judiciary Act. *Bingham* v. *Cabot*, 3 Dall. 382; *Turner* v. *Bank of North America*, 4 Dall. 8; *Abercrombie* v. *Dupuis*, 1 Cranch, 343; *Hodgson* v. *Bowerbank*, 5 Cranch, 303; *Brown* v. *Keene*, 8 Pet. 112, 115. The same rule has been maintained to the present day, and has been held to be unaffected by the Fourteenth Amendment of the Constitution, declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." *Robertson* v. *Cease*, 97 U. S. 646; *Grace* v. *American Ins. Co.*, 109 U. S. 278; *Timmons* v. *Elyton Land Co.*, 139 U. S. 378; *Denny* v. *Pironi*, 141 U. S. 121.

By the act of May 4, 1858, c. 27, § 1, it was enacted that, in a State containing more than one district, actions not local

should "be brought in the district in which the defendant resides," or "if there be two or more defendants residing in different districts in the same State," then in either district. 11 Stat. 272. The whole purport and effect of that act was not to enlarge, but to restrict and distribute jurisdiction. It applied only to a State containing two or more districts; and directed suits against citizens of such a State to be brought in that district thereof in which they or either of them resided. It did not subject defendants to any new liability to be sued out of the State of which they were citizens, but simply prescribed in which district of that State they might be sued.

These provisions of the acts of 1789 and 1858 were substantially reënacted in sections 739 and 740 of the Revised Statutes.

The act of March 3, 1875, c. 137, § 1, after giving the Circuit Courts jurisdiction of suits "in which there shall be a controversy between citizens of different States," and enlarging their jurisdiction in other respects, substantially reënacted the corresponding provision of the act of 1789, by providing that no civil suit should be brought "against any person" "in any other district than that whereof he is an inhabitant or in which he shall be found" at the time of service, with certain exceptions not affecting the matter now under consideration. 18 Stat. 470.

The act of 1887, both in its original form, and as corrected in 1888, reënacts the rule that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, but omits the clause allowing a defendant to be sued in the district where he is found, and adds this clause: "But where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 24 Stat. 552; 25 Stat. 434. As has been adjudged by this court, the last clause is by way of proviso to the next preceding clause, which forbids any suit to be brought in any other district than that whereof the defendant is an inhabitant; and the effect is that "where the jurisdiction is founded upon any of the causes mentioned in this

section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different States, the suit may be brought in the district in which either the plaintiff or the defendant resides. *McCormick Co.* v. *Walthers*, 134 U. S. 41, 43. And the general object of this act, as appears upon its face, and as has been often declared by this court, is to contract, not to enlarge, the jurisdiction of the Circuit Courts of the United States. *Smith* v. *Lyon*, 133 U. S. 315, 320; *In re Pennsylvania Co.*, 137 U. S. 451, 454; *Fisk* v. *Henarie*, 142 U. S. 459, 467.

As to natural persons, therefore, it cannot be doubted that the effect of this act, read in the light of earlier acts upon the same subject, and of the judicial construction thereof, is that the phrase "district of the residence of" a person is equivalent to "district whereof he is an inhabitant," and cannot be construed as giving jurisdiction, by reason of citizenship, to a Circuit Court held in a State of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides within the State of which he is a citizen; and that this act, therefore, having taken away the alternative, permitted in the earlier acts, of suing a person in the district "in which he shall be found," requires any suit, the jurisdiction of which is founded only on its being between citizens of different States, to be brought in the State of which one is a citizen, and in the district therein of which he is an inhabitant and resident.

In the case of a corporation, the reasons are, to say the least, quite as strong for holding that it can sue and be sued only in the State and district in which it has been incorporated, or in the State of which the other party is a citizen.

In *Bank of Augusta* v. *Earle*, 13 Pet. 519, 588, Chief Justice Taney said: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no exist-

ence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that State only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another."

This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicil, the habitat, the residence, the citizenship of the corporation can only be in the State by which it was created, although it may do business in other States whose laws permit it.

In *Lafayette Ins. Co.* v. *French*, 18 How. 404, in which an Indiana corporation was sued in Indiana upon a judgment recovered in an action against it in a state court of Ohio upon a contract made in that State, this court, speaking by Mr. Justice Curtis, and referring to *Bank of Augusta* v. *Earle*, said: "This corporation, existing only by virtue of a law of Indiana, cannot be deemed to pass personally beyond the limits of that State;" and held that it was bound by the judgment, because it had been allowed by the State of Ohio to make contracts in that State only upon the reasonable and lawful condition of its agent, residing and making contracts there, being deemed its agent to receive service of process in suits upon such contracts; and therefore that such a judgment recovered after such a notice was "as valid as if the corporation had had its habitat within the State." 18 How. 407, 408.

"A corporation," said Chief Justice Waite, "created by and organized under the laws of a particular State, and having its principal office there, is, under the Constitution and laws, for the purpose of suing and being sued, a citizen of that State." "By doing business away from their legal residence, they do not change their citizenship, but simply extend the field of their operations. They reside at home, but do business abroad." *Railroad Co.* v. *Koontz*, 104 U. S. 5, 11, 12. See also *Paul* v. *Virginia*, 8 Wall. 168, 181; *Railroad Co.* v. *Harris*, 12 Wall. 65, 81; *St. Clair* v. *Cox*, 106 U. S. 350, 354, 356; *Canada Southern Railway* v. *Gebhard*, 109 U. S. 527, 537.

The same doctrine has been constantly maintained by this court in applying to corporations the judiciary acts conferring on the Circuit Courts of the United States jurisdiction of suits between citizens of different States.

Those acts have never named corporations; and for half a century after the passage of the first act corporations were allowed to sue and be sued in the Circuit Courts, only when all the members of the corporation were, and were alleged to be, citizens of the State which created the corporation. *Bank of United States* v. *Deveaux*, 5 Cranch, 61; *Hope Ins. Co.* v. *Boardman*, 5 Cranch, 57; *Sullivan* v. *Fulton Steamboat Co.*, 6 Wheat. 450; *Breithaupt* v. *Bank of Georgia*, 1 Pet. 238; *Commercial Bank* v. *Slocomb*, 14 Pet. 60.

But in *Louisville &c. Railroad* v. *Letson*, in 1844, it was adjudged, upon great consideration, that it is sufficient to sustain the jurisdiction that the corporation is created by a different State from that of which the opposite party is a citizen; and Mr. Justice Wayne stated that the court rested its judgment upon the ground "that a corporation created by and doing business in a particular State is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State, for the purposes of its incorporation, capable of being treated as a citizen of that State, as much as a natural person," and "is substantially, within the meaning of the law, a citizen of the State which created it, and where its business is done, for all the purposes of suing and being sued." 2 How. 497, 558. And it has ever since been treated as settled that, for these purposes, the members of a corporate body must be conclusively presumed to be citizens of the State in which the corporation is domiciled. *Marshall* v. *Baltimore & Ohio Railroad Company*, 16 How. 314, 328; *Covington Drawbridge Co.* v. *Shepherd*, 20 How. 227, 233; *Ohio & Mississippi Railroad* v. *Wheeler*, 1 Black, 286, 296; *Muller* v. *Dows*, 94 U. S. 444; *Steamship Co.* v. *Tugman*, 106 U. S. 118, 121; *Memphis & Charleston Railroad* v. *Alabama*, 107 U. S. 581, 585.

In *Insurance Co.* v. *Francis*, it was held that the act of March 2, 1867, c. 196, (14 Stat. 558; Rev. Stat. § 639, cl. 3,)

authorizing the removal into the courts of the United States of suits "between a citizen of the State in which the suit is brought and a citizen of another State," did not warrant the removal of an action brought in a court of the State of Mississippi, in which the plaintiff, a citizen of Illinois, alleged that the defendant was a corporation created by the laws of New York, located and doing business in Mississippi under its laws; and Mr. Justice Davis, in delivering judgment, said: "This, in legal effect, is an averment that the defendant was a citizen of New York, because a corporation can have no legal existence outside of the sovereignty by which it was created. Its place of residence is there, and can be nowhere else. Unlike a natural person, it cannot change its domicil at will, and, although it may be permitted to transact business where its charter does not operate, it cannot, on that account, acquire a residence there." 11 Wall. 210, 216.

In *Ex parte Schollenberger*, 96 U. S. 369, 377, Chief Justice Waite said: "A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter; but it may by its agents transact business anywhere, unless prohibited by its charter, or excluded by local laws." The jurisdiction of the Circuit Court in that case, as well as in *New England Ins. Co.* v. *Woodworth*, 111 U. S. 138, 146, was maintained upon the ground that the defendant corporation, though incorporated in another State, yet, by reason of doing business in the State in which the suit was brought, and having appointed an agent there as required by its laws, upon whom process against the company might be served, was found in that State, within the meaning of the act of March 3, 1875, c. 137, § 1, then in force, and hereinbefore cited.

The statute now in question, as already observed, has repealed the permission to sue a defendant in a district in which he is found, and has peremptorily enacted that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." In a case between natural persons, as has been

seen, this clause does not allow the suit to be brought in a State of which neither is a citizen. If Congress, in framing this clause, did not have corporations in mind, there is no reason for giving the clause a looser and broader construction as to artificial persons who were not contemplated, than as to natural persons who were. If, as it is more reasonable to suppose, Congress did have corporations in mind, it must be presumed also to have had in mind the law, as long and uniformly declared by this court, that, within the meaning of the previous acts of Congress giving jurisdiction of suits between citizens of different States, a corporation could not be considered a citizen or a resident of a State in which it had not been incorporated.

The Quincy Mining Company, a corporation of Michigan, having appeared specially for the purpose of taking the objection that it could not be sued in the Southern District of New York, by a citizen of another State, there can be no question of waiver, such as has been recognized where a defendant has appeared generally in a suit between citizens of different States, brought in the wrong district. *Gracie* v. *Palmer*, 8 Wheat. 699; *St. Louis & San Francisco Railway* v. *McBride*, 141 U. S. 127, 131, and cases cited.

This case does not present the question what may be the rule in suits against an alien or a foreign corporation, which may be governed by different considerations. Nor does it affect cases in admiralty, for those have been adjudged not to be within the scope of the statute. *In re Louisville Underwriters*, 134 U. S. 488.

All that is now decided is that, under the existing act of Congress a corporation, incorporated in one State only, cannot be compelled to answer, in a Circuit Court of the United States held in another State in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different State.

Writ of mandamus denied.

Mr. Justice Harlan dissented.

BROWN *v.* SMART.

ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

No. 163. Submitted January 18, 1892. — Decided May 16, 1892.

An insolvent law of a State, providing that any conveyance of property within the State, made by a citizen of the State, being insolvent, within four months before the commencement of proceedings in insolvency, and containing preferences, shall be void, and shall be a cause for adjudging him insolvent and appointing an assignee to take and distribute his property, does not, as applied to a case in which the preferred creditors are citizens of other States, impair any right of the debtor under the Constitution of the United States; and such an adjudication, though made without notice to such creditors, and declaring void the conveyance made for their benefit, cannot, upon its affirmance by the highest court of the State, be reviewed by this court on a writ of error sued out by the debtor only.

THIS was a petition to the court of common pleas of Baltimore City, for an adjudication of insolvency, and the setting aside of an unlawful preference, under the insolvent act of the State of Maryland, which enacts that any conveyance containing preferences (with exceptions not material to this case) by a merchant or trader, being insolvent, shall be unlawful and void, and shall be deemed an act of insolvency, provided a petition in insolvency shall be filed by any creditor within four months afterwards; and that, upon such petition alleging the facts, and upon notice to the debtor, and proof of the allegations, an adjudication shall be made by the court that the debtor is insolvent, and thereupon his right and power to dispose of any part of his property shall cease, and, as soon as a trustee to manage and distribute his estate shall have been appointed by the court and shall have given bond, the whole property of the insolvent shall be divested out of him and be vested in the trustee. Maryland Code of Public General Laws of 1860, art. 48, as amended by Stats. 1880, c. 172, §§ 13, 23, 24, and 1886, c. 298; Code of 1888, art. 47, §§ 14, 22, 23.

This petition was filed December 8, 1887, by Theodore B. Smart and others, partners, and creditors in the sum of $600 of Solomon Brown, a merchant of Baltimore; and prayed the

court to adjudicate Brown an insolvent debtor, to appoint a trustee, and to decree fraudulent and void a conveyance made by him, being insolvent, on November 30, 1887, of all his property, including his stock of goods in his store in Baltimore, and all his debts, accounts and choses in action, to Isaac Eichberg of Alexandria, in the State of Virginia, preferring certain of his creditors, citizens of other States, whose debts were for money lent at various times from December 29, 1886, to September 30, 1887, under contracts made and to be performed in those States, and who were preferred in consideration of their agreement, expressed in the conveyance, to accept the provisions thereof in full satisfaction of their debts, and to acquit and discharge him of any part of those debts remaining unsatisfied out of the proceeds of the property conveyed. The petition prayed for a subpœna to Brown, to Eichberg and to each of the preferred creditors.

Brown alone was served with a subpœna, and appeared, and admitted the facts alleged in the petition and above stated; but denied that the conveyance created an unlawful preference, because all the creditors preferred therein resided out of the State of Maryland, and were creditors on contracts made and to be performed out of the State, and had agreed to accept the provisions of the conveyance in full satisfaction of their debts; and also denied that the court had any jurisdiction to decide upon the validity and effect of the conveyance, and especially because the court had acquired no jurisdiction of the trustee or of the creditors named therein.

The court overruled both defences, and entered an order adjudicating Brown to be an insolvent, declaring void the conveyance by him to Eichberg, and appointing a trustee to take possession of all his property.

Brown appealed to the Court of Appeals of Maryland, which affirmed the order. 69 Maryland, 320. Brown then sued out this writ of error.

Mr. Charles Marshall for plaintiff in error.

If the Insolvent Law of Maryland, as expounded by the Court of Appeals of that State, warrants the judgment in

this case, declaring the deed of trust from Brown to Eichberg to be void, neither Eichberg the trustee nor the foreign creditors secured by the deed being parties, and it not being possible to make them parties to this suit, it is submitted that it comes in collision to that extent with the Constitution of the United States. 14th Amendment, section 1.

The court will also observe that the insolvent law itself, section 24, contains a provision that when a deed is made by any person belonging to any of the classes mentioned in section 14, when insolvent or in contemplation of insolvency "the same shall be *prima facie* intended to hinder, delay and defraud the creditors of the person by whom the same is made, and the burden of proof shall rest upon him and the grantee to explain the same, and show the *bona fides* thereof."

Now, this section evidently contemplates that the grantee shall have an opportunity to be heard in defence of his rights, and yet the law contains no provision for notice to him of any kind, and if it did, it is not pretended that he, if a citizen of another State, could be legally required to submit himself to the jurisdiction of the insolvent court of Maryland.

Yet, by the judgment of the Court of Appeals in this case, that law warrants the insolvent court in pronouncing upon the rights of the grantee in his absence, and in the absence of power to make him a party to the proceeding in insolvency.

If the law is void as thus expounded, because repugnant to the Fourteenth Amendment of the Constitution of the United States, any judgment enforcing such a law is void as to all parties affected by it, including the plaintiff in error in this case.

It is respectfully submitted that the insolvent law of Maryland, so far as it is held to warrant such a judgment as that complained of here, attempts to do what no State can do. In the language of this court in *Cook* v. *Moffatt*, 5 How. 295, the State of Maryland has attempted to "inflict her bankrupt laws on contracts and persons not within her limits," and to do that, has by her law, as expounded by the Court of Appeals, made provision for adjudicating upon the rights of persons who neither are nor can be brought within her jurisdic-

tion. As expounded by the Court of Appeals, the law is an attempt on the part of the State to exercise powers that be long to Congress only.

Mr. M. R. Walter and *Mr. Charles A. Boston* for defendants in error.

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

The principles which underlie this case are clearly established by the decisions of this court. So long as there is no national bankrupt act, each State has full authority to pass insolvent laws binding persons and property within its jurisdiction, provided it does not impair the obligation of existing contracts; but a State cannot by such a law discharge one of its own citizens from his contracts with citizens of other States, though made after the passage of the law, unless they voluntarily become parties to the proceedings in insolvency. *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Ogden* v. *Saunders*, 12 Wheat. 213; *Baldwin* v. *Hale*, 1 Wall. 223; *Gilman* v. *Lockwood*, 4 Wall. 409. Yet each State, so long as it does not impair the obligation of any contract, has the power by general laws to regulate the conveyance and disposition of all property, personal or real, within its limits and jurisdiction. *Smith* v. *Union Bank*, 5 Pet. 518, 526; *Crapo* v. *Kelly*, 16 Wall. 610, 630; *Denny* v. *Bennett*, 128 U. S. 489, 498; *Walworth* v. *Harris*, 129 U. S. 355; *Geilinger* v. *Philippi*, 133 U. S. 246, 257; *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22. In *Denny* v. *Bennett*, above cited, the law upon this subject was well summed up by Mr. Justice Miller, speaking for the court, as follows: "The objection to the extraterritorial operation of a state insolvent law is that it cannot, like the bankrupt law passed by Congress under its constitutional grant of power, release all debtors from the obligation of the debt. The authority to deal with the property of the debtor within the State, so far as it does not impair the obligation of contracts, is conceded."

A provision of the insolvent law of a State, that all conveyances, by way of preference, of any property within its borders, made by a citizen of the State, being insolvent, and within four months before the commencement of proceedings in insolvency, shall be void, is a usual and a valid exercise of the power of the State over property within its jurisdiction, as to all such conveyances made after the passage of the law, whether to its own citizens or to citizens of other States.

But even if it should be held that such a law could not invalidate such a conveyance so far as citizens of other States are concerned, it is clearly valid so far as it makes the conveyance an act of insolvency, sufficient to support an adjudication of insolvency, and the appointment of a trustee or assignee to take and distribute among creditors any property which may lawfully come to his possession. The State might enact that conveyances preferring particular creditors, if made in good faith, should be valid so far as concerned them, and yet provide that, so far as the debtor was concerned, the preference showed such a disregard of the rights of other creditors as would justify adjudging the debtor to be insolvent, and appointing a trustee or assignee to take possession of and distribute any property not included in the conveyance.

In the case before us the only plaintiff in error is the insolvent himself. The position taken by him in the court below, but not argued in this court, that the obligation of a contract with him has been unconstitutionally impaired, is clearly untenable, because the statute of the State was in existence when the contract was made, and the subsequent decision of the Court of Appeals was not a law, within the meaning of the provision of the Constitution which declares that no State shall pass any law impairing the obligation of contracts. *New Orleans Waterworks* v. *Louisiana Co.*, 125 U. S. 18.

The only provision of the Constitution of the United States, now relied on by the plaintiff in error, is the first section of the Fourteenth Amendment, which forbids any State to deprive any person of property without due process of law. But the plaintiff in error has been deprived of no right by the judgment below. There is no doubt of the validity of that judg-

ment, so far as it adjudged him to be an insolvent and appointed an assignee to take possession of his property; and in any view he has no title or right in the property which was the subject of the conveyance in trust. If that conveyance was valid, the property belongs to the trustee for the benefit of the creditors named therein. If it was invalid, the property vested in the assignee in insolvency.

Whether the judgment below was ineffectual as against the trustee or the creditors named in the conveyance, either for want of notice or because the conveyance to them could not be set aside, or whether, on the other hand, that judgment was valid against them, because rendered in a proceeding *in rem* of which they were bound to take notice, is a question which could be presented by them only, and they are not parties to this writ of error. The plaintiff in error cannot invoke the judgment of this court upon the rights of persons under whom he does not claim. *Long* v. *Converse*, 91 U. S. 105; *Ludeling* v. *Chaffe*, 143 U. S. 301, 305.

Judgment affirmed.

FRANKLIN TELEGRAPH COMPANY *v.* HARRISON.

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

No. 319. Argued April 19, 1892.—Decided May 16, 1892.

A telegraph company gave to H. & Co. the right to put up at their own expense and maintain and use a wire upon the poles of the company between New York and Philadelphia, and to permit four other parties to use the same with priority of right, the company to have the use of the wire when not so employed. The company agreed to keep and maintain the wire when accepted by it, and to bear all expenses of batteries, etc., connected with its working and to permit such use by H. & Co. and four other persons for a period of ten years. At the end of that time the wire was to be the property of the company, when the company agreed "to lease the same" to H. & Co. "for the use of themselves and such other four persons" "for the sum of $600 per annum, payable quarterly, and upon the same terms in all other respects as if

the wire had not been given up" to the company. The wire was put up by H. & Co. and used by them and "four other persons" for the term of ten years without compensation, and after that at the agreed compensation. The company then notified H. & Co. that the use of the wire by H. & Co. and the four other persons had become such as to exclude the company from all use of it, which was not contemplated by the original contract, and that the agreement would be terminated by the company. H. & Co. filed their bill to restrain the company from so doing. *Held*,

(1) That H. & Co. and their licensees, after the expiration of the ten years, were entitled to the same absolute use of the wire which they enjoyed before the wire was given up to the company, on payment of $600 per annum, payable quarterly;

(2) That the facts disclosed no hardship which would justify a court of equity, in the exercise of its judicial discretion, to refuse the relief asked for;

(3) That the plaintiffs were entitled to such relief in equity.

THE case is stated in the opinion.

Mr. John F. Dillon and *Mr. Rush Taggart* for appellants.

Mr. R. C. McMurtrie and *Mr. S. S. Hollingsworth* for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

This suit was brought to obtain a decree restraining the appellants, the defendants below, from terminating or in anywise interfering with the use by the appellees, the plaintiffs below, of a telegraph wire upon the poles of the defendants between Philadelphia and New York, and requiring the defendants to maintain such wire in good working order for the use of plaintiffs and their licensees.

The plaintiffs base their claim to this relief upon a written contract made in 1867 with the Franklin Telegraph Company, a Massachusetts corporation, acting for itself and other companies. As the case depends upon the construction of that contract, it is given in full, as follows:

"Memorandum of agreement made this 21st day of May, 1867, by the Franklin Telegraph Company for their own

account, and on behalf of the Insulated Lines Telegraph Company, of the first part, and Thomas Harrison, M. Leib Harrison, John Harrison, George L. Harrison, Jr., and Thomas S. Harrison, trading as Harrison Brothers & Co., manufacturing chemists of Philadelphia, of the other part:

"Witnesseth, That the party of the first part, for and in consideration of the relinquishment by the parties of the second part to the party of the first part of a valuable contract made by the party of the second part with the Insulated Lines Telegraph Company, hereby grants to the party of the second part the right to put up, maintain and use a telegraphic wire between the cities of New York and Philadelphia, upon the poles of the Franklin Telegraph Company, or of the Insulated Lines Telegraph Company, or of those persons or corporations whose property has lately been purchased by or consolidated into the stock of the party of the first part. And the party of the second part are privileged at their option to allow four other parties to use the same with them, they and the licensees aforesaid to have priority in the use of the said wire, for transmission of messages free of all expense. The party of the first part to have the use of the same when not so employed. And in consideration of allowing the use of said wire to the party of the first part when they, the said parties of the second part and the licensees aforesaid, are not using the same, the party of the first part agrees, said wire having first been put up to the acceptance of J. G. Smithe, the superintendent of said Franklin Telegraph Company, and accepted by him, to keep and maintain at their own expense the said wire in good working order to and between the offices of the parties of the first part in New York and Philadelphia, and between said offices and the places of business of the parties of the second part and such four other persons or firms in the said cities of New York and Philadelphia, all expenses of batteries, &c., connected with the working of said wire to be paid by the parties of the first part. At the expiration of ten years the party of the second part agree that their private wire shall belong to the parties of the first part; after which time the parties of the first part agree to lease the same to

the party of the second part, for the use of themselves and such other four persons or firms as the party of the second part shall suffer and permit or license to use the same, for the sum of six hundred dollars per annum, payable quarterly, and upon the same terms in all other respects as if the wire had not been given up to the parties of the first part.

"The party of the second part, however, agree that no assignment by them of their right under this contract shall give their assignees the right to demand a lease of the said wire after the expiration of the ten years, which right is to be a personal privilege of the party of the second part or of that firm for the time being.

"It is further agreed that the right of giving the use of the wire to four other parties shall be exercised by the party of the second part or their assignees only by giving the same to any person or firm not being a telegraph company, a banker, or stock or exchange broker or railroad company.

"And in case the party of the second part shall procure a charter to carry on the business they are now engaged [in], or a similar business, the privileges and rights of the party of the second part shall enure to said corporation in like manner as if such corporation had been named as the party of the second part herein.

"In case of any disagreement on that or any other point embraced in this contract, the decision of the same shall be left to two disinterested persons mutually chosen by the parties hereto, with a right to call in a third as umpire, whose decision shall be final.

"In case those objections are held valid by the arbitrators and not acquiesced in by the parties of the second part, the party of the first part reserves the right to purchase the said wire at a fair valuation, to be determined by referees in the same manner as any other matter in this agreement; with the above exception, the party of the second part has the right of transfer.

"No change in the firm or firm name of the party of the second part or those interested through them by death or retirement or by addition of members to said firm or from

other cause shall vitiate the right or title of the party of the second part under this contract or destroy its continuance in full force to such new firm and the members thereof as if they were named herein.

"The parties of the second part and those interested through them are not to do other than their own legitimate mercantile and personal business. Should they be willing to transmit any other messages they are to charge the company's regular tolls and hand the same over weekly to the proper officers of said companies without discount or diminution.

"In case of a violation of this contract in this respect by the party of the second part or their licensees, they shall respectively pay the parties of the first part four times the current rates of similar messages and the expenses of recovering the same as liquidated damages, and if this should continue and be found by arbitration to have been intentionally persisted in, it shall terminate this contract against the offending party, whether Harrison Bros. & Co., or either of their licensees.

"It is agreed by the Franklin and Insulated Lines Telegraph Companies that no debts at present made or hereafter contracted shall in any way affect or injure the rights of the parties of the second part under this agreement, or impair their title to the wire put up by them on the poles of said companies.

"In case the said wire shall at any time be out of order or incapable from any cause of being used, the parties of the first part will transmit the messages of the party of the second part and their licensees from any of their offices to and from New York and Philadelphia in regular turn, with all other messages received for transmission, free of all charge and expense."

The plaintiffs are the successors in business of Harrison Brothers & Co., parties to the above contract, and entitled to all the rights conferred, and subject to all the liabilities imposed, by its provisions.

The Franklin Telegraph Company, June 14, 1876, leased all its property and franchises to the Atlantic and Pacific Tele-

graph Company, a corporation of New York, for the term of ninety-nine years from May 1, 1876; and on the 19th day of January, 1881, the latter corporation sold and transferred all its property and franchises (except the franchise to continue its corporate existence) to the Western Union Telegraph Company.

The plaintiffs, at their own expense, put up the required wire on the poles of the Franklin Telegraph Company between New York and Philadelphia. After May 21, 1877 — ten years from the date of the above contract having expired — they enjoyed its use, and paid to the Atlantic and Pacific Telegraph Company the stipulated sum of $600 per annum.

On the 20th of August, 1880, the plaintiffs received from the Atlantic and Pacific Telegraph Company a communication, in which it was said:

"In the contract entered into between your house and the Franklin Telegraph Company in May, 1867, it was contemplated that the telegraph company should have the use of the wire leased during a considerable portion of the time, in consideration of which the telegraph company were to maintain the line in working order and furnish battery power therefor. Your own business and that of your licensees has deprived us more and more of the use of this wire, until we find ourselves furnishing the exclusive use of a wire, between New York and Philadelphia, maintaining and supplying battery for it, for the sum of $600 dollars per annum. As this cannot be afforded and was not contemplated by the contract, and as the contract fixes no limit of continuance, we respectfully give notice that we shall consider it terminated from and after 21st of November next, being the end of the next quarter. Should you desire to continue the connection we shall be glad to accommodate you upon as favorable terms as can be afforded, and would like to have your decision at an early day, that we may make suitable provision for you, if desired, upon our new and substantial line now in process of construction."

To this the plaintiffs replied: "We are sorry that you still insist on your view of our rights under the contract. We had hoped that the views that we lately presented to you would,

when you came to think the matter over, convince you. We see no way, however, of settling the case except by having the meaning of the contract decided. We suggest, therefore, that an amicable suit be instituted for this purpose, and that your notice be extended so as to cover the time necessary to make a decision. If, in the meanwhile, you have any substitute to propose for the existing arrangement we shall be glad to consider it. We desire that the pleasant relations that have existed between us may not be disturbed, and think that our suggestion will meet with your approval."

Nothing further was done to interfere with the rights claimed by the plaintiffs until May 20, 1882, when they received the following notice: "You will please take notice that the Franklin Telegraph Company desires to terminate the agreement heretofore, and on the twenty-first day of May, 1867, executed between themselves and you, and that the same will be so terminated on the twenty-first day of November, 1882."

In anticipation of this threatened termination of the contract, and to prevent the consequences that would result from such action, the present suit was brought by the plaintiffs.

The defendants, in their answer, allege that the telegraphic wire, erected under the said agreement, consisted of the wire, the insulation thereof, and a cable under the North River, in order to complete the line of communication into the city of New York; that such cable became worn by long use and was no longer serviceable, so that the defendants were compelled to abandon its use, and it has since been taken up and removed; that the insulation of the wire, erected by the plaintiffs, also, became, by long use, unserviceable, and a new one was substituted by the defendants; that, finally, the wire itself, by long use, became imperfect, unreliable, unfit for use, and was taken down; and that, before the commencement of this suit, every part of the telegraphic line erected by the plaintiffs under the above agreement, had been taken down and removed for the reasons just stated, and no part of it was now in use.

It was also alleged in the answer that the cost to the plain-

tiffs of erecting said wire could not properly have exceeded $3000, that the expense to defendants of keeping and maintaining the same in good working order, and the expenses of batteries, etc., connected with the working of the wire, which defendants paid, amounted to $600 per annum between May 21, 1867, and May 21, 1877; and that the telegraphic facilities furnished to the plaintiffs and their licensees during the same period were of the value to the plaintiffs of $600 per annum.

By the final decree of the Circuit Court, held by Mr. Justice Bradley and Judge Butler, it was ordered, adjudged and decreed that "under and by virtue of the contract or agreement made and bearing date the 21st day of May, 1867, by and between the Franklin Telegraph Company, for their own account and on behalf of the Insulated Lines Telegraph Company, of the first part, and Thomas Harrison, M. Leib Harrison, John Harrison, George L. Harrison, Junior, and Thomas S. Harrison, trading as Harrison Brothers and Company, manufacturing chemists of Philadelphia, of the other part, the complainants in this suit, as successors of said Harrison Brothers and Company, are entitled, so long as the defendants, The Franklin Telegraph Company, their successors or assigns, shall keep up and maintain the line of telegraph between the cities of New York and Philadelphia mentioned in the said agreement or any telegraph line between the said cities, to an irrevocable license, subject to the payment of six hundred dollars per annum, payable quarterly; to have the use of one wire in and upon said line in the manner provided for in said agreement, for the benefit and use of their said firm of Harrison Brothers and Company, so long as the complainants or either of them shall continue to be members or a member of said firm and the said firm shall continue to carry on the business they were engaged in at the time of said agreement or a similar business, by whatever name the said firm may be called, or whether acting as a firm of individuals or under a charter of incorporation. The court therefore doth order, adjudge and decree that the defendants, the said Franklin Telegraph Company, their successors and assigns, so long as they shall continue to maintain said line of telegraph or any

telegraph line between the cities of New York and Philadelphia, do maintain in good working order a telegraph wire thereon, for the use of the said firm or corporation, so long as the complainants or either of them shall be members or a member thereof, according to the terms of said contract, and that they be enjoined from interfering with the use of said wire by the said firm or corporation in manner aforesaid."

The principal question is as to the nature of the interest the appellees had under the agreement of May 21, 1867, after the expiration of ten years from its date, when the ownership of the wire passed from Harrison Bros. & Co. to the telegraph company. It was stipulated that the company after the wire became its property should "lease the same" to Harrison Bros. & Co. "for the use of themselves and such other four persons or firms" as that firm "shall suffer and permit or license to use the same, for the sum of six hundred dollars per annum, payable quarterly, and upon the same terms in all other respects as if the wire had not been given up to" the telegraph company. The appellants insist that the agreement was only for a lease of the wire, to begin when it became the property of the telegraph company and to continue for one year; that as the appellees occupied it for that year and the next year, they became tenants from year to year; that it was in the power of the appellants to determine such tenancy at the end of any year upon notice; and that, having given proper notice, the interest of the appellees ceased.

It appears from the uncontradicted averments of the bill, as well as from the evidence, that the Franklin Telegraph Company originally owned two wires from Philadelphia to New York, and was doing a paying business; and that the Insulated Lines Telegraph Company owned four wires from Boston to New York, and four wires running south from New York to Washington through Philadelphia, but had a large bonded and floating debt, and was losing money. The latter company made overtures to the former for a consolidation, pending which inquiries were set on foot in respect to the nature of the contract between Harrison Bros. & Co. and the Insulated Lines Telegraph Company. The Franklin Telegraph

Company was unwilling to enter into the proposed consolidation, so long as that contract existed. Thereupon negotiations were commenced with Harrison Bros. & Co., which resulted in the agreement of May 21, 1867. The bill avers and the answer admits that said agreement "was made by said Franklin Telegraph Company with said Harrison Bros. & Co. for the purpose of having rescinded the said contract between the said Insulated Lines Telegraph Company and said Harrison Bros. & Co., and in order to secure the erection of a wire upon the poles of said company between New York and Philadelphia by and at the expense of said last-mentioned firm." What was the intrinsic value to that firm of the contract thus relinquished, or how necessary it was, at that time, to the interests of the Franklin Telegraph Company and of the proposed consolidated company that that contract should be surrendered and cancelled, the record does not disclose. But the agreement recites, and, therefore, the parties agree, that the contract so relinquished by Harrison Bros. & Co. was a "valuable" one. And the evidence shows that it was delivered up to the Insulated Lines Telegraph Company. At the examination of a witness, who had been the general agent of the Franklin Telegraph Company, and was directly connected with the negotiations leading up to that agreement, the plaintiffs called for the production of the contract which Harrison Bros. & Co. had relinquished. The attorney for the telegraph companies answered that he had not received previous notice to produce it, and could not do so then because it was not in his possession. This notice may have been insufficient under the strict rules of evidence, but it was within the power of defendants to have produced the contract at some subsequent date, so as to enable the court and the jury, if it was necessary to do so, to ascertain, with reasonable certainty, the real value of the privileges surrendered by Harrison Bros. & Co. in consideration of the rights given them by the contract of 1867. The contract would, perhaps, have thrown light upon the meaning of the clause by which that firm acquired the right to "lease" the wire put up by them after it became the property of the telegraph company. With that contract

before us we could, perhaps, better understand the suggestion, made in different forms, that Harrison Bros. & Co. got by the decree below privileges far greater in value than any relinquished by them, and that the contract of 1867, as interpreted by them, is a hard, unreasonable one that ought not to be enforced by a court of equity.

Looking at the written contract — which the bill alleges, and defendants insist, was made to carry out the previous agreement and understanding of the parties — it is quite clear that, although the word "lease" is used, the parties did not intend that the plaintiffs should be subjected, after the expiration of ten years, to the strict conditions applicable to a technical lease of real estate. The contract limits the period during which appellees should be the owners of the wire, but does not limit the time during which they could, of right, use it in their business. If it was intended that Harrison Bros. & Co. — having relinquished their valuable contract with the Insulated Lines Telegraph Company, and put up the wire at their own expense — should become, after ten years, only tenants from year to year of the telegraph company, that intention, it seems to the court, would have been distinctly avowed.

The agreement is clear and specific as to the consideration which passed from the respective parties. In consideration of the relinquishment by Harrison Bros. & Co. of their contract with the Insulated Lines Telegraph Company, that firm was given the privilege of putting up, at its own expense, a wire on the poles of the telegraph company, between Philadelphia and New York, to be used as well by them in their legitimate mercantile and personal business, as by their licensees, not exceeding four in number — such licensees not being telegraph or railroad companies, bankers or stock or exchange brokers. And in consideration of the company being allowed to use the wire, when not in use by Harrison Bros. & Co. or their licensees, the company agreed to keep and maintain it in good working order at its expense. The contract next provided that, upon the expiration of ten years, the wire should become the property of the telegraph com-

pany. Then follows the agreement of the telegraph company to lease it for $600 per annum, payable quarterly, to be used by Harrison Bros. & Co. and their licensees, "upon the same terms in all other respects as if the wire had not been given up" to the telegraph company. Now, this means that, whereas, before the expiration of ten years, the wire should belong to Harrison Bros. & Co. and be used by them and their licensees, free of charge or expense for legitimate messages, it should, after ten years, belong to the telegraph company, but subject to be used in the same way as before by paying $600 dollars annually; the right, however, remaining with the telegraph company to use it when not in use by Harrison Bros. & Co. and their licensees. The requirement that its use by Harrison Bros. & Co. after ten years should be "upon the same terms *in all other respects as if the wire had not been given up*," can only be met by according to appellees and their licensees the same absolute right of use they enjoyed before the wire was given up to the company, subject to the condition that, instead of having their messages transmitted without charge, they must pay $600 per annum. This, we think, is the reasonable interpretation of the contract. And that view is supported to some extent by the fact that the parties deemed it necessary to provide that no assignment by Harrison Bros. & Co. of their right under the contract should give their assignees the right to demand a lease of the wire after the expiration of the ten years. That clause was wholly unnecessary if it was intended to give Harrison Bros. & Co. merely the rights of a tenant from year to year; for, if only that relation was established by the contract, the telegraph company could have determined it at any time, upon due notice. After the expiration of ten years, Harrison Bros. & Co. had only a priority in the use of the wire in consideration of a fixed annual sum to be paid quarterly. They retained neither control nor possession nor interest in the property. They simply purchased the use, without limitation as to time, after the ten years, for themselves and licensees, of a wire erected on the poles of the telegraph company, between Philadelphia and New York.

We do not find in all this the essential characteristics of a lease.

Why shall not the telegraph company perform the terms of its contract? Its original execution was unattended by fraud, surprise, misrepresentation, imposition, concealment of material facts or mistake. The parties thoroughly understood the situation and knew what they were doing. The possibility that, by reason of an increase in the population and business of New York and Philadelphia, the use of a telegraphic wire between those cities could, in time, be sold for more than $600 per annum was, of course, present to the minds of those who were interested in the telegraph company, and to whom were entrusted the negotiations for the relinquishment of the contract Harrison Bros. & Co. had with the Insulated Lines Telegraph Company. Nevertheless, the telegraph company deliberately chose to risk that possibility in order to get the Harrison contract out of its way. That contract having been relinquished, and a large sum, exceeding $10,000, having been advanced by Harrison Bros. & Co. to erect the wire, the telegraph company ought not to be heard to urge, as a ground for not performing its agreement, that the annual license fee stipulated to be paid by appellees is much less than could be now obtained from others. If competing telegraph lines had been established between New York and Philadelphia, and by reason thereof such use as appellees and their licensees make of the wire in question could now be had for much less than $600 per annum, that circumstance would hardly constitute sufficient ground for them to refuse payment of the full amount stipulated to be paid for its use annually. A different rule should not be applied where the price has increased, because of the absence of competition among telegraph companies, or from other causes not attributable to the plaintiffs.

It is said that the contract turns out to be a hard one for the telegraph company, and that a court of equity should not aid in its enforcement. It is true that in many adjudged cases, and by numerous text-writers, the general rule is laid down that equity in the exercise of a sound judicial discretion

will refuse a decree for specific performance where it would be a great hardship upon one of the parties to grant relief of that character. But this general rule is subject, in its application, to some limitations that arise out of the facts of particular cases.

In *Cathcart* v. *Robinson*, 5 Pet. 264, 271 — which was a suit to enforce the specific performance of a contract for the sale and purchase of land, in which one of the defences was the excessive price for which the land was sold — Chief Justice Marshall, while conceding that excess of price was an ingredient which, associated with others, will contribute to prevent the interference of a court of equity, said: "The value of real property had fallen. Its future fluctuation was matter of speculation. At any rate, this excess of price over value, if the contract be free from imposition, is not in itself sufficient to prevent a decree for a specific performance."

In *Marble Company* v. *Ripley*, 10 Wall. 339, 356, where the decree required the specific performance of a contract to quarry marble, and was objected to upon the ground that, though supposed to be fair and equal when made, the contract became, by lapse of time, and the operation of unforeseen causes, and changed circumstances, unfair, unreasonable and unconscionable, the court, speaking by Mr. Justice Strong, said: "It may be doubted, however, whether the hardship of the contract is any greater than must have been contemplated when it was made. It is not unconscionable because Ripley obtains a larger profit from it than was at first expected, or because the other party obtains less. Those were contingencies, the possibility of which might have been foreseen. It could not have escaped the thought of the contracting parties that the expense of quarrying might possibly increase, and that the expense of sawing and preparing for market might either increase or diminish in the progress of time. Of that they took their chances. Besides, it is by no means clear that a court of equity will refuse to decree the specific performance of a contract, fair when it was made, but which has become a hard one by the force of subsequent circumstances or changing events." These principles, the court said, must be appli-

cable to contracts "that do not look to completed performance within a defined or reasonable time, but contemplate a continuous performance, extending through an indefinite number of years, or perpetually." Fry on Specific Performance, 116, and c. 6.

In Sugden on Vendors it is said that "a court of equity does not affect to weigh the actual value, nor to insist upon an equivalent in contracts, where each party has equal competence. When undue advantage is taken, it will not enforce the contract; but it cannot listen to one party saying that another man would give him more money or better terms than he agreed to take. It may be an improvident contract; but improvidence or inadequacy do not determine a court of equity against decreeing specific performance." c. 5, § 3, par. 25; *Sullivan* v. *Jacob*, 1 Molloy, 472, 477. So, in *Lee* v. *Kirby*, 104 Mass. 420, 428: "The question of the want of equality and fairness, and of the hardship of the contract, should, as a general rule, be judged of in relation to the time of the contract, and not by subsequent events. We do not intend to say that the court will never pay any attention to hardships produced by a change of circumstances; but certainly the general rule is, that a mere decline in value since the date of the contract is not to be regarded by the court in cases of this nature." See also *Revell* v. *Hussey*, 2 Ball & Beatty, 280, 287; *Paine* v. *Mellor*, 6 Ves. 349, 352; *Mortimer* v. *Capper*, 1 Bro. Ch. 156.

In view of these principles, which we think are founded in wisdom, we are of opinion that the fact that the appellants could, at the commencement of this suit, or since, sell at an increased price the privilege for which the appellees paid by relinquishing a valuable contract and advancing a large sum of money, and which privilege they now enjoy for the stipulated price of $600 per annum, is not sufficient to justify the court in withholding the relief asked.

It was said in argument, as a reason why the relief sought should not be granted, that the appellees and their licensees had now the exclusive use of the wire in question; whereas, the expectation of the parties, at the time of the contract, was

that the telegraph company would have the use of it during, at least, a part of the time. It is sufficient to say that this fact is not established by the evidence. It is true that an officer of the Atlantic and Pacific Telegraph Company, in a letter addressed to Harrison Bros. & Co., stated that his company was furnishing to that firm "the exclusive use of a wire between New York and Philadelphia, maintaining and supplying battery for it for the sum of $600 per annum." But no such fact was stated by any witness in the cause. It is still more significant that the answer contains no such defence. What would be the rights of the parties if the appellees so used the wire in question as to deprive the telegraph company of all opportunity to use it for its general business, or whether, in such a case, the court would or would not refuse specific performance, except upon the condition that the telegraph companies shared in the use of the wire for a reasonable portion of the time, *Willard* v. *Tayloe*, 8 Wall. 557, we need not inquire. No such case is presented for our consideration.

In respect to the question discussed at the bar, relating to the remedy, but little need be said. It is clear that the appellees had no adequate remedy at law for the protection of their rights. Suits at law, from time to time, to recover damages for the refusal of the telegraph company to transmit the messages of appellees over this wire, would not have given the relief necessary to secure their rights under the contract. Such a remedy would not be complete, nor an adequate substitute for an injunction that would secure the appellees against perpetually recurring denials of their rights. *Joy* v. *St. Louis*, 138 U. S. 1, 46; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550, 567. If appellees are entitled, for the sum of $600 per year, payable quarterly, to have the messages of themselves and their licensees transmitted over the appellants' wire between New York and Philadelphia, so long as the latter maintain a telegraph line between those cities — as we think they are — the only effective relief is a decree such as that rendered below.

Decree affirmed.

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE BREWER, dissenting.

I cannot assent to the conclusion reached by the court. In my judgment, the interest of appellees under the contract, after the expiration of ten years from its date, was in the nature of a lease, the word "lease" being advisedly used in the agreement. And as while the length of time was not expressed, it was provided that the wire should be leased "for the sum of six hundred dollars per annum, payable quarterly," the implication is that it was a right to use from year to year.

The accepted rules of construction forbid the view that the contract was of indefinite duration; and if such had been the intention, it should have been expressed.

Moreover, this is not a case for specific performance. The construction contended for by appellees is at the best doubtful, and as the record sufficiently discloses that the contract thus construed has a harsh and unconscionable operation, not reasonably within the contemplation of the parties when they entered into it, the court was not bound, by way of grace and not of right, to compel its execution.

My brother Brewer concurs with me in this dissent.

MATTHEWS *v.* WARNER.

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

No. 250. Argued March 28, 29, 1892. — Decided May 16, 1892.

N. M. was indebted to U. in the sum of $200,000 secured by railroad bonds and stock and a mortgage on real estate in Boston. The debtor, desiring to use the bonds and stock held as collateral, proposed to substitute for them a mortgage on real estate in New York to secure the bond of E. M., N. M.'s brother, who was indebted to N. M. and who gave the bond and mortgage to secure that debt. E. M., at the request of N. M., in order to enable N. M. to make the proposed substitution, wrote him a letter to be shown to U., saying, "You are hereby authorized to assign to U. the

mortgage for $250,000 which I have given you as collateral security for loans made to me." *Held*, that while, as between E. and N., the mortgage was to be regarded as collateral security for loans made to E. by N., the assignment to U. was absolute as a security for the indebtedness of N. to U., without regard to the indebtedness of E. to N., and that a suit in equity to put a different construction upon it was wholly without merit.

THE case is stated in the opinion.

Mr. John F. Dillon and *Mr. William A. Abbott* for appellants.

Mr. Joseph B. Warner for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

In May, 1875, Nathan Matthews, of Boston, was indebted to Thomas Upham, of the same city, in a large amount — about $200,000 — for money loaned from time to time. This debt was secured by railroad bonds and stocks, and by a mortgage upon real estate in Boston.

Matthews, desiring to obtain possession of these securities, proposed to Upham that he surrender them and take, in substitution, a mortgage upon property in the city of New York, which he had arranged to be executed by his brother Edward Matthews of that city, and was then expecting to receive.

Under date of May 6, 1875, Nathan Matthews wrote from Boston to Edward Matthews: "Dear Brother: . . . I want your lawyer to draw an assignment of the mortgage you give me to Thomas Upham, Medfield, Mass., the assignment for me to sign; but I want him to draw it before he records the mortgage, or rather while he can do it, as I want to give him the assignment; and I want you to write me a letter authorizing me to assign it to Thomas Upham, I, of course, giving you my agreement that I hold it as collateral."

The mortgage here referred to, dated May 8, 1875, was given to Nathan Matthews by Edward Matthews, his wife uniting with him, upon certain real estate in the city of New York, to secure the payment of the mortgagor's bond or obligation to the mortgagee for the sum of $250,000, maturing

May 8, 1876. This mortgage contained a proviso to the effect that if the mortgagor, his heirs or personal representatives, should pay to the mortgagee, his personal representatives or assigns, the amount of that bond, and the interest thereon, the mortgage should be void. It was duly acknowledged by the grantors, and was recorded in the proper office on the 11th of May, 1875.

Under date of May 10, 1875, Edward Matthews addressed a letter from New York to Nathan Matthews in these words: "Dear Bro.: You are hereby authorized to assign to Thomas Upham, Esquire, the mortgage for $250,000 which I have given you as collateral security for loans made to me." Subsequently, May 30, 1875, Nathan Matthews, by a written instrument, assigned and transferred to Upham the above mortgage of May 8, 1875, together with the bond or obligation therein described, and the money due and to become due thereon, with interest, subject only to the proviso mentioned in the mortgage. The consideration recited in the assignment was the sum of $250,000 paid to Nathan Matthews by Upham. This instrument was duly acknowledged before a notary public according to the laws of Massachusetts.

In expectation of receiving the above mortgage, Upham delivered to Nathan Matthews part of the securities in his hands, and upon receiving it surrendered the remainder. And, subsequently, upon the faith of the mortgage, he made other advances to Nathan Matthews, and renewed some of the latter's notes.

Nathan Matthews and Upham both failed in business in 1876. The latter made an arrangement with his creditors by which the time of payment of his debts should be extended and new notes given, and by which all his property should be transferred to Caleb H. Warner and Charles F. Smith to be held by them in trust to secure the payment of such new notes. In pursuance of that arrangement Upham assigned to those trustees the notes and other evidences of debt due from Nathan Matthews, and by writing, dated February 3, 1876, also assigned to them the above mortgage of May 8, 1875, and the bond therein described.

An agreement in writing was executed, March 6, 1877, between Edward Matthews, Nathan Matthews, and the trustees Warner and Smith, which recited that Warner and Smith held "a certain mortgage upon property in New York as security for certain negotiable paper bearing the names of the said Edward and the said Nathan;" and that Edward Matthews was "desirous of substituting therefor 150 first mortgage bonds of the Memphis and Little Rock Railroad Company of the par value of $1000 each, and 50 first mortgage bonds of the Carolina Central Railroad Company of the par value of $1000 each, and also a note of $5000, signed by Henry J. Furber, and payable in eleven months from date, which the said Nathan Matthews and the said Warner and Smith are willing should be received and held by the said Warner and Smith upon the terms and conditions hereinafter set forth." It was, therefore, agreed between the parties as follows: "(1) That the said bonds shall be delivered upon receiving an assignment of the said mortgage to Henry J. Furber, and that the said note shall be delivered within ten days of the receipt of the said assignment, and that the said bonds shall be immediately held, together with the said note when it shall be delivered, as a substitute for the said mortgage in the hands of the said Warner and Smith, and may be dealt with by them in every way as the mortgage might have been, and shall be collateral security for the claims now held by the said Warner & Smith against Nathan Matthews. (2) It is provided that if Mr. Nathan Matthews shall carry out his plan of paying his debts to the said Warner & Smith, then the said bonds and note shall not be delivered to Nathan Matthews, but shall be delivered by the said Warner & Smith to Benjamin E. Bates, W. H. Williams, Isaac Pratt, or some trust company in the city of Hartford, at Mr. Nathan Matthews' option, to be held by such depository as security for Mr. Edward Matthews' performance of the 'Hartford agreement,' so called, as hereinafter extended, in the same manner as the bonds now held by W. H. Williams in the hands of Messrs. Morton, Bliss and Company, in this city, are held under the terms of the said agreement. (3) If the said

Nathan Matthews shall not within thirty days give to the said Warner & Smith forty-nine bonds of the Boston Water Power Company and do all things necessary by him to be done in order to make payment to the said Warner & Smith of his liabilities to them, then the said Edward Matthews shall be at liberty at any time within ten days thereafter to fulfil the terms of the agreement between the said Nathan and the said Warner & Smith, and upon so performing the same the said Warner & Smith may deliver to him said bonds and note. (4) Upon the delivery of the assignment aforesaid Mr. Edward Matthews shall procure from Morton, Bliss and Company a full discharge of their claim against Nathan Matthews, and the case now pending between them shall be discontinued upon Mr. Nathan Matthews paying the taxable costs of said suit. (5) The time of performance of the said 'Hartford agreement' is hereby extended until the third day of April next. (6) Any failure to deliver the said note of Henry J. Furber shall be considered for all purposes a breach of the said 'Hartford agreement.'"

To the above agreement was appended the following, which was also signed by the same parties: "It is further agreed that when the said Edward Matthews shall have delivered the cash and notes as required by the Hartford agreement, amounting to one hundred and forty-eight thousand dollars, (subject to revision of interest as agreed,) and when the said Warner & Smith shall have received satisfaction of the indebtedness for which the said mortgage has hitherto been held, that thereupon the said bonds and note shall be delivered to Virginia B. Matthews or her attorney, J. Brander Matthews, and that said bonds and note shall be sold only after twenty days' notice, sent by mail, to the said Edward Matthews. It is further agreed that if Nathan Matthews shall select Mr. W. H. Williams as a depository under the foregoing provisions of this agreement, that in such case Mr. Williams may also hold in his own safe or vault the two hundred and fifty bonds heretofore deposited with Morton, Bliss & Co., as security for the performance of the Hartford agreement."

The railroad bonds and the Furber note were substituted for the mortgage, and were received by Warner and Smith. That note was collected by them, while the railroad bonds were sold and the proceeds deposited in the New England Trust Company.

Shortly after the above exchange or substitution was made, namely, on the 7th of April, 1877, Mrs. Virginia B. Matthews, wife of Edward Matthews, notified Warner and Smith, in writing, that the fifty first mortgage bonds of the Carolina Central Railroad Company and the one hundred and fifty first mortgage bonds of the Memphis and Little Rock Railroad Company, in their possession, were her individual and separate property, had been put into their possession without her consent or authority, and that unless they returned them she would hold them responsible as for an unlawful conversion.

A few months later Edward Matthews was adjudged a bankrupt; and on the 10th of December, 1877, Mrs. Matthews commenced a suit in equity to obtain possession of the railroad bonds that Warner and Smith had taken in place of the mortgage of 1875. That case was determined adversely to Mrs. Matthews, and her bill was dismissed. *Matthews* v. *Warner*, 6 Fed. Rep. 461. Upon appeal to the court that decree was affirmed on the 22d day of December, 1884. *Matthews* v. *Warner*, 112 U. S. 600, 601, 603. Mr. Justice Miller, speaking for this court, said: "It seems to be clear that this assignment [of the bond and mortgage for $250,000] was made by the consent of Edward or by his directions. This was in May, 1875. Some time prior to March, 1877, Edward Matthews, who had become embarrassed, desired to take up this mortgage, and entered into negotiations for that purpose with defendants, who agreed to an exchange of the bond and mortgage for the railroad bonds which are the subject of this suit. They accordingly sent Joseph B. Warner, their legal adviser, from Boston, where they resided, with the bond and mortgage, and the exchange was made by him as their agent, receiving the bonds in question at Mr. Matthews' office in the city of New York. This exchange took place on the 6th day of March, 1877. It appears that the 150 Memphis

and Little Rock Company bonds were on that day, and had been for some time previous in possession of Morton, Bliss & Co., bankers, as collateral security for the debt of Edward Matthews, who had placed them there."

Observing that it was significant that the bill filed by Mrs. Matthews was sworn to by one of her solicitors on his belief, and was signed in her name by them, the court further said: "The only act which she is ever said to have done or performed in person, asserting a claim to these bonds, is a notice, to which her name is appended, to the defendants, about a month after the exchange of the bond and mortgage for the railroad bonds, in which she says they are her bonds, and forbids them to sell them. A witness, the clerk of Matthews, says the signature, he thinks, was written by Mr. Matthews. And it is admitted that the letter was dictated by him and written in his office. The plaintiff, who, if she had any just claim to these bonds, could best have explained how that claim originated, who could have told what money or property she loaned her husband, or how he became her debtor, is not sworn as a witness in the case. It looks very much as if the box at the safe deposit vault, with a key in the possession of the son, who occupied the same office with the father, and in the light of other evidence in the case, was a contrivance by which the husband could use the bonds as his own when he desired, and assert them to be the property of the wife when that was more desirable. We are of opinion that plaintiff never had any real ownership, or actual control, or any lawful right, to the bonds in suit."

The present suit was commenced by Edward Matthews on December 8, 1884, the day preceding that on which the argument of Mrs. Matthews' case was commenced in this court. Its object was to compel the payment to Edward Matthews of the proceeds of the securities delivered to Warner and Smith, trustees, in substitution for the mortgage and bond of May 8, 1875, given to Nathan Matthews and by him assigned to Thomas Upham. Edward having died, this suit was revived in the names of his executors, the present appellants.

The grounds set forth in the bill for the relief asked are,

substantially, these: That the bond and mortgage of May 8, 1875, were given to secure, not only numerous negotiable notes, not then due, which Edward Matthews had given to Nathan Matthews for loans by the latter, amounting to $150,000, but other notes to be given by Edward to Nathan for additional loans of $50,000; that Edward was induced to give the bond and mortgage upon Nathan's representations that Upham held the notes given by Edward for the $150,000, and would furnish money for the additional loans of $50,000; that Nathan, also, represented that he wished to satisfy Upham, or any one who took the notes, that they were secured, and that if he had the mortgage he could more easily negotiate the notes; that relying upon these representations, and in the belief that the bond and mortgage would be collateral for the notes to be secured by them, by whomsoever held, he executed them, and, by the letter of May 10, 1875, consented to their being assigned to Upham; that the substitution of the securities, the proceeds of which are here in controversy, for the bond and mortgage of 1875, was because of the representation by Warner and Smith that they, as trustees, held the notes which said bond and mortgage were given to secure, whereas they never held them, as the notes, endorsed by Nathan Matthews, had been discounted at his request by various banks and individuals; that Nathan Matthews was adjudged a bankrupt, and the notes so given to him were paid, in part, by Edward, while the remainder were bought by and assigned to his wife, and by her were turned over to him before the commencement of this suit; and that Upham received the assignment of the bond and mortgage of 1875, and Edward's written consent to their being assigned to him, with knowledge that such bond and mortgage were given only to secure loans of Nathan to Edward, evidenced by the latter's notes, and with knowledge, also, of such circumstances as made it his duty to inquire of Edward whether he intended that Nathan should separate the bond and mortgage from the notes secured by them, and assign the mortgage and bond to secure Nathan's individual indebtedness, for which Edward was not liable.

Opinion of the Court.

The defence was that the mortgage was so made and assigned that Upham had, as against Edward Matthews, the right to take it as security for Nathan Matthews' debts to him, and that Edward is estopped to deny this; that Upham had neither notice nor knowledge of any dealings between the brothers that would affect his title; that Edward made the mortgage and consented to its being assigned with knowledge that it was to be used if Nathan so desired, to secure the latter's debts to Upham; that the plaintiffs are precluded by the position Edward took toward Nathan, the holders of the notes, and the defendants, from maintaining this suit; that Edward was under neither error nor mistake in reference to the notes held by the defendants when the railroad bonds were given in exchange for the mortgage; and that the plaintiffs have no equity against the defendants.

Upon final hearing the bill was dismissed. The opinion of Judge Colt will be found in 33 Fed. Rep. 369.

Whether the plaintiffs, as executors of Edward Matthews, are concluded by the decree in the suit brought by Mrs. Matthews, or whether the cause of action, here asserted, is barred by the statute of limitations of Massachusetts, are questions which, in view of the conclusions reached in respect to other issues in the case, need not be determined.

There can be no doubt that the bond and mortgage of 1875 were assigned by Nathan Matthews to Upham for the purpose, primarily, of securing the debts of the former to the latter. Was the assignment for such a purpose authorized by Edward Matthews? Did he, subsequently and with knowledge of the facts, adopt or ratify what his brother did? Is Edward Matthews, as between him and Upham or Upham's trustees, estopped from disputing the right of Upham to have received and held such bond and mortgage as security for Nathan's debts? If either of these questions is answered in the affirmative, the decree should be affirmed.

Nathan Matthews was largely indebted to Upham, and the latter held securities that were ample for his protection. Nathan, also, expected to apply to Upham for additional loans. Their relations were well known to Edward Matthews. There

is no room for doubt upon this point. Besides, Edward was hard pressed for money, being then — as he admitted in a letter of May 4, 1875 — indebted to Nathan alone in the sum of $200,000, and expected Nathan to raise for him the further sum of $50,000 if required. In his letter to Nathan of May 11, 1875 — on which day the mortgage was filed in New York for record — Edward said: "I enclose the bond for $250,000 mortgage, and I thought it might be more satisfactory to Mr. Upham to have Brander and Watson guarantee it, which they have done." Now, it may be — and we think such was the fact — that, as between Edward Matthews and Nathan Matthews, the mortgage of $250,000 was to stand as collateral security for Edward's debts or liabilities to Nathan. While this idea was expressed in the letters of May 6 and 10, and while Upham, who saw the letter of the 10th, when he took the assignment of the mortgage and bond, must be presumed to have known of the arrangement thus made by the brothers, as between themselves, he had no notice from anything contained in that letter, or from any communication made to him by either of the brothers, that restrictions of any character were placed upon Nathan's use of the mortgage. The fair meaning of the letter was this: That while, as between Edward and Nathan, the mortgage was to be regarded as collateral security for loans made to the former, the latter was authorized to assign it to Upham without restriction or limitation in respect to the purposes for which such assignment might be made by Nathan. Edward knew that Upham was to part with something of value in consideration of the assignment. But what would have been the inducement to Upham to accept the assignment of the mortgage, if, as is now claimed, the letter of the 10th was notice to him that the mortgage could not be used by Nathan, except as collateral security for Edward's debts to him? Upham had no interest in providing for the loans made by Nathan to Edward, unless he held the notes given by Edward to Nathan for such loans. But he did not hold those notes. He held securities for the debts due for money loaned by him to Nathan, and the latter, in order to get possession of those securities, offered to his creditor the

mortgage given by Edward to him. If Upham had taken an assignment of the bond and mortgage, with knowledge or notice that his assignor could use them only as collateral security for loans made to the mortgagor by the mortgagee, such assignment would have been of no value to him, after such loans were extinguished by payment.

But when the mortgagor said, as he did by the letter of May 10, (written expressly to be shown to Upham,) that the mortgagee might assign the mortgage to him — the letter imposing no conditions as to the purposes for which the assignment could be made — he meant, and intended Upham to understand, that the mortgagee could use the mortgage according to his own discretion, and for any purposes he chose, subject only to the condition that, *as between them*, it was to be deemed collateral security for the debts then due from the mortgagor to the mortgagee for money loaned. When Nathan wrote under date of May 6 to Edward, "I want to give him [Upham] the assignment, and I want you to write me a letter authorizing me to assign it to Thomas Upham, I, of course, giving you my agreement that I hold it as collateral," he meant, and Edward must have understood him to mean, that while, *as between them*, the mortgage was not executed because of any new and additional liability upon the part of Edward to Nathan, the assignment to Upham must be unconditional and absolute, so as to give the latter the full benefit of the mortgage. Nathan well knew that he could not get the securities put into Upham's hand as security for his own debts to Upham, nor obtain further loans from Upham, unless he presented to the latter such an assignment of Edward's mortgage and bond as would give him a security of equal value with those then held by him for Nathan's debts. There is not the slightest doubt, from the evidence, that Edward fully understood, at the time, all the details of Nathan's plan for obtaining not only the securities he had placed in Upham's hands, but further loans of money from him.

The interpretation we have given to the writing of May 10, 1875, authorizing Nathan Matthews to assign to Upham the mortgage executed by Edward Matthews, is supported by the

subsequent conduct of the parties. We allude here particularly to the written agreement of March 6, 1877. Edward admits in the original bill that Nathan desired to substitute for the bond and mortgage of 1875, the 150 first mortgage bonds of the Memphis and Little Rock Railroad Company, and the 50 first mortgage bonds of the Carolina Central Railroad Company — the proceeds of the sales of which are here in question — together with the Furber note for $5000; and that the agreement of 1877 was made in order to effect that result. Now, this agreement provides that the bonds and note just referred to should be received and held, in place of Edward's mortgage on the New York property, and be dealt with in every way as that mortgage might have been, and "shall be collateral security for the claims now held by the said Warner & Smith [trustees of Upham] *against Nathan Matthews;*" such bonds and note to be delivered to, and held by, certain named parties, as security for Edward Matthews' performance of what was called the Hartford agreement, *provided Nathan Matthews carried out his plan for paying his debts to Warner and Smith.* By these and other provisions in the agreement of 1877 it was distinctly admitted that the railroad bonds and the Furber note were to take the place of the mortgage of 1875, and stand as security for the debts *of Nathan Matthews*, held by Upham's trustees. Having consented to this substitution, Edward Matthews brought this suit, without even offering to reinstate the mortgage. He knew when the agreement of 1877 was signed that Nathan was largely indebted to Upham at the time the latter made an assignment to Warner and Smith for the benefit of his creditors. He knew that Warner and Smith, in behalf of Upham and his creditors, claimed to hold the mortgage and bond of 1875 as security for the debts of Nathan, and that such debts were none the less Nathan's, because his own name was upon the notes, or some of them, representing those debts. He induced the trustees to surrender the mortgage and take in place of it certain railroad bonds and a promissory note, which, he agreed, should be collateral security for the claims then held by Warner and Smith against Nathan Matthews. The suggestion

that he agreed to the substitution, only because induced by Warner and Smith to believe that they then held the notes he had given to his brother Nathan, and for which the mortgage of 1875 was collateral security, as between him and his brother, is inconsistent with any reasonable inference from the undisputed facts of the case. Even if that suggestion were supported by the evidence, the relief asked ought not to be granted, because, as already shown, Warner and Smith, trustees, had the right originally to hold the mortgage of 1875 as security for Nathan's debts to Upham; and that security having been surrendered by them to Edward Matthews in consideration of the transfer of the railroad bonds and promissory note described in the agreement of 1877, to be held as collateral security for Nathan's debts, Edward could not, in equity, reclaim those bonds and the Furber note, or recover their proceeds, without restoring the security for which they were substituted. The suit is wholly without merit, and it is unnecessary to cite authorities to support the conclusions reached by the court.

Decree affirmed.

MR. JUSTICE GRAY did not hear the argument or take part in the decision.

BAKER'S EXECUTORS *v.* KILGORE.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 322. Argued and submitted April 20, 1892. — Decided May 16, 1892.

The act of the legislature of Tennessee of March 26, 1879, c. 141, providing that "the rents and profits of any property or estate of a married woman, which she now owns or may hereafter become seized or possessed of . . . shall in no manner be subject to the debts or contracts of her husband, except by her consent," does not take away or infringe upon any vested right of the husband, or any right belonging to his creditors, and does not deny any right or privilege secured by the Constitution of the United States.

THE case is stated in the opinion.

Mr. F. A. Reeve, for plaintiff in error, submitted on his brief.

Mr. Henry H. Ingersoll for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was commenced, October 12, 1886, before a Justice of the Peace of Greene County, Tennessee, and involves the right of property in three heifers and one steer, levied upon as the property of Frederick Scruggs, but claimed by his wife to belong to her, and not subject to seizure or sale for the debts of her husband. Judgment having been rendered for her, the case was carried by appeal to the Circuit Court of that county.

It appears that Scruggs and wife were married about eighteen years before the commencement of this action, and lived, during most of their married life, on lands deeded to her, as follows: one hundred and thirty acres, by deed of January 1, 1881; two hundred and seventy-four acres, by deed of April 19, 1877; one hundred and eight acres, by deed of May 8, 1886. The deeds to Mrs. Scruggs were in fee simple, but did not create a technical separate estate. Some years prior to this litigation her husband failed in business, after which he attended to his wife's affairs, trading for her in stock, hogs, etc., and superintending farm work, etc., as her agent. He occasionally traded in live stock for himself. From 1879 to 1881 he engaged, in the name of his father, in merchandising in a house in the yard of the home dwelling lot, and from 1881 to 1884 in the name of his brother William, and with their money, he receiving and keeping all the profits. He and Mrs. Scruggs took from the store whatever each wanted, paid hands on the farm partly out of it, and put back into the store the proceeds of the farm, but without strict account being kept between them as husband and wife, or between them and William Scruggs, as in the case of strangers. The husband did

not keep the wife's funds strictly separate from his own, but often commingled them.

In the spring of 1884 he sold some cattle belonging to the wife for about $200; and afterwards bought two head of young cattle for her with part of this money. In September or October following he purchased one other steer for her with the proceeds of what was raised on her farms, and while the cattle were pasturing together, another calf came from one of her cows. They were levied on as the property of the husband under an execution issued September 10, 1886, which was based upon a judgment against him, in favor of one Scott, rendered September 22, 1876. At the execution sale Baker, the testator of the plaintiffs in error, became the purchaser of the cattle, having at the time notice from Mrs. Scruggs that they belonged to her, and, if sold, would be replevied as her property.

The trial court found that the cattle in question were the property of the wife, having been bought with the proceeds of her estate; that a certain act of the general assembly of Tennessee, passed March 26, 1879, c. 141, upon which the wife relied — and which will be presently referred to — was not, as claimed by the defendant, in violation either of the Constitution of the United States or of that of Tennessee, prohibiting the impairment of the obligation of contracts, and did not deprive the husband or his creditors of any vested rights; and that said act protected the cattle from any execution sued out against the property of the husband. Judgment was accordingly rendered for Mrs. Scruggs.

Upon appeal to the Supreme Court of Tennessee, the judgment was affirmed, the court holding that the act of 1879 was not obnoxious to the Constitution of the United States.

By the law of Tennessee in force when the judgment of September 22, 1876, was rendered against Scruggs, the interest of a husband in the real estate of his wife, acquired by her, either before or after marriage, by gift, devise descent or in any other mode, could not be sold or disposed of by virtue of any judgment, decree or execution against him; nor could the husband sell his wife's real estate during her life without

her joining in the conveyance in the manner prescribed for conveyances of land by married women. Laws of Tennessee, 1849, 111, c. 36, § 1; Code of Tennessee, 1858, § 2481; *Id.* 1884, § 3338. In *Lucas* v. *Rickerich*, 1 Lea, 726, it was held that the act of 1849 did not affect the right of the husband to take the rents and profits of the wife's real estate. This decision, it was said in *Taylor* v. *Taylor*, 12 Lea, 490, 495, led to the passage of the act of March 26, 1879, which, repealing all prior laws in conflict with it, provided: "Hereafter the rents and profits of any property or estate of a married woman, which she now owns or may hereafter become seized or possessed of, either by purchase, devise, gift or inheritance, as a separate estate, or for years, or for life, or as a fee-simple estate, shall in no manner be subject to the debts or contracts of her husband, except by her consent, obtained in writing: *Provided*, That the act shall in no manner interfere with the husband's tenancy by the curtesy." Acts of Tennessee, 1879, 182, c. 141; Milliken & Vertrees' Code, 1884, § 3343.

The cattle in dispute were, within the meaning of that act, profits of the wife's lands.

The plaintiff in error contends that when the act of 1879 was passed the judgment creditor of Scruggs had a right of which he could not be deprived by legislation, to subject to his demand any property vested in the husband; and that it was not competent for the legislature to exempt the rents and profits of the wife's estate from liability for the debts and contracts of the husband, existing at the time such immunity was declared.

We do not doubt the validity of the act of 1879, as applied to the judgment previously rendered against Scruggs. The particular profits of the wife's estate here in dispute had not, when that act was passed, come to the hands of the husband. They were not, at that time, in existence, nor in any legal sense, vested in him. Nor were they ever vested in him. He had a mere expectancy with reference to them when the act was passed. Moreover, his right, prior to that enactment, to take the profits of his wife's estate did not come from con-

tract between him and his wife or between him and the State, but from a rule of law established by the legislature, and resting alone upon public considerations arising out of the marriage relation. It was entirely competent for the legislature to change that rule in respect, at least, to the future rents and profits of the wife's estate. Such legislation is for the protection of the property of the wife, and neither impairs nor defeats any vested right of the husband. Marriage is a civil institution, a status, in reference to which Mr. Bishop has well said, "public interests overshadow private — one which public policy holds specially in the hands of the law for the public good, and over which the law presides in a manner not known in the other departments." 1 Bishop on Marriage, Divorce and Separation, § 5. The relation of husband and wife is, therefore, formed subject to the power of the State to control and regulate both that relation and the property rights directly connected with it, by such legislation as does not violate those fundamental principles which have been established for the protection of private and personal rights against illegal interference.

If the act of 1879 did not infringe any vested right of the husband, much less did it infringe any right belonging to his creditors.

The views we have expressed are supported by the judgment of the Supreme Court of Tennessee in *Taylor* v. *Taylor*, 12 Lea, 490, 498, where it was held that the acts of 1849 and 1879, above referred to, were enacted for the benefit of married women, not of their husbands, and that a husband has no vested right to the future profits of his wife's land that prevents the enactment of such a statute as that of 1879.

As the judgment did not withhold or deny any right or privilege secured by the Constitution of the United States, it must be

Affirmed.

McDONALD *v.* BELDING.

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

No. 379. Submitted April 26, 1892. — Decided May 16, 1892.

In Arkansas, although the rule obtains that a person holding under a quitclaim deed may be ordinarily presumed to have had knowledge of imperfections in the vendor's title, yet that rule is not universal, and one may become entitled to protection as a *bona fide* purchaser for value, although holding under a deed of that kind; and in this case it is held that the plaintiff in error, although taking a quitclaim deed, was not chargeable with notice of any existing claim to the property upon the part of either of the defendants in error.

In Arkansas, when the payment of the consideration and the acceptance of a deed by the purchaser occur at different times, the denial of notice of fraud, in order to support a claim to protection as a *bona fide* purchaser, must relate both to the time when the deed is delivered, and to that when the consideration was paid; but, where it appears upon the face of the answer, that the purchase for a certain price and the delivery of the deed were made at the same time, and were parts of one transaction, the denial of notice until the defendant had made the purchase is equivalent to a denial of notice at the delivery of the deed.

Rector v. *Gibbon*, 111 U. S. 276, distinguished from this case.

THE court stated the case as follows:

The appellees Belding and wife, being in possession of a tract of land within the Hot Springs Reservation, now known as lot nine, block sixty-eight, in the City of Hot Springs, Arkansas, leased the same, April 24, 1874, to Frank Flynn for the term of five years at an annual rent of two hundred dollars; the rent to cease whenever the lessors were unable to protect him in the possession and enjoyment of the lot; and the lessee to have the right, at any time within thirty days after the expiration of the term, to remove all buildings and improvements put upon the land, first paying any rent in arrear.

The lessee covenanted for himself and legal representatives to waive all benefit that might accrue to him or them in the

way of title to the demised premises by virtue of occupancy or settlement, and to hold the same only as the tenant or tenants of the lessors, and fully subject to the covenants contained in the lease.

Flynn presented his petition to the Hot Springs Commission organized under the act of Congress of March 3, 1877, 19 Stat. 377, c. 108, claiming to be entitled, by right of occupancy and improvements made before April 24, 1876, to purchase the above lot. The petition referred to Belding as claiming the land prior to his occupancy, and stated that he, Flynn, had not "recognized Belding as landlord since the Supreme Court of the United States decided the title to be in the United States." The plaintiffs, also, presented their petition to the commission and claimed the right to purchase this lot from the government.

The commission adjudged, December 8, 1877, that Flynn was entitled to purchase the lot; and, subsequently, May 21, 1881, the United States issued a patent to him, based upon the judgment rendered by the commission.

By deed of July 21, 1884, Flynn (his wife uniting with him) made a quitclaim deed of the premises to the appellant McDonald, the recited consideration being $8500 cash in hand paid to the grantors. This deed was duly acknowledged by Flynn August 2, 1884, and by Mrs. Flynn July 28, 1884, and was filed for record in the proper office August 2, 1884.

The present suit was brought by Belding and wife, December 19, 1884, more than seven years after the adjudication by the Hot Springs Commission in favor of Flynn, and more than three years after Flynn received the patent from the United States. It proceeds upon the ground that the commission committed an error of law in awarding the right to purchase this lot to Flynn rather than to them. The bill charged that Flynn "has recently executed to the defendant Michael McDonald, without consideration, and for the purpose of defrauding plaintiffs, a fraudulent deed of conveyance purporting to convey said lot to him for eight thousand five hundred dollars, when, in fact, nothing was paid by him for it; that defendant knew at the time of the making of said deed, and of the said

pretended purchase of the tenancy of the said Flynn as aforesaid, and of the rights of the plaintiffs."

The relief asked was an accounting with reference to rents, and a decree adjudging the deed to McDonald to be fraudulent and void, and declaring the lot to be held in trust for plaintiffs, or for plaintiff George Belding.

Flynn, in his answer, met all the material allegations of the bill. He alleged that the plaintiffs never sought to disturb the award of the commission until the bringing of this suit, "up to which time plaintiffs, and especially plaintiff George Belding had asserted and insisted that the said award and all other awards of the commission were right and ought not to be disturbed; that on the 21st day of July, 1884, this defendant, believing he had a clear title to said lot, sold it to the defendant McDonald as aforesaid, and executed to him a quitclaim deed therefor."

McDonald, in his answer, said: "He knows nothing of the lease alleged to have been executed between plaintiffs and his co-defendant Frank Flynn, nor of the alleged relation of landlord and tenant between them, nor of the alleged proceedings before said commissioners, but that if said relation ever did exist it was dissolved in June, 1876, by the United States, through their receiver taking possession of said land under paramount title; that defendant Flynn had then valuable improvements upon said lot, which he could not lawfully remove, and to avoid losing them filed a petition before said commissioners setting forth that fact and praying them to award the preference right to purchase it from the United States; that he supported said petition by evidence, and that said commissioners awarded said right to him, and that he afterwards purchased said lot from the United States, and on the 21st day of May, 1881, obtained a patent for it, a copy of which is annexed hereto and made part of this answer as Exhibit A; that on the 21st day of July, 1884, this defendant, finding the title to said lot to be in said defendant Flynn and knowing nothing whatever of plaintiff's alleged claim to it, bought it from him for the sum of eighty-five hundred dollars ($8500) in cash, and obtained from him a quitclaim deed thereto; that he

never heard of any claim of plaintiffs until he made said purchase and paid said money; that plaintiffs never until since said purchase sued for said lot or put any claim of record; that said deed and sale to this defendant were not made without consideration nor to defraud plaintiffs, but are made in good faith." The defendant annexed to and made part of his answer a copy of the deed to him from Flynn.

By an interlocutory decree it was declared that the Commission by error and mistake of law, awarded to Flynn the right to purchase the lot in question, and that the title, interest, and estate of the several defendants should be transferred to and vested in the plaintiffs. The cause was thereupon referred to a special master for report as to rents, taxes and improvements. By the final decree the relief asked by the bill was given.

Mr. John McClure for appellant.

Mr. R. G. Davies, *Mr. U. M. Rose* and *Mr. G. B. Rose* for appellees.

The answer of McDonald is not sufficient to support the defence of innocent purchaser. It denies notice of the claim of the plaintiff until after payment of the purchase-money, but does not deny notice until after the making of the deed to defendant. This defect is necessarily fatal. *Byers* v. *McDonald*, 12 Arkansas, 218, 286; *Miller* v. *Fraley*, 21 Arkansas, 22.

The case of *Miller* v. *Fraley*, 23 Arkansas, 738, is not against us. The deed in that case was not a quitclaim deed. The court said: "The deed in question is in the usual form of an absolute conveyance in fee, *with a special warranty against any claim made or suffered by the vendor*."

If such a warranty had been made in this case, of course it would have been broken. The question as to a quitclaim deed did not arise in that case and was not passed upon. The exact point was raised in *Gaines* v. *Summers*, 50 Arkansas, 322, and was then decided as it has been decided by this

court. In speaking of a quitclaim deed in that case, the court said: "It was at least sufficient to have put appellants on inquiry, which, if they had prosecuted with ordinary diligence, would, doubtless, have led to actual notice of the facts as shown by the evidence in this case; but they prosecuted no inquiry, and it follows that they are not *bona fide* purchasers without notice." This covers the whole ground. The rent of the house on the ground was not the sole criterion of the value of the rents.

We submit that the evidence fully sustains the finding of the master and the decree of the court below.

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

According to the evidence in the cause, McDonald paid in cash the full consideration recited in the deed from Flynn, without actual notice of any claim to the property by the plaintiffs, or either of them. Did he have such constructive notice of the plaintiff's claim as deprived him of the right to be regarded as a *bona fide* purchaser for value? It is said that in Arkansas no one can be deemed an innocent purchaser if he holds under a quitclaim deed. In that State, "a quitclaim deed is a substantive mode of conveyance, and is as effectual to convey all the right, title, interest, claim and estate of the grantor as a deed with full covenants, although the grantee has no possession of or prior interest in the land," and it is not necessary that a vendee hold "under a deed with general covenants of warranty to entitle him to protection as an innocent purchaser;" although, where "a person bargains for and takes a mere quitclaim deed, or deed without warranty, it is a circumstance, if unexplained, to show that he had notice of imperfections in the vendor's title, and only purchased such interest as the vendor might have in the property." *Bagley* v. *Fletcher*, 44 Arkansas, 153, 160; *Miller* v. *Fraley*, 23 Arkansas, 735, 740.

In *Gaines* v. *Summers*, 50 Arkansas, 322, 327, 328, the court, after referring to the fact that a deed recited a consid-

eration of only five dollars for real estate which had cost six thousand dollars, said: "Add to this fact that the conveyance executed was a quitclaim deed, and the conclusion that Mrs. Saunders did not acquire a good and valid title, in the absence of an explanation, would be irresistible. It was, at least, sufficient to have put appellants on inquiry, which, if they had prosecuted with ordinary diligence, would, doubtless, have led to actual notice of the facts as shown by the evidence in this case. But they prosecuted no inquiry; and it follows that they are not *bona fide* purchasers without notice." In the same case it was said that a person purchasing an interest in lands "takes with constructive notice of whatever appears in the conveyances constituting his chain of title;" and that if anything appeared in such conveyances, sufficient to put a prudent man upon inquiry, it was his duty to make the inquiry, and he would be charged by the law with the actual notice he would have received if he had made it. These cases fall far short of sustaining the broad contention of the plaintiffs in respect to quitclaim deeds. On the contrary, they show that, in Arkansas, one *may* become entitled to protection as a *bona fide* purchaser for value, although holding under a deed of that kind. Applying the principles of those cases to the present case, we are of opinion that McDonald is entitled to protection as an innocent purchaser. The deed that he accepted was not drawn as a quitclaim deed pursuant to any specific direction given by him. So far as the evidence discloses, the amount paid by him was the full value of the property. If he had, before purchasing, instituted an inquiry as to the title, so far as it was shown by the record of deeds, he would not have found any title of record in the plaintiffs. But he would have found that Flynn held under a patent from the United States based upon a claim established in favor of the patentee, under the acts of Congress relating to the Hot Springs reservation. It is true that if he had caused the proceedings of the Hot Springs Commission to be examined he would have seen that Belding contested, with Flynn, before that tribunal, the right to purchase the lot here in dispute. But he would, also, have learned that Flynn's right was recog-

nized by the Commission, and, from the records of the courts, state and Federal, he would have learned that more than seven years had then elapsed without legal proceedings, upon the part of the plaintiffs, questioning the correctness or validity of the judgment by that tribunal in favor of Flynn. He might well have supposed that Belding had acquiesced in that judgment. Under all the circumstances, it cannot be held that McDonald, although taking a quitclaim deed, was chargeable, when he purchased, with notice of any existing claim to the property upon the part of the plaintiffs, or of either of them.

It is contended that the answer of McDonald does not support the defence of being an innocent purchaser, in that, while denying notice of the plaintiff's claim at the time of the payment of the purchase money, it did not deny that he had such notice at the time of the delivery of the deed to him. This position is supposed to be sustained by *Byers* v. *McDonald*, 12 Arkansas, 218, 286, and *Miller* v. *Fraley*, 21 Arkansas, 22. In the first of those cases, the court, observing that the protection of a *bona fide* purchase is necessary only when the plaintiff has a prior equity which cannot be barred or avoided except by the union of the legal title with an equity arising from the payment of the money and receiving a conveyance without notice, and with a clear conscience, said: "Notice must be denied previous to and down to the time of paying the money and the delivery of the deed." In the other case, the language of the court was: "The answer of Greenwood & Co. should have positively denied notice of the fraud down to the time of paying the consideration and receiving the deed." The general rule announced in those cases applies where the payment of the consideration and the acceptance of a deed by the purchaser occur at different times. In such cases, the denial of notice, in order to support a claim to protection as a *bona fide* purchaser, must relate both to the time when the deed is delivered, and to that when the consideration was paid. But, where it appears upon the face of the answer that the purchase for a certain price and the delivery of the deed were at the same time, and as parts of one transaction, the denial of

Names of Counsel.

notice until the defendant had made the purchase is equivalent to a denial of notice at the delivery of the deed. McDonald's answer denies every circumstance set forth in the bill from which notice could be inferred. He expressly alleges in his answer that he never heard of any claim of the plaintiffs until he had made the purchase and paid in cash the sum of $8500 for the property. And in his deposition he distinctly states that he first knew of the plaintiffs' claim when he received notice of this suit. His evidence is not contradicted by anything in the record. This is a substantial compliance with the rule announced in the cases last cited.

It is proper to say that the present case is unlike *Rector* v. *Gibbon*, 111 U. S. 276. That case did not present any question in respect to the rights of a *bona fide* purchaser for value from the person to whom the Hot Springs Commission accorded the right to purchase.

The decree is reversed, with directions to dismiss the bill.

GLENN *v.* MARBURY.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 1231. Submitted January 11, 1892. — Decided May 16, 1892.

The statute of limitations begins to run against an action against a stockholder in an insolvent corporation, in the hands of a receiver, to recover unpaid assessments on his stock, when the court orders the assessment to be made.

When such a call is made the action, in the District of Columbia where the common law prevails, must be brought in the name of the company.

THE case is stated in the opinion.

Mr. Henry Wise Garnett, *Mr. Conway Robinson, Jr.*, *Mr. Charles Marshall* and *Mr. John Howard* for plaintiff in error.

Mr. Martin F. Morris for defendant in error.

Opinion of the Court.

Mr. Justice Harlan delivered the opinion of the court.

This action at law was brought, March 22, 1889, by John Glenn, in his capacity as substituted trustee in a certain deed of trust made by the National Express and Transportation Company, a corporation of Virginia; also, as trustee by virtue of an order passed by the Chancery Court of the City of Richmond, Virginia, in a suit in equity brought by William W. Glenn, suing on behalf of himself and others, creditors of that corporation. Its object was to obtain a judgment against the defendant, Marbury, for the sum alleged to be due from him under an order, in the above cause, making an assessment and call on subscribers to the stock of that company.

The facts necessary to be stated in order to show fully the grounds of the defence are as follows:

In August, 1866, Josiah Reynolds, a citizen of Maryland and a stockholder of the National Express and Transportation Company, suing on behalf of himself and all stockholders of that corporation who should come in and contribute to the expenses of the suit, brought an action in equity in the Circuit Court of the United States for the Eastern District of Virginia, against that corporation — to be hereafter, in this opinion, designated as the Express Company — and against its president, directors and superintendent. The bill set forth that the company had been and was then being conducted in a reckless, extravagant and improvident manner, and that the money subscribed by the plaintiff and other stockholders had been and was being wasted and misapplied in conducting its business, chiefly in ways and for purposes that were illegal and in fraud of the rights of stockholders. The relief sought was an injunction restraining and prohibiting the company from conducting its business in the illegal and improvident manner specified in the bill. The bill, also, prayed that a receiver be appointed by the court to take possession of the property and effects, books of account and papers of the company; that such property and effects might be sold and disposed of, and any money due the company collected by the receiver; and that an account be taken under the order of

the court of its business, its debts and liabilities paid, and the balance distributed among the stockholders. The bill particularly referred to an agreement with one Ficklin which, it was alleged, ought to be set aside as in fraud of the rights of stockholders. The defendants were duly served with process, and one of them, J. J. Kelly, the superintendent of the Express Company, filed an answer. The company appeared and adopted as its own the answer of Kelly.

On the 23d of August, 1866, an order of injunction was issued restraining the defendants "from collecting or taking any proceedings to collect or enforce from the complainant the payment of moneys for or on account of his stock in said company or assignments or calls thereon, either by sales of stock or otherwise, and from making any assessments upon the complainant in respect to or on account of his said stock, and also enjoining and restraining the said company, its directors, agents and servants, from pleading, using, or applying the property, funds, effects and credits of the said company to or for any purposes or objects other than the regular and legitimate express and transportation business for which the said company was organized, and from carrying out or fulfilling the agreement with Benjamin Ficklin, mentioned in said bill or any similar agreement with any other person, and from selling any of the shares of said stock held or owned by the complainant until the further order of this court."

The Express Company, on the 20th day of September, 1866, — having previously appeared and filed its answer in the Reynolds suit — executed to John Blair Hoge, J. J. Kelly and C. Oliver O'Donnell, a deed assigning and conveying to them all the estate, property, rights and credits of the company, of every kind and wherever they might be, including moneys payable to the company, "whether on calls or assessments on the stock of the company," or on notes, bills, accounts or otherwise. The deed was made on certain trusts, among others, that the trustees should permit the Express Company to remain in the possession and use of all the property conveyed or assigned, except debts, claims and moneys payable, until November 1, 1866, and thereafter until the trustees should be

requested by one or more of the creditors secured by the deed, and whose debt or debts should then be due, to take possession of the assigned property: the trustees, however, to take possession at any time, if requested by the company's board of directors. The trustees were required by the deed to proceed without unnecessary delay "to collect all the debts, claims and moneys payable, which are hereby granted or assigned."

On the 31st of December, 1866, the court appointed a receiver of the money, property and effects of the Express Company, "with all the powers, rights and obligations usual in such cases, subject to the control of this court, until the affairs of said company be fully and finally closed up." He was ordered to execute and file, before entering upon his duties, a bond, with sureties to be approved by the court, of $20,000, conditioned for the faithful discharge of his duties as receiver of the funds, property and effects of the Express Company. It was further provided in the order appointing the receiver as follows:

"That upon the execution, approval, and filing of said bond the said receiver shall be vested with all the estate, real and personal, as well as all the money, notes, accounts, assessments due on stock or other securities, or rights in action of the said National Express and Transportation Company, as trustee of such estate and property, for the use and benefit of the creditors of said company and of its stockholders and others who may be interested in the same, with all the powers, rights and authority of a trustee appointed by this court or acting within its jurisdiction and control.

"Such receiver shall have all the powers and authority which ordinarily belong to such trustee, and the said defendants, as well as all other persons who may have the possession or control of any of the money, books, property, effects or things in action of the said National Express and Transportation Company, and especially John Blair Hoge, John J. Kelly and C. Oliver O'Donnell, the trustees named in a pretended assignment referred to in the complainant's petition, are hereby required to assign, transfer and deliver to the said trustee, on being notified of this order, all such money, property, notes,

bonds, estate, real and personal, so in their hands or under their control, and they are also required to execute and deliver all deeds, conveyances, releases, transfers or acquittances that may in anywise be necessary to place any or all of said property or effects so in the hands or under the control of the said receiver, and they and each of them, on being required, shall make all discovery and furnish all information which the said receiver may require in relation to any or all of the property, business or transactions of the said company.

"The said receiver will proceed to collect all the property, money and effects of the said National Express and Transportation Company and convert the same into money, and he will also ascertain the amount of the debts and liabilities of the said National Express and Transportation Company, and, after payment therefrom of all expenses, including counsel fees and costs, with such compensation as the court may allow him, will, from time to time, apply the funds so received and obtained by him in the satisfaction and discharge of the debts of the said company under the orders of this court.

"And if there shall be any sums due upon the shares of the capital stock of the said company the said receiver will proceed to collect and recover the same, unless the persons from whom the said sums may be due shall be wholly insolvent, and for this purpose may prosecute actions at law or in equity for the recovery of such sums in his own name as receiver or otherwise as he may deem best, and shall apply the money so received under the order of this court to the satisfaction and payment of the remaining debts of said company, as well as the legal and necessary expenses of the due execution of this trust, including a reasonable compensation and commission to himself for services on this behalf and also including such necessary and reasonable fees and costs as may be necessary in maintaining, prosecuting, or defending any suit or suits which it may be necessary to prosecute or defend in order to the full execution of this trust."

The receiver gave the required bond, and it was approved by the court on the 12th of January, 1867.

Reynolds having died, Washington Kelley, a stockholder,

was permitted to become a party plaintiff and, with the leave of the court, filed August 20, 1870, an amended and supplemental bill. The receiver reported to the court, December 11, 1880, that he had not been able to obtain possession of any of the company's effects, except two freight cars, and that so far as he could ascertain, in all the States where the company did business, its property and effects had been attached by its creditors. This report being made, "on motion of the defendants John Blair Hoge and J. J. Kelly," the order appointing the receiver was vacated, annulled and set aside, the receiver discharged and exonerated, the injunction dissolved, and the suit dismissed.

On the 4th of December, 1871, W. W. Glenn, suing on behalf of himself and all other creditors of the Express Company, filed his bill in equity, in the Chancery Court of the City of Richmond against that corporation, and its officers, and against the trustees named in its deed of September 20th, 1866. The object of that suit was to collect the assets of the company, including the amounts due from the subscribers to its stock. The proceedings in that cause are fully set out in *Hawkins* v. *Glenn*, 131 U. S. 319. It is only necessary now to state that in the progress of that suit an order was entered December 14, 1880, sustaining the validity of the deed of assignment of September 20, 1866, removing the surviving trustees named in it, with their consent, and substituting in their place John Glenn, who was clothed by that order, "with all the rights and powers, and charged with all the duties of executing the trusts of said deed to the same effect as were the original trustees therein;" Glenn, however, not to take possession of the property covered by the deed, until he gave bond with security for the faithful discharge of his duties as substituted trustee. He gave such bond January 3, 1881, and it was approved by the court.

By the same order a call and assessment of thirty per cent of the par value of each share of stock was made upon stockholders, who were required to make payment to John Glenn, substituted trustee. By a decree entered July 21, 1883, it was adjudged "that John Glenn, trustee, on the payment to him,

within six months from the date of this decree, by any of the subscribers to the stock of the defendant company, or by any other person claimed to be liable on account of said stock, of twenty-five per centum of the original amount of said subscription, with interest thereon at the rate of six per centum per annum, from thirty days from the date of this decree, with any costs incurred heretofore or by said trustee in any suit brought by him heretofore, or which may hereafter be brought before tender of said twenty-five per cent under this decree, to recover of such stockholder or other party, the amount for which he may be responsible on said stock under the decree in this cause, shall execute a receipt therefor to operate as a full acquittance and discharge of all persons on account of such subscription, both of the original subscribers thereto, and of any assignee thereof." By another order, made March 26, 1886, in the Circuit Court of Henrico County, Virginia — to which the cause was removed in 1884 — an additional call and assessment of fifty per cent of the par value of each share of stock was made upon stockholders, who were severally required to pay the said amounts hereby called for and assessed to John Glenn, he being "authorized and directed to collect and receive said call and assessment, and to take such prompt steps to that end, by suit or otherwise, and in such jurisdictions as he may be advised."

Marbury, it is admitted, was an original subscriber for 100 shares of the company's stock, for which he received a certificate, paying twenty per cent only on his subscription. The object of the present suit is to recover from him the sum of $5000, by reason of the above call and assessment of fifty per cent, with interest at the rate of six per cent per annum from March 26, 1886, the date of the order making such call and assessment. He pleaded that he never was indebted, and did not promise as alleged; that the plaintiff's cause of action did not accrue within three years before the commencement of this suit; that the Chancery Court of the city of Richmond had no jurisdiction to render the decree of December 14, 1880; and that the plaintiff, as trustee, had no right to sue in the court below in his own name or otherwise.

At the trial below the court refused to instruct the jury, at the plaintiff's instance, that this action, having been brought within three years after the decree, in the Circuit Court of Henrico County, Virginia, of March 26, 1886, the plea of limitation constituted no defence. It also refused to instruct the jury, at the instance of the plaintiff, that the decree of July 21, 1883, in the Virginia court constituted no defence, and did not relieve the defendant from liability for the assessment made by the order in that court of March 26, 1886. And, upon the motion of the defendant, the jury were directed to find, and in accordance with that direction returned a verdict, for the defendant, on which judgment was entered.

Upon appeal to the general term the judgment was affirmed upon the authority of *Glenn* v. *Busey*, 5 Mackey, 233, where it was held, in a case similar to the present one, that Glenn could not maintain an action in the court below in his own name as trustee.

Since the decision in *Hawkins* v. *Glenn*, 131 U. S. 319 and *Glenn* v. *Liggett*, 135 U. S. 533, the only questions open for consideration in the present case relate to limitation and to the right of the plaintiff to bring this action in his own name as trustee.

It is not disputed that the time prescribed by the statutes in force in the District of Columbia for the bringing of suits like the present one is three years from the accruing of the cause of action. The defendant contends that liability upon his subscription of stock could have been enforced by the receiver appointed by the Circuit Court of the United States for the Eastern District of Virginia in the Reynolds suit, at any time after the 12th of January, 1867, on which day the receiver's bond was filed and approved by the court; and that, as more than three years elapsed, after that date, and while the Reynolds case was pending, without suit being brought against him, he is protected by the statute of limitation. We are of opinion that this position cannot be sustained. The order of December 31, 1866, in the Reynolds suit was not, in any proper sense, a call or assessment on the company's stock. Nor was it equivalent to one. The deed of September 20, 1866, assigned

and transferred to Blair, Kelly and O'Donnell, trustees, among other property, all moneys payable "on calls or assessments on the stock of the company," and the order of December 31, 1866, in the Reynolds suit vested in the receiver, as trustee, "assessments due on stock," and directed him to proceed in the collection and recovery of "any sums due upon the shares of the capital stock of the said company." But nothing was due from subscribers of stock until a formal call or assessment was made by the company, and no call or assessment could be made by the trustees named in the deed of September 20, 1866, or by the receiver in the Reynolds suit. *Glenn* v. *Macon*, 32 Fed. Rep. 7.

In *Hawkins* v. *Glenn*, the court said (p. 333): "By the deed the subscriptions, so far as uncalled for, passed to the trustees, and the creditors were limited to the relief which could be afforded under it, while the stockholders could be subjected only to equality of assessment, and as the trustees could not collect except upon call, and had themselves no power to make one, rendering resort to the president and directors necessary, or, failing their action, then to the courts, it is very clear that the statute of limitations could not commence to run until after the call was made." See also *Scovill* v. *Thayer*, 105 U. S. 143, 155. If the court, in the Reynolds suit, had intended to make a call for the payment in full of all subscriptions of stock, it would have used language different from that employed in the order appointing the receiver. It is clear that no action could have been maintained by the receiver in the Reynolds suit, in respect to unpaid subscriptions, except to compel the payment of sums due on formal calls or assessments, if any, made by the company prior to the institution of that suit. For these reasons, the defence based upon limitation cannot be sustained. And in conformity with *Hawkins* v. *Glenn*, and *Glenn* v. *Liggett*, we hold that limitation commenced to run, in favor of the present defendant, only from the order in the Virginia court making the call or assessment on subscribers of stock. *Glenn* v. *Williams*, 60 Maryland, 93, 122, 123.

The other question — as to the right of the plaintiff, in virtue

of the authority conferred upon him by the Virginia court, to bring the present action in his own name as trustee, is a more serious one. In *Jackson* v. *Tiernan*, 5 Pet. 580, 597, 599, Mr. Justice Story, speaking for the court, said that "the general principle of law is, that choses in action are not at law assignable. But, if assigned, and the debtor promises to pay the debt to the assignee, the latter may maintain an action for the amount against the debtor, as money received to his use. Independently of such promise, there is no pretence that an action can be sustained." After referring to some adjudged cases, which he said were distinguishable from the one then before the court, he proceeded: "They are either cases where there was an express promise to hold the money subject to the order of the principal, or there was an implied promise to pay it over as it was received to the use of a particular person. The express promise to pay to order bound the party, and excluded any claim for a lien, and any defence for want of privity between him and the holder of the order. The receipt of the money for the use of a particular person necessarily imported a promise or obligation to hold it in privity for such person."

In *Pritchard* v. *Norton*, 106 U. S. 124, 130, Mr. Justice Matthews, delivering judgment, said: "Whether an assignee of a chose in action shall sue in his own name or that of his assignor is a technical question of mere process, and determinable by the law of the forum; but whether the foreign assignment, on which the plaintiff claims, is valid at all or whether it is valid against the defendant, goes to the merits and must be decided by the law in which the case has its legal seat. Wharton, Conflict of Laws, §§ 735, 736." And in *New York Guaranty Co.* v. *Memphis Water Co.*, 107 U. S. 205, 214, the court, speaking by Mr. Justice Bradley, said: "We have lately decided, after full consideration of the authorities, that an assignee of a chose in action, in which a complete and adequate remedy exists at law, cannot, merely because his interest is an equitable one, bring a suit in equity for the recovery of the demand. *Hayward* v. *Andrews*, 106 U. S. 672. He must bring an action at law in the name of

the assignor to his own use. This is true of all legal demands standing in the name of a trustee, and held for the benefit of *cestuis que trust.* Besides the authorities cited in that case, reference may be made to Mitford on Pleading, 123, 125; Willis's Equity Plead. 435, note g; *Adair* v. *Winchester*, 7 Gill & Johns. 114; *Mosely* v. *Boush*, 4 Rand. Va. 392; *Doggett* v. *Hart*, 5 Fla. 215; *Smiley* v. *Bell*, Mart. & Y. Tenn. 378; and the English and American notes to *Ryall* v. *Rowles*, 1 Ves. Sen. 348, and to 2 White & Tudor's Leading Cases in Equity, pp. 1567, 1670 (ed. 1877)."

The right which the Express Company acquired by the defendant's subscription to its capital stock was only a chose in action. It passed by the deed of September 20, 1866, to the trustees Blair, Kelly and O'Donnell, but subject to the condition that a chose in action is not assignable so as to authorize the assignee to sue at law, in his own name, unless the right to do so is given by a statute, or by settled law, in the jurisdiction where suit is brought. This is the well-established rule of the common law, and the common law touching this subject governs in the District of Columbia. If the trustees named in the deed of 1866 had sued in this District for sums due upon calls or assessments on stock, they must have sued in the name of the Express Company for their use, unless the stockholders expressly promised to pay them, or unless such a promise could be implied as matter of law. There was no such express promise by Marbury, although he concurred in the assignment made by the company to those trustees.

But it is said that stockholders must be presumed to assent to every lawful disposition made of its property by the corporation. When this point was made in *Glenn* v. *Busey*, 5 Mackey, 243, it was fully met by Mr. Justice Cox, speaking for the court. After observing that a stockholder in a corporation holds a double relation to it; that, in his capacity as debtor, he has not promised to pay to the company's order or to its assignee, but to the company only; and that as stockholder he would not be held to have given more than the general authority to the corporation to deal with its property, he said: "If we go further than this, we must hold that the mere fact

of being a stockholder in a corporation makes his indebtedness a negotiable one, even against the terms of his agreement with the company and the intention of the parties. Thus, if a stockholder borrowed money from the company on his sealed bond, the argument would be that as his bond is a part of the assets of the company, and he has generally and impliedly assented to the assignment or negotiation of its property, as it may think best, *ergo*, his bond may be negotiated like a promissory note. But this reasoning would not stop at corporations. It would apply equally to partnerships. Each member of a partnership is the agent of all, and all the others are the agents of each, and all or each would have authority to settle debts by the assignment of property of the firm. If, then, one becomes indebted to the firm on an open account, the firm, on the principles before mentioned, could assign or negotiate the debt, and so give the assignee a right of action in his own name. In such action the plaintiff, after stating the original indebtedness and its assignment, which would make a demurrable case, would only have to supplement it by an averment that the debtor was a member of the firm who made the assignment, and his case would be complete. It is hardly necessary to say that this would be a novelty in the law of contracts and actions and pleadings, for which not a semblance of authority could be found."

Is the question as to the right of the trustee Glenn to bring this suit, in his name, any different by reason of the fact that the Virginia court made the call or assessment in question, substituted the plaintiff as trustee in the place of Blair, Kelly and O'Donnell removed, and both authorized and directed him to collect and receive such call or assessment, taking steps to that end by suit or otherwise, and in such jurisdiction as he might be advised? We think not. Undoubtedly the Express Company, having refused or neglected to make the necessary call or assessment, a court of equity could itself make it, if the interest of creditors required that to be done. In other words, as said in *Scovill* v. *Thayer*, 105 U. S. 143, 145, and repeated in *Hawkins* v. *Glenn*, 131 U. S. 335, "the court will do what it is the duty of the company to do." See

also *Glenn* v. *Williams*, 60 Maryland, 93, 113, 114. But the making of the call or assessment by the court, for the company, does not, in the absence of some statutory provision on the subject, change the rule that a demand upon the stockholder to meet a call or assessment, by competent authority, must be enforced in the name of the person or corporation holding the legal title to the stock subscription, and to whom the promise of the stockholder was made. There is no reason why the trustee Glenn could not have sued in the name of the company. For, as said in *Hawkins* v. *Glenn*, concurring with the Supreme Court of Appeals of Virginia in *Hamilton* v. *Glenn*, 85 Virginia, 901, 905, "as this corporation, notwithstanding it may have ceased the prosecution of the objects for which it was organized, could still proceed in the collection of debts, the enforcement of liabilities, and the application of its assets to the payment of its creditors, all corporate powers essential to those ends remained unimpaired."

We concur entirely in the views expressed by Mr. Justice Cox, speaking for the court, in *Glenn* v. *Busey*, where will be found a careful and elaborate discussion of this question. In harmony with the decision in that case, we hold that the present suit cannot, consistently with the principles of the common law — which is the law, upon this question, for the District of Columbia — be maintained by the plaintiff in his own name, as trustee. We are aware that a different rule obtains in some jurisdictions where the common law has been modified by statute or by a settled course of decisions, but we are unable to hold that the law of this District is otherwise than has been indicated in this opinion.

Judgment affirmed.

DOWLING *v.* EXCHANGE BANK OF BOSTON.

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

No. 349. Argued April 29, 1892. — Decided May 16, 1892.

An agreement of partnership between three partners for carrying on the business of sawing lumber, etc., in a village in Michigan, which provided that no part of the capital should be diverted or used by either partner otherwise than in the business, two of the partners to secure sawing for the mill and superintend the financial part of the business, the third partner to have the management of the work at the mill, did not create a partnership, each member of which had, under the settled rules of commercial law, and as between the firm and those dealing with it, authority to give negotiable paper in its name; and, one partner, without the knowledge of his copartners, having put the firm name to notes which were discounted by a bank in Boston, but not for the benefit of the firm, the other partners were entitled, in an action by the bank to recover on the notes, to have it submitted to the jury whether, under the circumstances, they were estopped to dispute the authority of their partner to make them and to put them in circulation.

THE court stated the case as follows:

Edward P. Ferry, of Grand Haven, Michigan, and George E. Dowling and Frank H. White, of Montague, in the same State, entered, February 1, 1873, into written articles of copartnership, "for the purpose of carrying on the business of sawing lumber, pickets and laths at the said village of Montague, in the steam saw mill lately there erected," the name of the firm being F. H. White & Co., and the partnership to continue for the full term of five years, unless sooner dissolved by agreement. Of the capital of the firm Ferry contributed one-half, and Dowling and White one-fourth each.

By the written terms of the partnership, no part of the capital was to be diverted or used by either partner, otherwise than in the business; the profits and losses were to be shared according to their respective interests; Ferry and Dowling were to have the care and charge of securing the sawing for the mill, the supervision of the financial part of the business and of the firm's books to be divided between them, as they might agree

without charge for their services; and White was to have full management of the work of sawing, of hiring and discharging of men and fixing their wages, keeping double entry books, which should be open at any time for the inspection of the partners, and receiving for his services one thousand dollars, to be paid by the firm. It was further provided that the books of the firm should be closed as of January 31, in each year, the profits then to be ascertained and passed to the credit of the respective partners, and applied in a specified way.

At the date of the several transactions out of which this litigation arose there was a firm, Ferry & Bro., at Grand Haven, Michigan, engaged in business as manufacturers of and dealers in lumber and shingles. It was composed of Thomas W. Ferry and Edward P. Ferry.

The present action involved the question of the liability of F. H. White & Co. upon three promissory notes, bearing date, respectively, Montague, Michigan, October 17, 1882, November 27, 1882, and January 15, 1883, and for the respective sums of $5288.75, $5100.73 and $5391.90, and payable, each, four months after date, to the order of Ferry & Bro., "at the National Exchange Bank, Boston, Mass., value received." Each note was endorsed by Thomas W. Ferry, in the name of Ferry & Bro., and was sold by him, acting in the name of his firm, to that bank. Neither White nor Dowling — whose firm continued in business under the above articles of partnership until May 31, 1883 — had any knowledge of the existence of these notes until after their respective maturities, nor until shortly before the commencement of this action. Neither authorized the notes to be given. They were gotten up by Thomas W. Ferry, with the aid of Edward P. Ferry and one Thompson, the bookkeeper of Ferry & Bro., the latter acting under the direction of Thomas W. Ferry. The proceeds were used for the benefit of Thomas W. Ferry, or of his firm. The firm name of F. H. White & Co. to each note was signed by Edward P. Ferry, who did not communicate to White and Dowling that he had done so.

Separate actions having been brought by the bank upon the notes, they were, by consent, consolidated. Before the order

of consolidation was made Dowling filed in each action his affidavit, stating that "on the 17th day of October, 1882, he was, and still is, a member of the copartnership firm of F. H. White & Co., of Montague, Michigan; that said firm was at said time, and still is, composed of Edward P. Ferry, Frank H. White, and this deponent as copartners;" that "he never executed the promissory note, a copy of which was served upon him with the plaintiff's declaration;" that "the signature thereto is not in the handwriting of this deponent; and that said promissory note was not executed by any person having authority to bind this deponent or to bind the said defendants, Edward P. Ferry, Frank H. White, and this deponent jointly upon said promissory note."

A verdict was returned in favor of the plaintiff for $17,791.45, the court saying to the jury: "Regretting very much that these defendants White and Dowling, who alone make defence here, are in such a situation that they must suffer from the wrong-doing of their associate, the court is unable to relieve them without violating principles of law which are essential to the security of mercantile business, and violating also the rights of parties innocent of the wrong. As there is, in the opinion of the court, no question of fact about which there is any conflict in the evidence, the court holds that, giving effect to the testimony, the plaintiff is entitled to a verdict, and you are instructed to find accordingly against all the defendants." The opinion which preceded this charge is reported in 30 Fed. Rep. 412.

Judgment having been rendered upon the verdict, a severance was duly had between the defendants, so as to authorize a writ of error in the name of Dowling alone.

Mr. Michael Brown (with whom was *Mr. J. C. Fitzgerald* on the brief) for plaintiff in error.

Mr. Mark Norris (with whom was *Mr. Lyman D. Norris* on the brief) for defendant in error.

To sustain the defence made it must appear that F. H. White & Co. was a co-partnership of such a character that the

members thereof had no authority, under any circumstances, to make commercial paper.

If they had power to make negotiable paper for the firm's use, then the paper in suit is good in this bank's hands, it being beyond dispute a *bona fide* purchaser for value before maturity, and without notice of any defect or irregularity in the issue of the notes.

To sustain the defence in this case, these notes must have been void at issue, for lack of power to make them — not voidable — for fraud. It is impossible to say so on this record.

In cases where partnerships are engaged in buying and selling it is settled that the law implies authority to make commercial paper, and that paper made by one co-partner in such firms though not used in the firm business is binding on the firm, in the hands of a good faith holder for value before maturity. *Wagner* v. *Simmons*, 61 Alabama, 143; *Prince* v. *Crawford*, 50 Mississippi, 344, 358; *Winship* v. *Bank of the United States*, 5 Pet. 529; *Kimbro* v. *Bullitt*, 22 How. 256; *Walworth* v. *Henderson*, 9 La. Ann. 339; *State Bank* v. *Noyes*, 62 N. H. 35; *Hoskinson* v. *Elliot*, 62 Penn. St. 393; *Smith* v. *Collins*, 115 Mass. 388.

But in cases where the firm is not engaged in buying and selling, the question whether partners have the authority to make commercial paper is a question of fact, and such power will be held to exist on proof: (1) Of express authority; or (2) Of the necessity of such power to the successful conduct of the business; or (3) Of the usage of similar firms engaged in the same business; or (4) Of the usage of the particular firm. *Prince* v. *Crawford*, 50 Mississippi, 344; *Smith* v. *Sloan*, 37 Wisconsin, 285; *Gray* v. *Ward*, 18 Illinois, 32; *State Bank* v. *Noyes*, 62 N. H. 35; *Irwin* v. *Williar*, 110 U. S. 499.

The evidence as to the character of this partnership, the scope of its business and the actual course and conduct thereof came wholly from defendants below and was in no way contradicted or disputed. It therefore became the duty of the court to direct a verdict. *Orleans* v. *Platt*, 99 U. S. 676; *Improvement Co.* v. *Munson*, 14 Wall. 442; *Walbrun* v. *Bab-*

bitt, 16 Wall. 577; *Arthur* v. *Morgan*, 112 U. S. 495; *County of Macon* v. *Shores*, 97 U. S. 272; *Merchants' Bank* v. *State Bank*, 10 Wall. 604; *Railroad Co.* v. *Jones*, 95 U. S. 439; *Pleasants* v. *Fant*, 22 Wall. 110.

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

It is not disputed that the execution by Edward P. Ferry, in the name of F. H. White & Co., of the notes in suit, was without express authority of his partners, and that neither of the notes was given or used in the business of that firm. The primary question, therefore, is, whether, for the protection of the plaintiff a *bona fide* purchaser for value, it will be conclusively implied, as matter of law, from the nature or course of the firm's business, that Edward P. Ferry had authority from his partners to make those notes or either of them.

Mr. Justice Clifford, speaking for the court in *Kimbro* v. *Bullitt*, 22 How. 256, 268, said that "wherever the business, according to the usual mode of conducting it, imports, in its nature, the necessity of buying and selling, the firm is then properly regarded as a trading partnership, and is invested with all the powers and subject to all the obligations incident to that relation," citing, among other cases, *Winship* v. *Bank of United States*, 5 Pet. 529, 561. Mr. Justice Story said that the doctrine that each partner may bind the firm by bills of exchange, promissory notes and other negotiable instruments is generally limited to partnerships in trade and commerce, and does not apply to other partnerships unless it is the common custom or usage of such business to bind the firm by negotiable instruments, or it is necessary for the due transaction thereof. Story on Partnership, § 102, *a*.

In *Irwin* v. *Williar*, 110 U. S. 499, 505, Mr. Justice Matthews, speaking for the court, said: "The liability of one partner, for acts and contracts done and made by his copartners, without his actual knowledge or assent, is a question of agency. If the authority is denied by the actual agreement between the partners, with notice to the party who claims under it, there is

no partnership obligation. If the contract of partnership is silent, or the party with whom the dealing has taken place has no notice of its limitations, the authority for each transaction may be implied from the nature of the business according to the ordinary and usual course in which it is carried on by those engaged in it in the locality which is its seat, or as reasonably necessary or fit for its successful prosecution. If it cannot be found in that, it may still be inferred from the actual though exceptional course and conduct of the business of the partnership itself, as personally carried on with the knowledge, actual or presumed, of the partners sought to be charged." Again: "What the nature of that business in each case is, what is necessary and proper to its successful prosecution, what is involved in the usual and ordinary course of its management by those engaged in it, at the place and time where it is carried on, are all questions of fact to be decided by the jury, from a consideration of all the circumstances which, singly or in combination, affect its character or determine its peculiarities, and from them all, giving to each its due weight, it is its province to ascertain and say whether the transaction in question is one which those dealing with the firm had reason to believe was authorized by all its members. The difficulty and duty of drawing the inference suitable to each case from all its circumstances cannot be avoided or supplied by affixing or ascribing to the business some general name, and deducing from that, as a matter of law, the rights of the public and the duties of the partners."

It is very clear that the articles of agreement between Ferry, White and Dowling did not create a partnership, each member of which had, under the settled rules of commercial law, and as between the firm and those dealing with it, authority to give negotiable paper in its name. The firm was of the class denominated in many adjudged cases as non-trading or non-commercial firms, the members of which could not be held, as matter of law, and by reason of the nature of the partnership business, to have authority to execute negotiable instruments in the name of the firm.

We quite agree with the learned judge who presided at the trial, that the liability of a partnership upon negotiable instru-

ments executed by one partner in the name of the firm, exists not only where the firm is a trading or commercial partnership, but "where the actual course of business pursued adopts the practice of issuing the mercantile paper of the firm to accommodate its necessities or convenience whenever the occasions occur." But the difficulty in this case is that the jury were not permitted to determine, from a consideration of all the circumstances of the case, what, in view of the admitted nature of the business of F. H. White & Co., was necessary and proper to its successful operation, what was involved in the usual and ordinary course of its management by those engaged in it, or what should be inferred from the actual course and conduct of the partnership, so far as it was known, or ought reasonably to have been known, to the parties sought to be charged with liability on the notes in suit. We do not deem it necessary to make a detailed statement of the numerous facts disclosed by the evidence, or to suggest what inference might be drawn from them. It is sufficient to say that the issue as to whether the defendants were estopped to dispute the authority of Edward P. Ferry to make the notes in suit, in the name of F. H. White & Co., was one peculiarly for the jury, under all the facts indicating the nature, necessities, and course of business of the firm, and under proper instructions from the court as to the legal principles by which they should be guided in determining the case.

We think the court erred in holding, as matter of law, that the jury were not at liberty, under any view of the facts, to find for the defendants. It seems to us that a verdict in their favor would not have been so palpably against the evidence as to have made it the duty of the court to set it aside and grant a new trial.

The judgment is reversed as to the defendant Dowling, who alone prosecutes this writ of error, with directions to grant him a new trial.

NEBRASKA *v.* IOWA.

ORIGINAL.

No. 4. Original. Argued January 29, 1892. — Decree entered May 16, 1892.

This case was decided February 29, 1892, 143 U. S. 359, and the decree withheld in order to enable the parties to agree to the designation of the boundary between the two States. Such agreement having been reached a decree is now entered accordingly.

THIS case is reported in volume 143 U. S. pages 359 to 370. No decree was entered, the court observing (page 370): "We think we have by these observations, indicated as clearly as is possible the boundary between the two States, and upon these principles the parties may agree to a designation of such boundary, and such designation will pass into a final decree. If no agreement is possible, then the court will appoint a commission to survey and report in accordance with the views herein expressed." The parties having come to such an agreement, the court on the 16th of May, 1892, entered the following decree.

Mr. J. N. Woolworth for the State of Nebraska.

Mr. J. Y. Stone, Attorney General of the State, *Mr. J. J. Stewart* and *Mr. Smith McPherson* for the State of Iowa.

Decree.

This cause came on to be heard upon the pleadings and proofs, and was argued by counsel, and thereupon, the parties having agreed upon a designation of the boundary in accordance with the principles set forth in the opinion of this court, filed on February 29, 1892, it is ordered, adjudged and decreed as follows:

That the boundary between the State of Nebraska and the State of Iowa, between the north line of sections twenty-two (22) and twenty-three (23), in township seventy-five (75) north of range forty-four (44) west of the fifth principal meridian,

according to the surveys of the public lands in the State of Iowa, and the middle, east and west lines of section twenty-eight (28) in said township and range, is, and is hereby established in the middle of the main channel of the Missouri River, save and excepting the part of the said boundary described as follows:

Commencing at a point on the south line of section twenty (20), in township seventy-five (75) north, range forty-four (44) west of the fifth principal meridian, produced eight hundred and sixty-one and one-half (861½) feet west of the southeast corner of said section, and running thence northwesterly to a point on the south line of lot four (4) of section ten (10), in township fifteen (15) north of range thirteen (13) east of the sixth principal meridian, twenty-two hundred and seventy-five (2275) feet east of the southwest corner of the northwest quarter of the southeast quarter of said section ten (10); thence northerly to a point on the north line of lot four (4) aforesaid, two thousand and sixty-eight (2068) feet east of the centre line of said section ten (10); thence north to a point on the north line of section ten (10), two thousand and sixty-eight (2068) feet east of the quarter section corner on the north line of said section; thence northerly to a point three hundred and twelve (312) feet west of the southeast corner of lot one (1), in section three (3), township fifteen (15) north, range thirteen (13) east aforesaid; thence northerly to a point on the section line between sections two (2) and three (3), three hundred and fifty-eight (358) feet south of the quarter section corner on said line; thence northeasterly to the centre of the southeast quarter of the northwest quarter of section two (2) aforesaid; thence east to the centre of the west half of lot five (5), otherwise described as the southwest quarter of the northwest quarter of section one (1), in township fifteen (15), range thirteen (13) aforesaid; thence southeasterly to a point on the south line of lot five (5) aforesaid, fifteen hundred and forty (1540) feet west of the centre of section one (1), last aforesaid; thence south two thousand and fifty (2050) feet to a point fifteen hundred and forty (1540) feet west of the north and south open line through said section one (1); thence south-

westerly to the southwest corner of the northeast quarter of the southwest quarter of section twenty-one (21), in township seventy-five (75) north, range forty-four (44) west of the fifth principal meridian; thence southeasterly to a point six hundred and sixty (660) feet south of the northeast corner of the northwest quarter of the northeast quarter of section twenty-eight (28), in township seventy-five (75) north, range forty-four (44) west, aforesaid; and said line produced to the centre of the channel of the Missouri River.

Commencing again at the point of beginning first named, namely, a point on the south line of section twenty (20), in township seventy-five (75) north, range forty-four (44) west of the fifth principal meridian, produced eight hundred and sixty-one and one-half (861½) feet west of the southeast corner of said section, and running thence southeasterly to a point six hundred and sixty (660) feet east of the southwest corner of the northwest quarter of the northwest quarter of section twenty-eight (28), in township seventy-five (75) north, range forty-four (44) west of the fifth principal meridian, and said line produced to the centre of the channel of the Missouri River.

The territory lying on the west of said line from the point last aforesaid, to the section line between sections two (2) and three (3), in township fifteen (15) north, range thirteen (13) east of the sixth principal meridian, according to the government surveys in Nebraska, and also the territory lying north of the above-described line, to where it intersects the middle, east and west line of section one (1), in said township and range, and the territory lying east of the above-described line from the point last aforesaid to the Missouri, are in the State of Nebraska, and the lands included between and within the above-described line are in the State of Iowa.

It is further ordered that the costs of this suit be paid by the parties equally.

So ordered.

TELFENER *v.* RUSS.

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

No. 329. Argued April 22, 25, 1892. — Decided May 16, 1892.

Under the laws of Texas, for the purchase of a portion of its unappropriated lands, an applicant could acquire no vested interest in the land applied for, that is, no legal title to it, until the purchase price was paid and the patent of the State was issued to him; but he had the right to complete the purchase and secure a patent within the prescribed period, which right is designated in the decisions of the Supreme Court of the State as a vested right that could not be defeated by subsequent legislation, and is a valuable right, which could be assigned.

The measure of damages for the breach of a contract for the sale of such a vested right by the purchaser is the difference between the contract price and the saleable value of the property.

THE court stated the case as follows:

On the 14th of July, 1879, the legislature of Texas passed an act "to provide for the sale of a portion of the unappropriated public lands of the State," and the investment of the proceeds. The following are the sections of the act which bear upon this case:

"SEC. 2. That any person, firm or corporation, desiring to purchase any of the unappropriated lands herein set apart and reserved for sale, may do so by causing the tract or tracts which such person, firm or corporation desire to purchase, to be surveyed by the authorized public surveyor of the county or district in which said land is situated.

"SEC. 3. It shall be the duty of the surveyor, to whom application is made by responsible parties, to survey the lands designated in said application within three months from the date thereof, and within sixty days after said survey, to certify to, record and map the field-notes of said survey; and he shall also, within the said sixty days, return to and file the same in the general land office, as required by law in the other cases."

Statement of the Case.

"SEC. 5. Within sixty days after the return to and filing in the general land office of the surveyor's certificate, map, and field-notes of the land desired to be purchased, it shall be the right of the person, firm or corporation who has had the same surveyed to pay or cause to be paid into the treasury of the State the purchase money therefor at the rate of fifty cents per acre, and upon the presentation to the commissioner of the general land office of the receipt of the state treasurer for such purchase money, said commissioner shall issue to said person, firm or corporation a patent for the tract or tracts of land so conveyed and paid for."

"SEC. 7. It shall be the duty of the commissioner of the general land office to give such general and specific instructions to the surveyors in relation to the survey of the public lands under the provisions of this act as may best subserve all interests of the State and carry into force and effect the intent and purposes of this act.

"SEC. 8. After the survey of any of the public domain authorized by this act, it shall not be lawful for any person to file or locate upon the land so surveyed, and such file or location shall be utterly null and void.

"SEC. 9. Should any applicant for the purchase of public land fail, refuse or neglect to pay for the same at the rate of fifty cents per acre within the time prescribed in section 5 of this act, he shall forfeit all right thereto and shall not thereafter be allowed to purchase the same, but the land so surveyed may be sold by the commissioner of the general land office to any other person, firm or corporation who shall pay into the treasury the purchase money therefor."

An amendment of the act in 1881 extended its provisions to unappropriated land in other counties than those originally mentioned. On the 22d of January, 1883, both acts were repealed. Whilst the first of these acts was in force the plaintiff below, the defendant in error here, claimed to have acquired a valuable and transferable interest in a large body of these lands, exceeding in extent a million of acres, and to have sold the lands to the defendant below, Count Joseph Telfener, at twenty-five cents an acre. To recover damages for breach

of this alleged contract, and a supplementary contract of the same date accompanying it, the present action was brought in a state court of Texas.

The petition of the plaintiff, the first pleading in the action, alleges that the plaintiff is a resident of Texas, and that the defendant is not a resident of the State, but a transient person then temporarily in the State of New York; that on the first day of November the plaintiff was the sole owner of a certain valuable, valid and transferable interest in the whole of a certain body of land containing, as subsequently ascertained by survey, 1813 tracts of 640 acres each, being an aggregate of 1,160,320 acres, situated in the county of El Paso, in the State of Texas, and forming part of what is known as the Pacific reservation; and that he had become such owner by complying with the requirements of the act of July 14, 1879, mentioned above and of the amendatory act of March 11, 1881. The petition then details the mode in which the plaintiff became such owner, namely, that during the month of October, 1882, being a responsible party, and intending to purchase the said body of land which was subject to sale under the terms of the acts mentioned, he applied to the surveyor of the county of El Paso for the purchase and survey of the eighteen hundred and thirteen tracts, describing them by metes and bounds as a whole; that he made the application pursuant to the instructions of the commissioner of the general land office of the State to the surveyors of the counties and land districts containing lands subject to sale; that the application was filed and recorded in the office of the surveyor in October, 1882; that, having thus made due application for the purchase and survey of said lands, he was, on the first day of November, 1882, about to have them surveyed into tracts of 640 acres each, when the defendant, by his duly authorized agents, applied to him to purchase his interest in the lands thus acquired; and that thereupon the plaintiff, not yet having paid to the State of Texas the fifty cents per acre, to which the State was entitled, and the defendant offering to assume such payment and desiring simply to contract with the plaintiff for the purchase and assignment of his right to

purchase from the State, they entered into the contracts contained in the exhibits annexed, marked M and N, which are as follows:

"EXHIBIT M.

"THE STATE OF TEXAS }
County of Dallas, } *ss*:

"This contract and agreement entered into by and between George W. Russ, of Dallas County, Texas, party of the first part, and Count J. Telfener, party of the second part, this first day of November, A.D. 1882, witnesseth as follows:

"Whereas said Russ claims to have made application in due form for the purchase of about one million acres of land, more or less, in El Paso County, Texas, from the State of Texas, under and by virtue of an act of the legislature of Texas, approved July 14, 1879, providing for a sale of a portion of the public lands of Texas at 50 cents per acre, and the amendments to said act, said application having been made in October, 1882, and duly filed in the surveyor's office of El Paso County, at Ysleta; and whereas the said Count Telfener is desirous of purchasing from said Russ all his rights, titles, and interest under and by reason of such application, provided it shall appear that such application has been regularly made and filed in such manner as will, under the terms of said law, entitle the said Russ to become the purchaser of the said lands from the State of Texas; and in such case has agreed and promised to pay to said Russ, as consideration of his sale, transfer, and assignment of all his said rights, titles, and interest, twenty-five cents per acre for each and every acre of land covered by his said application, and the said Russ has agreed and bound himself, in consideration of said price and sum to be paid to him, to sell, transfer, and assign unto the said Count Telfener all his rights, titles, and interest in said lands acquired by his application and files—

"In order, then, that the said contract of purchase and sale and assignment may be effected the said parties agree as follows:

"The said Count Telfener, for the purpose of ascertaining

whether the said application for purchase has been regularly and properly made as aforesaid and according to the provisions of said law and the amount of land covered by or embraced within such application, shall proceed at once and inspect the records and files of the surveyor's office of El Paso County, at Ysleta, and the map of said county in said office. If it shall be there shown that the said application and files thereof have been regularly and properly made in such manner as under the terms of said law would entitle the said Russ to become the purchaser of said lands from the State of Texas, the said parties shall ascertain, by reference to said application and files and the maps of said county in said surveyor's office and in the office of the Commissioner of the General Land Office of the State of Austin, the number of acres approximately embraced in or covered by said application and files. The number of acres being ascertained by approximation in manner aforesaid, and said application having been found good and regular as aforesaid, the said Count Telfener agrees to pay to the said Russ in cash, in the city of Dallas or the city of Austin, Texas, as said Russ shall prefer, ninety per centum of the said purchase price so agreed upon as aforesaid for the number of acres so ascertained approximately as aforesaid; and the said Russ agrees and binds himself that upon such payment being made he will execute and deliver to said Count Telfener any and all deed or deeds or other instruments that may be proper or necessary conveying, transferring, and assigning unto the said Count Telfener all and singular the rights, titles, and interests that the said Russ now has or may be entitled to in and to said lands by reason of such application and files, binding himself by covenant of warranty against all persons claiming or to claim the same or any part thereof by, through, or under him. It is understood, however, that the said inspection, ascertainment of regularity of files, and of the amount of land by approximation shall be completed on or before the 15th day of November, 1882, and that the said Count Telfener shall not be entitled to any delay beyond that time for said purposes and for making the payment aforesaid.

"After the transfer and assignment as aforesaid shall have

been made by the said Russ the said Count Telfener shall proceed, without delay, and have said lands surveyed and platted, and the field-notes thereof returned and filed according to the provisions of said law.

"Upon the completion of said surveys and field-notes the number of acres embraced in said lands so sold and transferred shall be ascertained, and if the said sum so paid as aforesaid by said Count Telfener shall not amount to the full purchase price of twenty-five cents per acre for each and every acre of said land the deficit shall be paid at once in cash to said Russ by the said Count Telfener in the city of Dallas, Texas, or at Austin, Texas, as the said Russ may prefer.

"Witness our hands this 1st day of November, 1882.

"GEO. W. RUSS.
"J. TELFENER,
"By C. BACCARISSE, *Agt.*

"Witness: CHAS. FRED. TUCKER.
"WM. MCGRAIN."

"EXHIBIT N.

"This contract and agreement entered into this 1st day of November, 1882, by and between Count J. Telfener and G. W. Russ, witnesseth as follows:

"Whereas the said parties have this day entered into a contract providing for the sale and transfer by the said Russ to the said Count Telfener of all the right, title, and interest of the said Russ in a certain tract of about one million acres of land in El Paso County, Texas, for the purchase of which the said Russ has made application under and by virtue of the act of the legislature of Texas approved July 14, 1879, known as the 50-cent act; and whereas if said sale and transfer shall be made as provided for by said contract it will be necessary to complete the surveys of said land and file the field-notes and maps thereof in the surveyor's office of El Paso County, Texas, and in the General Land Office at Austin within the time required by the said law: Now, therefore, it is agreed by the said Russ that if the sale and transfer

shall be made under the said contract as aforesaid he will at his own proper cost and expense make all the surveys, field-notes, and maps of the said lands and file them in the office of the surveyor of El Paso County and in the General Land Office of the State, at Austin, in the manner and within the time required by the provisions of the said law, and that he will pay all the fees required to be paid for such patents as shall be issued by the Commissioner of the General Land Office for said lands to said Count Telfener, his heirs or assigns, the said surveys, field-notes, and maps to be correct, and in consideration of said services and payments to be rendered and paid by said Russ the said Count Telfener agrees and binds himself to pay to said Russ in cash, at the city of Dallas or Austin, Texas, the sum of five (5) cents per acre for each and every acre so surveyed, platted, and returned by him as aforesaid, said payment to be made as follows, viz.: Three (3) cents per acre when the survey and field-notes shall be completed and one (1) cent per acre when the field-notes shall be filed in the land office, and the balance when the patents shall issue.

"Witness our hands this 1st day of November, 1882.

"Geo. W. Russ.

"J. Telfener,

"By C. Baccarisse, *Agt.*"

The petition alleges that by the contracts set forth the plaintiff sold, and agreed to assign to the defendant, and the defendant purchased and agreed to accept from the plaintiff, at the price of twenty-five cents an acre, a conveyance of plaintiff's application to purchase of the State 1813 tracts of land, being part of the Pacific reservation, and that at the time the plaintiff was able and authorized to make the contracts and to execute and deliver a proper and valid assignment and transfer of his said application and of all his rights, titles and interests thereunder to the defendant.

The petition also contains various allegations as to arrangements made by the parties for ascertaining whether or not the application of the plaintiff for the purchase of the lands had

been regularly and properly made, and according to the provisions of the laws of Texas, and among others that such conformity being shown as would entitle the plaintiff to become the purchaser, the defendant agreed to pay him ninety per cent of the purchase price stipulated. It also alleges the readiness of the plaintiff to fully comply with the contract and the failure of the defendant in all things to comply with the same on his part, to the damage of the plaintiff of four hundred thousand dollars.

The plaintiff therefore prayed judgment for the sum of twenty-five cents per acre alleged to be due to him for said one million one hundred sixty thousand three hundred and twenty acres, and also for the sum of fifty-eight thousand and sixteen dollars alleged to be due him on the supplementary contract contained in Exhibit N, together with legal interest on both sums, and for such further judgment and decree as on the hearing might seem equitable and just.

The defendant appeared to the action, and for answer said: First, that the petition was insufficient in law, wherefore he prayed judgment; second, that he denied all and singular the allegations of the petition; and, third, that he denied that he executed, by himself or agent, the instruments, or either of them, annexed to the petition.

The case was subsequently, on application of the defendant, removed from the state court to the Circuit Court of the United States for the Western District of Texas, and there the defendant had leave to file an amended answer, which averred, 1st, that the petition was insufficient in law to require him to answer it, upon which the judgment of the court was prayed; 2d, that the so-called Pacific reservation was not subject to sale by the State of Texas; and, 3d, that if Baccarisse, mentioned in the petition as the agent of the defendant, ever had any authority to negotiate in regard to the purchase of lands in Texas, it was merely as an employé under one Wescott, and his employment was merely to inquire and ascertain whether options or conditional contracts could be obtained by which parties would agree to sell lands in that State subject to the inspection and approval of an expert or

inspector sent out by a London syndicate for that purpose, such contract not to be final and binding unless ratified by the defendant after the approval of the expert; that the defendant never knew, until shortly before the present suit was instituted, that Baccarisse had attempted to execute any contract, as set up in the petition; and that he never authorized him to make any contracts, nor ever approved or ratified any made by him. This answer was again amended, by leave of the court, by the addition of a further defence, in which the defendant averred that if any such contract or contracts as are referred to and exhibited with the petition, were entered into by his authority or ratified by him, which is denied, the same were without any consideration, or, if there was any valid consideration therefor, the same failed in this, that the law which permitted the purchase of the lands was repealed before the steps required thereby to obtain title, or any vested interest therein, could have been or were taken, and by reason thereof all right, if any, which defendant acquired or could have acquired under the contracts were lost to him.

The case was tried by the court with a jury. Among other things, it was contended by the defendant that the plaintiff had no assignable interest in the lands described, but the court, of its own motion, charged the jury that if this were a rule when nothing but an application had been filed, the Supreme Court of the State had decided that, after surveys, a right did attach which could not be divested by adverse legislation, and that, in that case, all the surveys, excepting four mentioned, were made before the first day of November, 1882, the date of the contract of sale. To this ruling an exception was taken. It was also contended that the plaintiff, even if the contracts had been originally valid, had suffered no pecuniary damages from their breach; and the court was requested to charge the jury that the measure of damages would be the difference between twenty-five cents per acre, for as many acres as were embraced in the plaintiff's application to the county surveyor to purchase, and the diminished market value below that figure on the 15th of November, 1882; that no special damages could be recovered unless they were alleged and proved, and as such

damages had neither been alleged nor proved the jury should find for the defendant; but the court refused thus to charge, and instructed the jury that if the contracts were made as stated, and the plaintiff had complied with the laws of Texas respecting the application for the lands, he was entitled to recover twenty-five cents an acre for all the lands of which a survey was made. To this ruling an exception was taken. The jury found for the plaintiff in the sum of $384,809.38. A remittitur of $400.38 having been made therefrom, judgment was entered for the balance, namely, $384,409, the same to draw interest at the rate of eight per cent per annum. To review this judgment the case is brought here on writ of error.

Mr. Robert G. Ingersoll for plaintiff in error. *Mr. J. L. Peeler* was with him on the brief.

Mr. Jefferson Chandler and *Mr. John J. Weed* for defendant in error.

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

Two questions were presented for our consideration on the argument of this case — 1st, whether the plaintiff below, the defendant in error here, acquired any assignable interest in the real property described in the contract upon which the action is brought; 2d, assuming that he had an assignable interest, whether the rule for the measure of damages for breach of the contract for such interest by the defendant was correctly stated to the jury by the court.

1. The State of Texas opened its unappropriated lands for sale on the most liberal terms. Any person, firm or corporation desiring to purchase any portion of the lands might do so by applying to have the same surveyed by the authorized public surveyor of the county or district in which it was situated. It was made the duty of the surveyor to whom such application was made by a responsible party, to survey the land designated, within three months thereafter, and within sixty days after the survey to certify and record a map and field-notes of

the survey, and return and file them in the General Land Office of the State. Within sixty days after the return and filing of these papers in the General Land Office it was the right of the person, firm or corporation that had had the survey made to pay or cause to be paid into the treasury of the State the purchase money at the rate of fifty cents per acre. Upon presentation to the Commissioner of the General Land Office of the receipt of the state treasurer of the purchase money, the Commissioner was to issue to the person, firm or corporation a patent for the tract or tracts surveyed and paid for. And the statute declared that if any applicant for the purchase of public land refused or neglected to pay for the same at the rate of fifty cents per acre, within the time prescribed in the 5th section, he should forfeit all rights thereto and should not thereafter be allowed to purchase the same, but the land surveyed might be sold by the Commissioner of the General Land Office to any other person, firm or corporation that should pay into the treasury the purchase money therefor.

It will thus be seen that an applicant, under the laws of Texas, for the purchase of a portion of its unappropriated lands, could acquire no vested interest in the land applied for, that is, no legal title to it, until the purchase price was paid and the patent of the State was issued to him. If the price was not paid within sixty days after the return to the General Land Office of a map of the land desired and the field-notes of its survey, he forfeited all right to the land, and was not thereafter allowed to purchase it. He had, however, the right to complete the purchase and secure a patent within the prescribed period, after the map and field-notes of the survey were filed in the General Land Office, which is designated in the decisions of the Supreme Court of the State as a vested right that could not be defeated by subsequent legislation. Whether this vested right for the limited period prescribed was assignable to others without the consent of the state authorities, neither the statutes of the State nor the decisions of its courts inform us definitely. It would seem that if a right to purchase land for however short a period is vested in

one, it is a valuable right, and is, in that sense, property, and in the absence of express prohibition would be therefore assignable. Such is apparently the import of language used by the Supreme Court of the State in some of its decisions. *White* v. *Martin*, 66 Texas, 340; *Jumbo Cattle Co.* v. *Bacon*, 79 Texas, 5.

In this case the purchase price of the land applied for by the plaintiff was never paid or tendered to the State by him, and on January 22, 1883, both of the laws of Texas — that of July 14, 1879, and that of March 11, 1881, were repealed. But it is contended that previous to such repeal he had acquired a right to complete the purchase of the land by paying its price and thus obtaining a patent for it, and while possessing that right the alleged contract was made with the defendant for its sale to him.

2. We will not, however, rest our decision upon the assignability of the right to purchase alleged to have been thus made, without the assent of the state authorities, as there is another and clear ground for the disposition of the case, in the instruction of the court to the jury upon the measure of damages for the alleged breach of the contract, which was that, if the contract was made as stated, and the plaintiff had complied with the laws of Texas respecting the application for the land, he was entitled to recover of the defendant twenty-five cents an acre — the full contract price — for all the land of which a survey was made. In this instruction the Circuit Court erred.

Assuming that the plaintiff had acquired a vested right to complete the proceedings for the purchase of the land desired, and to secure a patent for it, and that such right was not personal to him but was transferable to another without the assent of the state authorities, he did not show that he had suffered any damages by the failure of the defendant to comply with the contract for the right to purchase the land. On the 15th of November he possessed all the right to the land which he ever possessed, and, assuming that the defendant then failed to make the payment which he had agreed to make, all the damages suffered by the plaintiff was the dif-

ference between the value of the right, as stipulated to be paid, and the amount which could then have been obtained on its sale. The measure of damages for breach of a contract of sale of land by the purchaser is the difference between the contract price and the salable value of the property. That is the rule laid down by the Supreme Court of Texas in *Kempner* v. *Heidenheimer*, 65 Texas, 587. That court also adds that the salable value "may be fixed by a fair resale, after notice to the party to be bound by the price as the value, within a reasonable time after the breach." In that case it was also held that, where no sale was made, the plaintiff was only entitled to recover the difference between the market value at the date of the defendant's breach and the price he had agreed to pay, and that the duty devolved upon the plaintiff to establish these factors in the measure of damages. The same rule as to the measure of damages upon a breach of a contract for the sale of lands was held to be the proper one by the Supreme Court of Massachusetts in *Old Colony Railroad* v. *Evans*, 6 Gray, 25, 36, after considering numerous authorities on the subject. A similar rule prevails in Pennsylvania. *Bowser* v. *Cessna*, 62 Penn. St. 148, 151. The same rule must apply where the contract is not for the land but for a right to purchase the land. The measure of damages must be the difference between the contract price and the salable value of the right when payment was to be made.

In the present case no evidence was produced to show the value on the 15th of November of the right of the plaintiff which he had sold to the defendant, nor was there any evidence produced as to the amount for which he could have sold to others that right; there was no evidence, therefore, for the estimate of damages at that time upon which the jury could have based a verdict. If anything could then have been obtained from the sale of that right, and the contract had been valid and binding, it was the duty of the plaintiff to make the sale when the defendant defaulted in his contract, and thus to have subjected him to as little loss as practicable. But no such sale was attempted, and no evi-

dence was offered as to the value of the supposed right sold, and consequently no foundation laid for any recovery.

It follows that the judgment must be reversed, and the cause remanded, with directions to the court below to grant a new trial, and to take further proceedings in accordance with this opinion.

BARDON v. NORTHERN PACIFIC RAILROAD COMPANY.

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

No. 343. Argued April 27, 28, 1892. — Decided May 16, 1892.

Land which, at the time of the grant of July 2, 1864, 13 Stat. 365, c. 217, of public lands to the Northern Pacific Railroad Company, was segregated from the public lands within the limits of the grant by reason of a prior preëmption claim to it, did not, by the cancellation of the preëmption right before the location of the grant pass to the company, but remained part of the public lands of the United States, subject to be acquired by a subsequent preëmption settlement followed up to acquisition of title.

IN EQUITY. The case is stated in the opinion.

Mr. John B. Sanborn and *Mr. William F. Vilas* for appellant.

Mr. James McNaught (with whom were *Mr. F. M. Dudley*, *Mr. A. H. Garland* and *Mr. H. J. May* on the brief) for appellee.

MR. JUSTICE FIELD delivered the opinion of the court.

The plaintiff, the Northern Pacific Railroad Company, a corporation organized under the act of Congress of July 2, 1864, 13 Stat. 365, c. 217, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific coast by the northern route," and having its principal places of business in the city of New York, in the State of New York, and in

the city of St. Paul, in the State of Minnesota, brings this suit against Mary Bardon, a citizen of Wisconsin, to charge her as trustee of certain real property held by her in that State, and compel her to convey the same to the company.

The bill, as amended, sets forth the most important provisions of the act of Congress organizing the company and authorizing it to "locate, construct, furnish, maintain and enjoy, a continuous railroad and telegraph line with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence, westerly, by the most eligible railroad route, as should be determined by your orator, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget's Sound, with a branch via the valley of the Columbia River to a point at or near Portland, in the State of Oregon," and vesting it with the powers, privileges and immunities necessary to carry into effect the purposes of the act.

By the third section of the act a grant of land is made to the company. The section, so far as it bears upon the questions involved, is as follows:

"SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line as said company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said

time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided*, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said Northern Pacific Railroad Company, or may consolidate, confederate and associate with said company upon the terms named in the first section of this act."

The Northern Pacific Railroad Company, under this act of incorporation, proceeded to designate the general route of its proposed road, and afterwards to have its line definitely fixed. The necessities of the case do not require us to go into a very close consideration of these matters. The admissions of counsel reduce the questions for decision within narrow limits. It is conceded that the premises in controversy lie within the place limits of the grant to the Northern Pacific Railroad Company, and that the title to them would pass to that company under the grant and the compliance of the company with its conditions, unless they are excepted from the grant by the facts admitted in the pleadings and the stipulation of parties.

Among the facts admitted are these: That on and prior to September 12, 1855, the tract of land, in relation to which this suit was brought, had been surveyed by the United States and was a part of the public domain, subject to sale by preëmption and otherwise as then provided by law; that on that day James S. Robinson, Jr., settled upon the land, and that he was at the time a qualified preëmptor; that on the 21st of September following he filed his declaration of settlement upon the land, under the preëmption laws, with the register and re-

ceiver at the proper land office of the United States; that he died without making final proof on the preëmption claim or paying the government for the land; that after his death his heirs, on the 30th of July, 1857, made payment for the land and received the receiver's receipt therefor and a certificate of purchase from the register, with the statement that, on its presentation to the Commissioner of the General Land Office, the heirs would be entitled to receive a patent for the land; that on the 5th of August, 1865, this preëmption entry was cancelled by the Commissioner of the General Land Office for alleged failure to furnish proof of continuous residence prior to July 30, 1857; that Robinson did not, in his lifetime, pay to the government the money required under the preëmption laws of the United States to acquire title to the land, except such fees as are paid to local officers at the time of filing a preëmption application; and that whatever money was paid for and on account of the land, prior to 1865, was paid by the heirs of Robinson, except the fees mentioned, and whatever money was thus paid was refunded to the heirs by the government upon the cancellation of the preëmption claim.

It is thus seen that when the grant to the Northern Pacific Railroad Company was made, on the 2d of July, 1864, the premises in controversy had been taken up on the preëmption claim of Robinson, and that the preëmption entry made was uncancelled; that by such preëmption entry the land was not at the time a part of the public lands; and that no interest therein passed to that company. The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws. All land, to which any claims or rights of others have attached, does not fall within the designation of public land. The statute also says that whenever, prior to the definite location of the route of the road, and of course prior to the grant made, any of the lands which would otherwise fall within it have been granted, sold, reserved, occupied by homestead settlers, or preëmpted or otherwise disposed of, other lands are to be selected in lieu thereof under the direction of the Secretary of the Interior. There would therefore be no

question that the preëmption entry by the heirs of Robinson, the payment of the sums due to the government having been made, as the law allowed, by them after his death, took the land from the operation of the subsequent grant to the Northern Pacific Railroad Company, if the preëmption entry had not been subsequently cancelled. But such cancellation had not been made when the act of Congress granting land to the Northern Pacific Railroad Company was passed; it was made more than a year afterwards. As the land preëmpted then stood on the records of the Land Department, it was severed from the mass of the public lands, and the subsequent cancellation of the preëmption entry did not restore it to the public domain so as to bring it under the operation of previous legislation, which applied at the time to land then public. The cancellation only brought it within the category of public land in reference to future legislation. This, as we think, has long been the settled doctrine of this court.

In *Wilcox* v. *Jackson*, 13 Pet. 498, 513, this court held that whenever a tract of land has been legally appropriated to any purpose, from that moment it becomes severed from the mass of public lands, and no subsequent law, or proclamation, or sale will be construed to embrace it, or to operate upon it, although no reservation of it be made. The validity and effect of the appropriation do not depend upon its not being subjected afterwards to cancellation because of the omission of some particular duty of the party claiming its benefit.

In *Witherspoon* v. *Duncan*, 4 Wall. 210, 218, this court held that if a party entitled by law to enter land at the land office does so, when the certificate of entry is given to him, a contract is executed between him and the government, and thereafter the land ceases to be a part of the public domain. The court considered the question whether there was any difference in such case between a cash and a donation entry, the one being complete when the money was paid, and the other not until it was confirmed by the General Land Office and a patent issued. There, it is true, the question was as to the power of a State to tax the land before the patent issued, and the court said if the law on the subject is complied with and

the entry conforms to it, it is difficult to see why the right to tax does not attach as well to the donation as to the cash entry. In either case, when the entry is made and a certificate is given, the particular land is segregated from the mass of public lands and becomes private property.

In *Hastings &c. Railroad Co.* v. *Whitney*, 132 U. S. 357, 361, this court, in commenting upon the decision in the case last cited, said: "The fact that such an entry may not be confirmed by the land office on account of any alleged defect therein, or may be cancelled or declared forfeited on account of non-compliance with the law, or even declared void, after a patent has issued, on account of fraud, in a direct proceeding for that purpose in the courts, is an incident inherent in all entries of public lands." And it added: "In the light of these decisions, the almost uniform practice of the department has been to regard land, upon which an entry of record valid upon its face has been made, as appropriated and withdrawn from subsequent homestead entry, preëmption, settlement, sale or grant until the original entry be cancelled or declared forfeited; in which case the land reverts to the government as part of the public domain, and becomes again subject to entry under the land laws."

The case of *Leavenworth, Lawrence & Galveston Railroad* v. *United States*, 92 U. S. 733, well illustrates this doctrine. It was here at October term, 1875, and was elaborately argued. It was a suit in equity brought by the United States to establish their title to certain tracts of land, and to enjoin the railroad company from setting up any right or claim to them. A grant had been made by the act of Congress of March 3, 1863, to the State of Kansas of certain tracts of land lying in what is known as the "Osage country," to aid in the construction of certain railroads and telegraph lines in that State. Within the limits of the Osage country there had been reserved by treaty with the Great and Little Osage tribes of Indians certain described tracts of land in that State so long as they might choose to occupy the same. (7 Stat. 240.) The act contained words of conveyance similar to those used in other grants by Congress to aid in the construction of rail-

roads, without a specific exception of any lands as being subject to the use of the Indians. The only exceptions to the granting clause were: 1st, that in case it should appear that the United States had, when the lines or routes of the road and branches were definitely fixed, sold any section or any part thereof granted, or that the right of preëmption or homestead settlement had attached thereto, or the same had been reserved by the United States for any purpose whatever, then it should be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land, in alternate sections or parts of sections, designated by odd numbers, as should be equal to such lands as the United States had sold, reserved or otherwise appropriated, or to which the right of preëmption or homestead settlements had attached as aforesaid; and, 2d, that lands previously reserved to the United States by an act of Congress, or in any other manner by competent authority, for the purpose of aiding in any internal improvement, or for any other purpose whatsoever, were reserved from the operation of the act, except so far as it might be found necessary to locate the routes of the road and branches through such reserved lands, in which case the right of way only should be granted, subject to the approval of the President of the United States. After the granting act was passed the Indian title or right of occupancy was extinguished.

On the argument of the case the United States maintained that the granting act, though not mentioning the claim of the Indians, did not affect their lands, and was not intended to do so. The railroad company, on the contrary, contended that although the grant did not operate upon any specified lands until the road was located, it covered the lands in controversy, and by the extinction of the Indian title they had, in the proper sense of the term, become public lands. But the court answered that the grant was made for the purpose of aiding a work of internal improvement, and did not extend beyond that intent; that the grant was one *in præsenti;* and that the words "there be and is hereby granted" were those of absolute

donation. "They vest," said the court, "a present title in the State of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it and attach it to any particular tract."

The lands granted were designated by odd-numbered sections within certain definite limits, and only the public lands, said the court, owned absolutely by the United States were subject to survey and division into sections, and to them only was the grant applicable. It embraced, therefore, only such as could at the time be sold and enjoyed, and not those which the Indians, pursuant to treaty stipulations, were left free to enjoy. In affirmance of its views the court added that since the land system was inaugurated the grants of the government, either to individuals or to aid in works of internal improvement, had always been recognized as attaching only to so much of the public domain as was subject to sale or other disposal, although the roads of many subsidized companies passed through Indian reservations, observing that such grants could not be otherwise construed, for Congress could not be supposed to have thereby intended to include land previously appropriated to another purpose, unless there was an express declaration to that effect. A special exception of it was not necessary, because the policy which dictated them confined them to land which Congress could rightfully bestow without disturbing existing relations and producing vexatious conflicts.

In *Buttz* v. *The Northern Pacific Railroad*, 119 U. S. 55, a portion of the land granted was in the occupation of certain Indian tribes, and the act provided that the United States should extinguish, as rapidly as might be consistent with public policy and the welfare of the Indians, their title to all lands falling under the operation of the act and acquired in the donation to the road — a provision which distinguished the grant from the one in *The Leavenworth Case*. In *The Buttz Case*, the grant passed the land, therefore, to the railroad company subject to the Indians' right of occupancy, which could only be interfered with or determined by the United States.

In *The Leavenworth Case*, the appellant, the railroad com-

pany, contended that the fee of the land was in the United States, and only a right of occupancy remained with the Indians; that under the grant the State would hold the title subject to their right of occupancy; but as that had been subsequently extinguished, there was no sound objection to the granting act taking full effect. The court, however, adhered to its conclusion, that the land covered by the grant could only embrace lands which were at the time public lands, free from any lawful claim of other parties, unless there was an express provision showing that the grant was to have a more extended operation, citing the decision in *Wilcox* v. *Jackson*, 13 Pet. 498, to which we have referred above, that land once legally appropriated to any purpose was thereby severed from the public domain and a subsequent sale would not be construed to embrace it, though not specially reserved. And of the Indians' right of occupancy it said, that this right, with the correlative obligation of the government to enforce it, negatived the idea that Congress, even in the absence of any positive stipulation to protect the Osages, intended to grant their land to a railroad company, either absolutely or *cum onere*. "For all practical purposes," the court added, "they owned it; as the actual right of possession, the only thing they deemed of value, was secured to them by treaty, until they should elect to surrender it to the United States."

Three justices, of whom the writer of this opinion was one, dissented from the majority of the court in *The Leavenworth Case*; but the decision has been uniformly adhered to since its announcement, and this writer, after a much larger experience in the consideration of public land grants since that time, now readily concedes that the rule of construction adopted, that, in the absence of any express provision indicating otherwise, a grant of public lands only applies to lands which are at the time free from existing claims, is better and safer, both to the government and to private parties, than the rule which would pass the property subject to the liens and claims of others. The latter construction would open a wide field of litigation between the grantees and third parties.

A principle somewhat analogous to the one expressed in *The Leavenworth Case* was announced in *Kansas Pacific Railway Co.* v. *Dunmeyer*, 113 U. S. 629. There a homestead claim had been filed in the land office by one Miller upon part of an odd-numbered section lying within the place limits of the grant of land to the Union Pacific Railroad Company. The claim was recognized by a certificate of entry before the route of the company's road was definitely located. Subsequently to the definite location, Miller abandoned his entry and purchased the land from the railroad company, and to him a certificate of sale was given. This certificate of sale afterwards passed to one Lewis Dunmeyer, to whom the company gave a deed purporting to convey a good title. After Miller's purchase the homestead entry was cancelled. One G. B. Dunmeyer then made an entry of the land under the homestead law, claiming that by Miller's abandonment of the former entry and its cancellation the land had not been brought within the grant, but had reverted to the mass of the public land. Lewis Dunmeyer then brought an action against the company in the state court of Kansas, on the covenant in the deed for a good title, and recovered judgment, which was affirmed by the Supreme Court of the State, and from that court was brought here. The question, among others, considered was the effect of the abandonment of the homestead claim by Miller upon the ownership of the property. It was contended that although Miller's homestead claim had attached to the land within the meaning of the exception of the grant before the line of definite location was filed, yet, when he abandoned his claim so that it no longer existed, the exception ceased to operate, and the land reverted to the company; and that the grant, by its inherent force, reasserted itself and extended to and covered the land as though it had never been within the exception. But the court rejected this view, stating that it was unable to perceive the force of the proposition, observing: "No attempt has ever been made to include lands reserved to the United States, which reservation afterwards ceased to exist, within the grant, though this road, and others with grants in similar language, have more

than once passed through military reservations for forts and other purposes, which have been given up or abandoned as such reservations, and were of great value; nor is it understood that in any case where lands had been otherwise disposed of, their reversion to the government brought them within the grant." Not only does the land once reserved not fall under the grant should the reservation afterwards from any cause be removed, but it does not then become a source of indemnity for deficiencies in the place limits. Such deficiencies can only be supplied from lands within limits designated by the granting act or other law of Congress. The land covered by the preëmption entry being thereby excepted from the grant to the Northern Pacific Railroad Company was also thereby excepted from any withdrawals from sale or preëmption of public lands for its benefit.

From the decisions cited, and approving, as we do, the reasons on which they are founded, it follows that the land in controversy, upon which Robinson had made a preëmption claim as early as September 12, 1855, it being then open to preëmption sale, and subsequently filed his declaration of settlement under the preëmption laws, and by whose heirs, after his death, payment of the purchase price had been made, and to them a receiver's receipt therefor given, and a certificate of entry issued to them, was severed from the mass of public lands from which the grant to the Northern Pacific Railroad Company could alone be satisfied. That preëmption entry remained of record until August 5, 1865, when it was cancelled, but this was after the date of the grant to the Northern Pacific Railroad Company, and also after the dates of the several grants made to the State of Wisconsin to aid in the construction of railroad and telegraph lines within that State. The cancellation, as already said, did not have the effect of bringing the land under the operation of the grant to the Northern Pacific Railroad Company; it simply restored the land to the mass of public lands to be dealt with subsequently in the same manner as any other public lands of the United States not covered by or excepted from the grant.

No disposition was subsequently made of the land thus re-

stored to the public domain until December 2, 1871, when it seems that one Owen Sheridan applied for a homestead entry upon it, and was permitted to make such entry, and the same remained of record until the 30th of June, 1880, when it was cancelled. From that time the land continued a part of the unappropriated public lands of the United States until the 2d of January, 1881, when the appellant, Mary Bardon, made her preëmption settlement upon it and afterwards followed up the settlement with all the steps required by law for the acquisition of the title. On the 14th of February, 1881, she filed her declaratory statement therefor; on the 8th of June, 1882, she made her final proofs; on the 22d of June she made her payment for the land, and on the 19th of January, 1887, the Secretary of the Interior issued to her a patent of the United States for the land in the form provided by law.

There was nothing in any of the proceedings of the Northern Pacific Railroad Company, or of the companies to whom the land granted to Wisconsin was conveyed by the State, or in the acts of the appellant, which in any respect impaired her right to the completion of her preëmption claim, or to the full fruition of her perfected title.

It follows that

The decree must be reversed, and the cause be remanded to the Circuit Court, with a direction to dismiss the bill; and it is so ordered.

JENKINS *v.* COLLARD.

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

No. 316. Submitted April 18, 1892. — Decided May 16, 1893.

Although, under the ruling in *Wallach* v. *Van Ryswick*, 92 U. S. 207, the defendant in a proceeding for confiscation under the confiscation act of July 17, 1862, 12 Stat. 589, c. 195, and Joint Resolution No. 63, of the same date, 12 Stat. 627, had no power of alienating the reversion or

Statement of the Case.

remainder which was still in him after confiscation and sale, still an alienation of it by him by a deed of warranty, accompanied by a covenant of seizin on his part, estopped him and all persons claiming under him from asserting title to the premises against the grantee, his heirs and assigns, or from conveying it to any other parties.

The general pardon and amnesty made by the public proclamation of the President at the close of the war of the rebellion had the force of public law.

THE court stated the case as follows:

This is an action of ejectment brought by the plaintiffs to recover of the defendant two lots of land in the city of Cincinnati, Ohio, with the buildings thereon, known as Nos. 50 and 52 West Pearl Street in that city. The plaintiffs below, who are also plaintiffs in error here, are the children and only heirs of Thomas J. Jenkins, deceased. They are residents and citizens of West Virginia. Two of them, Albert Gallatin Jenkins and George R. Jenkins, are minors under the age of twenty-one years, and appear by their mother and guardian. The defendant is a citizen of Ohio and a resident of Cincinnati.

The petition, the designation given to the first pleading in the case, alleges that prior to 1863 Thomas J. Jenkins was the owner of the real estate mentioned, which is fully described, and that while such owner he joined the rebel army, and such proceedings were had in the District Court of the United States for the Southern District of Ohio in the year 1863, that the property was confiscated, and the life estate of Jenkins was sold, and the defendant William A. Collard, then or subsequently in the year 1865, and during the lifetime of Jenkins, became the owner of the life estate; that Jenkins died on the 1st day of August, 1872; and that thereupon the plaintiffs became seized of the legal estate in the premises and entitled to the possession thereof; but that the defendant since that time has unlawfully kept them out of possession. The petition also sets forth that the defendant has been receiving the rents, issues and profits of the premises from the first day of August, 1872, up to the commencement of this action without the consent of the plaintiffs, and has refused to account for them; that their yearly value has been, on the average, eighteen hun-

dred dollars; and that the plaintiffs have been deprived of all profit and benefit from the premises since that time, to their damage of forty thousand dollars. They therefore pray judgment for the possession of the premises and for the damages alleged.

The defendant appeared to the action and set up nine defences. The first defence, which was substantially the general issue, was subsequently withdrawn. To the several other defences demurrers were interposed and all of them, except the one to the second defence, were sustained, and no further proceeding respecting them was taken. The second defence was as follows:

"For a second defence the defendant says that he denies that such proceedings were had in the District Court of the United States within and for the Southern District of Ohio, in the year 1863, or at any other time, that the said property was confiscated, but defendant avers that in a proceeding instituted in said court in the year 1863, a decree was entered in the words and figures following, to wit:

"'District Court United States, Southern District of Ohio.

"'The United States }
vs. }
"'Lots and Stores Nos. 50 and 52, Pearl Street, Cincinnati. }

"'This cause came on for hearing at this term, upon the libel of information filed herein, and upon the evidence in the case, and the court find that, in pursuance of law, the attorney of the United States for the Southern District of Ohio did issue to the marshal of said district his warrant in writing bearing date March 9th, 1863, commanding him to seize for the cause set forth in said warrant all the right, title, and interest of one Thomas J. Jenkins, in and to the real estate described in said warrant, and in said libel of information, and that in pursuance thereof the said marshal, on the 12th day of March, 1863, seized said real estate and notified the tenants thereof, and also W. A. Collard, agent of said Jenkins, of such seizure by notice in writing. That afterwards, on the 7th day of March, 1863, a writ of monition issued out of this court,

under the laws thereof, to said marshal, by virtue whereof the usual notice prescribed by law and by the rules of this court to all persons interested in said real estate to appear in this court on the first Tuesday of April, 1863, to assert their claims, if any they have, in said real estate, was given by said marshal, which notice was duly published in the Cincinnati Daily Gazette, a newspaper printed and of general circulation in said district, for ten days from and after March 18, 1863, and all persons interested having made default, and the default of all persons being duly entered, and the court having heard the testimony of the witnesses proving that said Thomas J. Jenkins, of the State of Virginia, at the date of said seizure, was the owner of said property, and that ever since the 17th day of July, 1862, the said Thomas J. Jenkins was, and now is, in the army service of the rebels in arms against the United States, to wit, in the State of Virginia; and the court further find that the allegations in said libel are true in fact, and that the life estate of said Jenkins in said real estate is justly and legally forfeited to the United States in pursuance of law, for the causes set forth in said libel.

"'It is further ordered, sentenced and decreed that the life estate of said Thomas J. Jenkins be, and the same is, hereby condemned as enemies' property, and that the same be appraised, advertised and sold in the manner pointed out by the rules of this court, and to that end the necessary process is ordered to be issued to the marshal to make sale of said real estate in the manner aforesaid, and that upon such sale he bring the proceeds into this court for distribution; and it is further ordered that the rights of all loyal people to share in such distribution are hereby reserved for further hearing.'

"Defendant says that the above was the only decree touching said property, except the decree of confirmation of the sale and distribution of proceeds.

"Defendant says that thereafter such proceedings were had in said cause that there was sold and conveyed by the marshal, in accordance with said decree, the life estate of said Thomas J. Jenkins to one Edward Bepler.

"Defendant says that by reason of the premises all the

estate of said Jenkins in said property was not condemned and sold, but that there remained in him the reversion or remainder in fee of said property after said life estate sold to said Bepler. Defendant further says that after the termination of the civil war said Thomas J. Jenkins bargained and sold to the defendant, in consideration of the sum of eighteen thousand dollars paid to said Jenkins by defendant, all the interest and estate of said Jenkins in said property, and did execute and deliver to the defendant, on the 26th day of August, 1865, a deed in fee simple, with covenants of general warranty, binding himself and his heirs, and Susan L. Jenkins, wife of said Thomas J. Jenkins, did join in said deed and did release all her right and expectancy of dower in said property.

"Defendant further says that on the 6th day of June, 1865, said Edward Bepler did execute and deliver to the defendant a deed for said life estate purchased by him at said sale. Defendant says that by reason of the premises he became the owner in fee simple of the property and entered into possession thereof and so continued to the present time."

To this defence the plaintiffs demurred on the ground that it constituted no defence and was insufficient in law on its face; and they claimed and asked the court to hold that by the decree set up there was an adjudicated forfeiture and sale of the lots described under the confiscation act of Congress of July 17, 1862, 12 Stat. 589, c. 195, and the joint resolution of even date therewith, 12 Stat. 627, and that there was not left in Thomas J. Jenkins any interest which he could convey by deed, but that all which could become the property of the United States and could be sold by virtue of a decree of condemnation and order of sale was the life estate of Thomas J. Jenkins, and that a decree condemning the fee could have no greater effect than to subject the life estate to sale, and therefore the deed executed and delivered by him on the 26th day of August, 1865, was a nullity, and the plaintiffs inherited and were entitled to the property as prayed for in their petition. But the court held that by reason of said decree all the estate of Thomas J. Jenkins in the property was not condemned and

Counsel for Defendant in Error.

sold, but only a technical life estate therein, and that there remained in him the reversion or remainder in fee of the property after the termination of the life estate sold to said Bepler, which he could sell and convey by deed, and which he did sell and convey by the deed of August 26th, 1865, and that consequently the plaintiffs had not inherited any interest in the property, and overruled the demurrer; to which the plaintiffs excepted. The plaintiffs then had leave to reply to the defence, and they replied as follows: "That by the proceedings in the District Court of the United States for the Southern District of Ohio, in the year 1863, all the estate of Thomas J. Jenkins in the property was confiscated and sold, and there did not remain in him the reversion or remainder in fee after the sale to Bepler; that they admit the execution and delivery of a deed to the defendant on the 26th day of August, 1865, by Thomas J. Jenkins, at Cincinnati, in the State of Ohio, but deny that Jenkins had any interest in the property at that time which he could convey, and aver that defendant took nothing by the deed from him." To which reply the defendant demurred, and, after hearing the case, the Circuit Court of the United States for the Southern District of Ohio, at October term, 1888, held that only the technical life estate of Thomas J. Jenkins was confiscated by the said decree, and that there was left in him the reversion or remainder, which he sold and conveyed to the defendant by the deed of August 26, 1865, and that consequently the plaintiffs had no interest in the property, and sustained the demurrer; to which ruling the plaintiffs excepted. And the plaintiffs not desiring to plead further, the court gave judgment for the defendant for the reasons stated in overruling the demurrer.

To review that judgment the case is brought to this court on writ of error.

Mr. S. A. Miller for plaintiffs in error.

Mr. J. D. Brannan and *Mr. John C. Healy* for defendant in error.

Opinion of the Court.

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

The important questions presented in this case relate to the nature and duration of the estate condemned and sold by the decree of the United States District Court for the Southern District of Ohio in the proceedings taken for the confiscation of the property of Thomas J. Jenkins, under the act of Congress of July 17, 1862, 12 Stat. 589, and to the power of disposition possessed by him over the naked fee or property in reversion, after the termination of the confiscated estate. The questions must find their solution in the interpretation given to the provisions of that act and to the terms of the decree. The act is entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels and for other purposes."

In one of the earlier cases in this court under this act, it was earnestly contended that the act was not passed in the exercise of the war powers of the government, but in the execution of the municipal power of the government to legislate for the punishment of offences against the United States. Such was the contention in *Miller* v. *United States*, 11 Wall. 268, 308, 369. The court, however, was of opinion that only the first four sections, which were aimed at individual offenders, were open to that objection; and admitted that they were passed in the exercise of the sovereign, and not the belligerent, rights of the government; but held that in the 5th and following sections another purpose was avowed, not that of punishing treason and rebellion, as described in the title, but the other purpose there described, that of seizing and confiscating the property of rebels. The language of the 5th section is that "to insure the speedy termination of the present rebellion it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits and effects of the persons hereinafter named in this section, and to apply and use the same, and the proceeds thereof, for the support of the army of the United States." And the court, stating that the avowed purpose of the act was not to reach any criminal

personally, but to insure the speedy termination of the rebellion, which the court had recognized as a civil war, held that this purpose was such as Congress in the situation of the country might constitutionally entertain, and that the provisions made to carry it out, namely, confiscation, were legitimate, unless applied to others than enemies. The act, therefore, in execution of this purpose, provided for judicial proceedings *in rem*, for the condemnation and sale of the property mentioned, after its seizure, to be brought in any District or Territorial Court of the United States, which should conform as nearly as possible to proceedings in admiralty and revenue cases; and it declared that if the property should be found to have belonged to a person engaged in rebellion, or who had given aid or comfort thereto, the same should be condemned as enemies' property, and become the property of the United States, and might be disposed of as the court should decree, and the proceeds thereof paid into the Treasury of the United States for the purposes stated. After the act embodying this and other provisions had passed both houses of Congress and been presented to President Lincoln for approval, it was ascertained that he was of opinion that in some of its features it was unconstitutional, and that he intended to veto it. His objections were that in several of its clauses the provision of the Constitution concerning forfeitures not extending beyond the life of the offender was disregarded. Art. III, sec. 3. To meet this objection, which had been communicated to members of the House of Representatives, where the bill originated, a joint resolution, explanatory, as it was termed, of the act — but which might more properly be designated amendatory of the act and restrictive of its operation — was passed by the House and sent to the Senate. That body, being informed of the objections of the President, concurred in the joint resolution. It was then sent to the President, and was received by him before the expiration of the ten days allowed him for the consideration of the original bill. He returned the bill and resolution together to the house where they originated, with a message, in which he stated that, considering the act and the resolution explanatory of the act as being substantially one, he approved and signed both. 12 Stat. 589 and 627.

The joint resolution declares that the provisions of the third clause of the 5th section of the act shall be so construed as not to apply to any act or acts done prior to its passage, "nor shall any punishment or proceedings under said act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life." No decree condemning real property of persons seized under the act, could therefore extend the forfeiture adjudged beyond the life of the offending owner. During his life only could the control, possession, and enjoyment of the real property seized and condemned be appropriated. To that extent the property vested in the United States upon its condemnation and passed to the purchaser to whom the government might afterwards sell it.

What then was the situation of the remainder of the estate of the offending party after the condemnation and sale? The proceedings did not purport to touch any interest in the property or control of it beyond his life. When that ceased, his heirs took the property from him. They could not take anything from the government, for it had nothing; the interest it acquired by the condemnation passed by the sale to the purchaser. The reversionary interest or remainder of the estate must have rested somewhere. It could not have been floating in space without relationship to any one. The logical conclusion would seem to be that it continued in the offending owner. This, we think, follows, not only from the language of the act, but from decisions of this court construing its provisions, though some of the latter contain declarations that its possession is unaccompanied with any power of disposition over the future estate during his life.

In *Bigelow* v. *Forrest*, 9 Wall. 339, which came before this court at December term, 1869, it was held that the act of July 17, 1862, and the explanatory resolution of the same date, were to be construed together, and that thus construed all that could be sold by virtue of a decree of condemnation and order of sale under the act was a right to the property seized terminating with the life of the offending person, and that the fact that he owned the estate in fee simple, that the libel was against all his right, title, interest and estate, and

that the sale and marshal's deed professed to convey as much, did not change the result. The District Court, said this court, under the act of Congress, had no power to order a sale which would confer upon the purchaser rights outlasting the life of the party, and had it done so it would have transcended its jurisdiction. This was the unanimous decision of the court.

In *Day* v. *Micou*, 18 Wall. 156, before this court at October term, 1873, it was held also by the court unanimously that, under the confiscation act and joint resolution explanatory of it, only the life estate of the person for whose offence the land had been seized was subject to condemnation and sale, and that the fact that the decree may have condemned the fee did not alter the case.

In *Wallach* v. *Van Riswick*, 92 U. S. 202, 207, which was before this court at October term, 1875, it was held that after an adjudicated forfeiture and sale of an enemy's land under the confiscation act, and the joint resolution accompanying it, there was not left in him any interest which he could convey by deed. This ruling was not made upon any express provision of the statute. There is no personal disability imposed by its provisions upon the offending party beyond the forfeiture of his estate during his life. It was made by the court, apparently upon what it considered the policy of the confiscation act. The purpose of the act, it said, and its justification, was to strengthen the government, and to enfeeble the public enemy by taking from his adherents the power to use their property in aid of the hostile cause. "With such a purpose," it added, "it is incredible that Congress, while providing for confiscation of enemy's land, intended to leave in that enemy a vested interest therein, which he might sell and with the proceeds of which he might aid in carrying on the war against the government." In this ruling, the court, in addition to the statutory effect of the decree as a conveyance to the United States of the title to the land for the life of the offending party, made the decree impose upon him a disability or disqualification to hold or transfer an estate which the United States did not acquire or condemn.

Though the ruling in *Wallach* v. *Van Riswick* was followed

in several cases — in *Pike* v. *Wassell*, in 1876, 94 U. S. 711, and in *French* v. *Wade*, in 1880, 102 U. S. 132 — this court subsequently held, in 1884, in *Avegno* v. *Schmidt*, 113 U. S. 293, that the heirs at law of a person, whose life interest in real estate was confiscated under the confiscation act of July 17, 1862, took at his death by descent from him and not from the United States under the act, and, in 1887, in *Shields* v. *Schiff*, 124 U. S. 351, 355, that the confiscation act of July 17, 1862, construed in connection with the joint resolution of the same date, made no disposition of the confiscated property after the death of the owner, but left it to devolve upon his heirs, and not by donation from the government.

It is not to be overlooked that previous to the decision of the case of *Wallach* v. *Van Riswick* a general amnesty and pardon had been proclaimed by the President throughout the land to all who had participated in the rebellion, thus relieving them from the disabilities arising from such participation. Estates and interests in land, present and future, which had not for such participation been previously condemned and sold to others, fell at once under the control and disposition of the original owners, as though the offences alleged against them had never been committed. The pardon and amnesty did not and could not change the actual fact of previous disloyalty, if it existed, but, as said in *Carlisle* v. *United States*, 16 Wall. 147, 151, "they forever closed the eyes of the court to the perception of that fact as an element in its judgment, no rights of third parties having intervened." As repeatedly affirmed by this court, pardon and amnesty in legal contemplation not merely release offenders from the punishment prescribed for their offences, but obliterate the offences themselves.

In *Illinois Central Railroad Co.* v. *Bosworth*, 133 U. S. 92, 100, 102, 104, 105, which was here at October term, 1889, we have the latest expression of this court upon the subject we have been considering, and also on the effect of pardon and amnesty upon the disabilities imposed upon parties whose life estates had been confiscated under the act of July 17, 1862, and the accompanying joint resolution. That was an action brought by the surviving children of A. W. Bosworth, deceased, to recover pos-

session of one undivided sixth part of a tract of land in New Orleans, which formerly belonged to their father. The petition stated that the latter, having taken part in the war of the rebellion, and done acts which made him liable to the penalties of the confiscation act, the said one-sixth part of the land was seized, condemned and sold, under the act, and purchased by one Burbank, in May, 1865; that A. W. Bosworth died in October, 1885; and that the plaintiffs, upon his death, became the owners in fee simple of the said one-sixth part of the property of which the defendant, the Illinois Central Railroad Company, was in possession. The company filed an answer setting up various defences, among others, tracing title to themselves from Bosworth, by virtue of an act of sale executed by him and wife in September, 1871, disposing of all their interest in the premises with full covenants of warranty. They also alleged that Bosworth had, before the act of sale, not only been included in the general amnesty proclamation of the President, issued on the 25th of December, 1868, but had received from him a special pardon on the 2d of October, 1865, and had taken the oath of allegiance and complied with the terms and conditions necessary to be restored to, and reinvested with, the rights, franchises and privileges of citizenship.

The principal question involved in the case was whether, by the effect of the pardon and amnesty granted to A. W. Bosworth, he was restored to the control and power of disposition over the fee simple or naked property in reversion, expectant upon the determination of the confiscated estate in the property in dispute. "The question of the effect of pardon and amnesty," said the court, "on the destination of the remaining estate of the offender, still outstanding after a confiscation of the property during his natural life, has never been settled by this court." In *Wallach* v. *Van Riswick*, the court said it "was not called upon to determine where the fee dwells during the continuance of the interest of a purchaser at a confiscation sale, whether in the United States, or in the purchaser subject to be defeated by the death of the offender." It had been also suggested that the fee remained in the person whose estate was confiscated, but without any power in him to dis-

pose of or control it. "Perhaps," said Mr. Justice Bradley, in speaking for the court, and referring to those different suggestions, "it is not of much consequence which of these theories, if either of them, is the true one; the important point being that the remnant of the estate, whatever its nature, and wherever it went, was never beneficially disposed of, but remained, so to speak, in a state of suspended animation." And again he said, "it is not necessary to be over-curious about the intermediate state in which the disembodied shade of naked ownership may have wandered during the period of its ambiguous existence. It is enough to know that it was neither annihilated, nor confiscated, nor appropriated to any third party. The owner, as a punishment for his offences, was disabled from exercising any acts of ownership over it, and no power to exercise such acts was given to any other person. At his death, if not before, the period of suspension comes to an end, and the estate revives and devolves to his heirs at law." "It would seem to follow," added the learned justice, "as a logical consequence from the decisions in *Avegno* v. *Schmidt* and *Shields* v. *Schiff*, that after the confiscation of the property the naked fee (or the naked ownership, as denominated in the civil law) subject, for the lifetime of the offender to the interest or usufruct of the purchaser at the confiscation sale, remained in the offender himself; otherwise, how could his heirs take it from him by inheritance? But, by reason of his disability to dispose of, or touch it, or affect it in any manner whatsoever, it remained, as before stated, a mere dead estate, or in a condition of suspended animation. We think that this is, on the whole, the most reasonable view. There is no corruption of blood; the offender can transmit by descent; his heirs take from him by descent; why, then, is it not most rational to conclude that the dormant and suspended fee has continued in him?" And the court held after full consideration that the disabilities which prevented the offending party — Bosworth — from exercising power over the suspended fee, or naked property, was removed by the pardon and amnesty, and that he was restored to all his rights, privileges and immunities, as if he had never offended, except as to

those things which had become vested in other persons; and that, among other things, "he was restored to the control of so much of his property and estate as had not become vested either in the government or in any other person; especially that part or quality of his estate which had never been forfeited, namely, the naked residuary ownership of the property, subject to the usufruct of the purchaser under the confiscation proceedings."

In the confiscation proceedings, under which the property in controversy was condemned and sold, the decree of the United States District Court adjudged, from the proof presented, that Thomas J. Jenkins, the party whose property was proceeded against, was, at the date of its seizure, the owner of the property, which consisted of certain real estate described, and had been since July 17, 1862, and was in the service of the rebels, in arms against the United States, and *that his life estate in the said real estate* was justly and legally forfeited, and it ordered *that such life estate* be condemned and sold, and that the necessary process be issued to the marshal to make such sale and bring the proceeds into court. Upon this decree a sale and conveyance were made by the marshal *of the life estate of said Jenkins* to one Edward Bepler. The only sale and conveyance executed under the decree as thus seen, were of the life estate of Thomas J. Jenkins in the real property in controversy. No condemnation was had or sale made of any other estate in the premises.

In some of the cases, as, for instance, *Bigelow* v. *Forrest*, 9 Wall. 339, a condemnation and sale had been made of the property in fee, and it was held to be valid as a condemnation and sale of the life estate of the offending owner; but the reverse is not true. When the lesser estate — the life estate — is sold, the sale cannot be held to pass the larger estate — the fee.

Of the reversion or remainder of the estate of the offending party no disposition was ever made by the government. It must, therefore, be construed to have remained in him, but, under the ruling in *Wallach* v. *Van Riswick*, without any power in him to alienate it during his life. That disability

was in force when he executed, with his wife, the deed of the premises, August 26, 1865. The proclamation of pardon and amnesty was not made by the President until December 25, 1868. This deed, however, was accompanied with a covenant of seizin on his part, and that he would warrant and defend the title against the lawful claims of all persons whomsoever. Admitting that he had no present estate in the premises, and none in expectancy, he was at liberty to add to his deed the ordinary covenants of seizin and warranty, and the same legal operation upon future acquired interests must be given to them as when accompanying conveyances of parties whose property has never been subject to confiscation proceedings. That warranty estopped him and all persons claiming under him from asserting title to the premises against the grantee and his heirs and assigns, or conveying it to any other parties. When, subsequently, the general amnesty and pardon proclamation was issued, the disability, if any, that had previously rested upon him against disposing of the remaining estate, which had not been confiscated, was removed, and he stood, with reference to that estate, precisely as though no confiscation proceedings had ever been had. The amnesty and pardon in removing the disability, if any, resting upon him, respecting that estate, enlarged his estate, the benefit of which enured equally to his grantee. The removal of his disabilities did not affect the purchaser's right under the decree of confiscation. The latter remained in the full enjoyment of the property during the life of the offending party, but he had no claim upon the future estate, nor did the heirs of the offending party have any such claim upon it as to preclude the operation of any previous warranties by him respecting it. *Van Rensselaer* v. *Kearney*, 11 How. 297; *Irvine* v. *Irvine*, 9 Wall. 617. As the general pardon and amnesty to all persons implicated in the rebellion are not pleaded by the defendant, to relieve the offending party, whose life estate in the premises in controversy was confiscated, from his disabilities respecting the reversionary interest, or naked fee in the premises, it is claimed that no benefit can be derived from them. But this result does not follow from the omission in pleading, for the pardon and amnesty were

made by a public proclamation of the President, which has the force of public law, and of which all courts and officers must take notice, whether especially called to their attention or not. *Jones* v. *United States*, 137 U. S. 202, 212, 215.

Judgment affirmed.

ROSSMAN *v.* HEDDEN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 332. Argued April 25, 1892. — Decided May 16, 1892.

Plain glazed and plain enamelled tiles, imported in February, May and June, 1886, were subject to a duty of fifty-five per cent as other earthen ware not specially enumerated.

The classification of a dutiable article is to be determined as of the date when the law imposing the duty was passed.

THE court stated the case as follows:

This was an action brought in the Circuit Court of the United States for the Southern District of New York to recover duties alleged to have been paid under protest upon three importations of tiles by the steamships Canada, Furnessia and Rhaetia, entered at the port of New York in 1886. The case was tried by the Circuit Court (Lacombe, J.) and a jury in October, 1888.

From the bill of exceptions it appears that the plaintiff introduced testimony showing the importation of the tiles described in the bill of particulars, and that the defendant, as collector of customs, levied and collected duty at 55 per cent ad valorem thereon; and that the plaintiff in due season protested and appealed to the Secretary of the Treasury, and brought suit within the time prescribed by law.

The ground of the objection stated in the protests was, as to the Furnessia, that the tiles "were dutiable at 35 % ad valorem, under section 2499, Rev. Stat., by similitude to

encaustic tiles;" and as to the Canada and Rhaetia, that the tiles "were dutiable at 20 % ad valorem, under Tariff Schedule B, as paving tile, directly or by virtue of section 2499, Rev. Stat. If not so dutiable, then they should pay 35 %, by similitude to encaustic tiles, under said section and schedule."

Testimony was given showing "that upon the entry *ex* Canada, Feb'y 24, '86, a portion of the duty was paid on the 26th day of February, 1886, and the remainder on the 10th day of May, 1886. The only goods in this suit upon said entry were two packages of tiles, marked D. F. & T., 25,306, 25,307, on which duty was taken on entry at 35 % ad valorem, the same being entered as encaustic tiles; both of said packages were delivered to the plaintiff on or before March 18, 1886; duties on said entry to the amount of $126.10 were paid February 26, 1886 (the date of said entry); and an increased duty of $14.30 (total, $140.40) was paid May 10th, 1886. The bill of particulars claimed, as an excess of duty on this entry, $12.20. . . ."

Testimony was further given that all the tiles in dispute were called in trade plain glazed and plain enamelled tiles.

Those having the color in the glaze are termed enamelled, and those having the color in the body are termed plain glazed.

The goods were described in the plaintiff's entries as follows: 1. By the Canada, February 26, 1886: Two packages encaustic tiles. 2. By the Furnessia, May 25, 1886: Eight casks plain white tiles. 3. By the Rhaetia, June 4, 1886: Eight hogsheads, one case, earthenware tiles. "The invoice by the Furnessia described the goods as glazed earthenware tiles."

Witnesses after testifying to the use of tiles on March 3, 1883, and prior thereto, were asked as to their use since, and for what purposes they were used or intended to be used now, or for what purposes imported; but the court sustained objections to the questions and plaintiff excepted.

Testimony was adduced on plaintiff's behalf "by dealers in tiles of long experience, that on March 3, 1883, and immediately prior thereto, the tiles in suit were used in this country

to lay down in cement in vestibules, on hearths, bath-room floors and walls, on kitchen floors under sinks, interspersed with unglazed tiles on floors in church chancels, conservatories, hospital floors and walls, and generally in places where either a non-absorbent cleanly tile was required or where there was little wear and tear and a particularly ornamental effect was desired;" and also "by importers and large dealers in tiles of many years' experience that at the date of the passage of the act of March 3, 1883, the term paving tile had no meaning in the trade and commerce of this country different from its ordinary meaning, and meant tiles used for paving, and gave evidence tending to show that plaintiff's importations per Canada and Rhaetia were such tiles;" and also "by architects of long experience in this country that plaintiff's tiles were used for paving purposes; that tiles used for hearths were considered paving tiles; that the hearth, architecturally, was a part and an extension of the floor, and that a paving tile was a tile made to be laid horizontally and flat and intended so to be used.

"It appeared, however, that the principal use of the tile imported per Furnessia, represented at the trial by sample Exhibit No. 5, was for walls, though sometimes used for hearths, bath-room floors, and under kitchen sinks and other places, at the date of the passage of the act of March 3, 1883; that it was used for the same general purposes as glazed encaustic tiles.

"That encaustic tiles consist of two varieties, glazed and unglazed; the unglazed being generally used for floors and hearths and the glazed being generally used on walls, though sometimes for hearths and other places.

"Testimony was also given on the part of the plaintiff, by large dealers in earthenware of long experience, that the term 'earthenware' as used in the trade and commerce of this country, does not, and did not at the date of the passage of the tariff act of March 3, 1883, include tiles of any kind, but referred principally to tableware and pottery.

"It further appeared that all the tiles in suit and all paving and encaustic tiles described in Tariff Schedule B, are made

of clay, all baked in kilns, and generally made by the dust process, from pulverized clay molded under pressure in a dry state.

"Witnesses on the part of the defendant, including manufacturers of tiles, officers of tile companies, dealers, and salesmen of tiles, tile designers and architects, all of large and long experience, testified that the term paving tile had a well-known designation and definition in the trade and commerce of this country on March 3d, 1883, and prior thereto, and referred to an unglazed, hard-baked tile used for flooring purposes, and that the term paving tile and flooring tile at that time were interchangeably used to denote the same kind of a tile; that the tiles in suit were made of a different kind of clay from the so-called paving tile; that the body of the plaintiff's tiles in suit was softer, more porous, and a more expensive body than the body of a paving tile; that the body of the tiles in suit was composed of china clay, Cornwall stone and flint, and some other materials, costing from $15 to $22 a ton, while the clay used in the manufacture of paving tile is a different and cheaper kind of clay, worth $1.50 a ton, and is not porous and not absorbent, and which body is baked hard to stand the wear and tear of being trod or walked upon; that paving tiles were used to be walked and trod upon where there was wear and tear, and that the tiles such as plaintiff's were used for walls, facings, dadoes, and decorative purposes, and sometimes used in modern hearths, which are protected by a fender and raised from the floor and not to be walked upon and are considered part of the mantels and grates and not as a part of the floor; that such tiles as plaintiff's have been used somewhat for hearths since March 3, 1883, and were not used to any extent on hearths prior to March 3d, 1883.

"That the tiles in suit were not adapted for any wear and tear, and would be dangerous to walk upon on account of their slippery surface, and easily become broken if used for flooring purposes, except for ornament on floor borders. That encaustic tiles are made of several kinds of clay instead of one only, with the colors burned in.

"That encaustic tiles are both glazed and unglazed; that the

unglazed encaustic were sometimes used for flooring purposes, and the glazed encaustic were for ornamental purposes, and for walls, dadoes and facings.

"The tiles are now generally made by the dust process, dry clay being subjected to great pressure in moulds, and then baked; that the paving tiles are baked once, the glazed or enamelled tiles are baked twice; that the modern hearth is about eighteen or twenty inches wide, guarded by a brass or iron fender, and is not used to be walked upon, and that such hearth is not considered by architects to be a part of the floor.

"The testimony of a potter of very long experience tended to show that in his experience these articles were earthenware."

During the course of the trial the court held that there was no "room for the similitude doctrine," and that there was only a single question for the jury, "whether they are paving tiles or not," and plaintiff excepted.

As to the importation by the Canada, the court instructed that the verdict must be for the defendant "for the reason that the payment was not in fact made to obtain possession of the goods." As to that by the Furnessia, the court directed a verdict for the defendant because the protest of the plaintiff restricted him to the single claim of similitude to encaustic tile, which could not be sustained upon the testimony. As to the importation by the Rhaetia, the court charged:

"The old English word 'ware,' with which you are familiar in the combination of hardware, tinware, etc., is a comprehensive word. It is defined by Worcester and Webster as 'goods, commodities, merchandise,' and in the same dictionaries the term 'earthenware' is defined as 'ware made of earth or clay.'

"Reading for the word 'ware' the definition which the dictionary gives for it, we will find as the definition of 'earthenware' 'goods, commodities or merchandise made of earth or clay.'

"That, you see, is a very general, broad and comprehensive word, and it was evidently used by Congress in that same sense, for we find the word 'earthenware' used as the heading of a schedule which contains articles as dissimilar as a porcelain teacup, a Parian vase, a fire-brick, and a slate pencil.

"To which plaintiff, by his counsel, then and there excepted.

"It is sufficiently broad, this word earthenware, to cover tiles, to cover the articles imported by the plaintiff here as they appear and have been described by the witnesses; therefore, unless they are covered by some other provision of the tariff act, they must be held dutiable as earthenware and the determination of the collector in that respect sustained.

"To which the plaintiff, by his counsel, then and there excepted."

Several instructions were requested by plaintiff and refused, but as the affirmative rulings involved the disposition of the questions presented by them, they need not be repeated here.

The jury found a verdict for the defendant, and judgment was entered thereon, and a motion for new trial having been overruled, the case was brought by writ of error to this court.

The charge of the court is reported in full in 37 Fed. Rep. 99.

By section 6 of the act of March 3, 1883, (22 Stat. 488, 491, 495, c. 121,) the following sections of the Revised Statutes were reënacted as amended.

"SEC. 2499. There shall be levied, collected and paid on each and every non-enumerated article which bears a similitude, either in material, quality, texture or the use to which it may be applied, to any article enumerated in this title as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles on which different rates are chargeable, there shall be levied, collected and paid on such non-enumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest duty; and on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which the component material of chief value may be chargeable."

"SEC. 2502. There shall be levied, collected and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty which are, by the schedules, respectively prescribed, namely:"

"SCHEDULE B. — EARTHENWARE AND GLASSWARE.

"Brown earthenware, common stoneware, gas retorts and stoneware not ornamented, twenty-five per centum ad valorem.

"China, porcelain, parian and bisque, earthen, stone and crockery ware, including plaques, ornaments, charms, vases and statuettes, painted, printed or gilded, or otherwise decorated or ornamented in any manner, sixty per centum ad valorem.

"China, porcelain, parian and bisque ware, plain white, and not ornamented or decorated in any manner, fifty-five per centum ad valorem.

"All other earthen, stone and crockery ware, white, glazed or edged, composed of earthy or mineral substances, not specially enumerated or provided for in this act, fifty-five per centum ad valorem.

"Stoneware above the capacity of ten gallons, twenty per centum ad valorem.

"Encaustic tiles, thirty-five per centum ad valorem.

"Brick, fire-brick and roofing and paving tile, not specially enumerated or provided for in this act, twenty per centum ad valorem.

"Slate, slate-pencils, slate chimney pieces, mantels, slabs for tables and all other manufactures of slate, thirty per centum ad valorem.

"Roofing-slates, twenty-five per centum ad valorem."

Mr. Edward Hartley for plaintiff in error.

Mr. Assistant Attorney General Parker for defendant in error.

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

By the protest as to the importation by the Rhaetia it was claimed that the goods were subject to duty at twenty per

cent as paving tiles, or by similitude to paving tiles, or chargeable at thirty-five per cent by similitude to encaustic tiles. The entry described the articles as "eight hogsheads, one case, earthenware tiles," and the collector assessed them as earthenware composed of earthy substances. The court held that the similitude clause did not apply, and the jury found against the plaintiff upon the only issue submitted to them, namely, whether the articles were paving tiles or earthenware. It was not contended that these tiles were encaustic tiles, composed of several kinds of clay instead of one only; and as to their identity with paving tiles, defendant's evidence tended to show that at the time of the passage of the act paving tiles were commercially known as unglazed, hard-baked tiles, and that the tiles in suit were of a different kind of clay, composed of softer, more porous and more expensive clays, and costing ten times as much as paving-tile clay. We must assume that the tiles were neither encaustic nor paving tiles, and if they properly fell within the fourth paragraph they cannot be held to be non-enumerated articles and taxed by similitude. *Arthur* v. *Butterfield*, 125 U. S. 70; *Mason* v. *Robertson*, 139 U. S. 624.

The covering of roofs, floors and walls with tiles made of many different materials is of very ancient origin, and there is much interesting information in respect of their manufacture and that of pottery to be found in works on those subjects.

So far as this case is concerned, we see no reason to question the sufficiency of the ordinary definition of tiles as plates or pieces of baked clay, used for covering roofs, floors and walls, and for ornamental work of various kinds, as well as for drains, etc. And that such pieces being made of earth are earthen, and being earthen goods, commodities or merchandise, are "earthenware," we think is clear.

Webster defines "earthenware" as "vessels, and other utensils, ornaments, or the like, made of baked clay;" and we agree with counsel for defendant in error that the words "or the like," and the cross-reference to "pottery," are broad enough to include the tiles in suit under the fourth paragraph.

The title to Schedule B divides the subjects under it into

two classes, "earthenware," and "glassware," but counsel insists that the groups are three: "(1) earthenware; (2) tiles, brick, and slate; (3) glass and glass articles."

Reference is made to the tariff legislation since 1842 to show that tiles and earthenware were considered different things, and that tiles were always associated with bricks as similar things. It is argued that this distinction was intended to be preserved in the act under consideration; but, we are of opinion that this conclusion does not follow, and that it was the intention of Congress to place all of the articles in Schedule B in one or the other of the two classes designated in the heading. All of the schedule relates to glass, except the first nine paragraphs. The first five, it is conceded, relate solely to earthenware, and the next four are encaustic tiles; brick, fire-brick, and roofing and paving tiles; slates, slate-pencils, etc.; and roofing slates; all consisting of earths, though only two hardened by man. These four are all in some respects in similitude, and although a difference between a Sevres vase and a roofing slate may be admitted, they are not inappropriately placed where they are, and we perceive no adequate ground for holding that they should be treated as a class by themselves.

The fact seems to be that these tiles were decorative earthenware tiles, called in trade, as appears from the evidence, plain glazed and plain enamelled tiles, those having the color in the glaze being termed enamelled, and those having the color in the body being termed plain glazed; and in reference to such tiles the department ruling is that they are properly assessed as "glazed earthenware." Syn. Dec. 1885, 7051; and see *Id.* 1877, 3352; *Id.* 1878, 3705.

We think the view taken by the court entirely correct, and this disposes also of the importation by the Furnessia. The protest rested upon the sole ground that the articles "were dutiable at 35 % ad valorem, under section 2499, Rev. Stat., by similitude to encaustic tiles." The articles were described in plaintiff's entry as "eight casks plain white tiles," and in the invoice as "glazed earthenware tiles." The collector taxed them under the fourth paragraph.

It appeared that the principal use of these tiles was for walls, though sometimes used for hearths, bath-room floors, and under sinks, and for the same general purposes as glazed encaustic tiles; but if they were covered by the fourth paragraph then they could not be classed with encaustic tiles by similitude. And that these "plain white tiles," or "glazed earthenware tiles" were within that paragraph, follows from what we have already said. There was nothing to be submitted to the jury.

The tiles brought by the Canada were described in plaintiff's entry as "two packages encaustic tiles," and were delivered to plaintiff on or before March 18, 1886. It was shown that a portion of the duty was paid on the day of entry, February 26, and the remainder May 10. As plaintiff had been in possession of these tiles for some weeks before payment of the excess, he did not pay in order to obtain possession, and the instruction of the court to find for the defendant was therefore correct.

Plaintiff's counsel insists that he originally paid the difference between paving tiles and encaustic tiles to obtain possession, but as the tiles were described as encaustic, and chargeable by law as such at a duty of thirty-five per cent, this contention is inadmissible. There is nothing to show that the Circuit Court was apprised that plaintiff's claim was that he had paid the excess between twenty and thirty-five per cent, and as payment of the excess between thirty-five and fifty-five per cent was made May 10, and the protest filed and appeal taken to the Secretary of the Treasury on that day, it is plain that the Circuit Court was not mistaken as to the facts.

Finally, we are of opinion that the court did not err in excluding evidence as to the purposes for which similar tiles were used after March 3, 1883, or for what purposes they were intended to be used or were imported, at the time of the trial. This came within the rule that the classification is to be determined as of the date when the law imposing the duty was passed. *Curtis* v. *Martin*, 3 How. 106, 109; *American Net and Twine Co.* v. *Worthington*, 141 U. S. 468, 471.

Judgment affirmed.

CROSS *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 1525. Submitted April 25, 1892. — Decided May 16, 1892.

Under the act of February 6, 1889, "to provide for writs of error in capital cases," 25 Stat. 655, c. 113, a writ of error does not lie from this court to the Supreme Court of the District of Columbia to review a judgment of that court in general term affirming a judgment of the trial court convicting a person of a capital crime.

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

Mr. Solicitor General for the motion.

Mr. Charles Maurice Smith and *Mr. Joseph Shillington* opposing.

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

William D. Cross was tried upon an indictment for murder in the Supreme Court of the District of Columbia, holding a criminal term, in March, 1890, and a verdict of guilty having been returned, and a motion for a new trial heard and overruled, was sentenced to death. He thereupon prosecuted an appeal to the court in general term, which reversed the conviction and granted a new trial. 19 Dist. Columb. 562.

A second trial was had at the June, 1891, special criminal term, which again resulted in a verdict of guilty, and, a motion for a new trial having been made and overruled, he was, July 30, 1891, sentenced to be executed January 22, 1892. From this conviction he prosecuted an appeal to the court in general term, which, on January 12, 1892, finding no error in the record, affirmed the judgment. The opinion, by Cox, J., will be found in 20 Washington Law Rep. 98.

On January 21 a writ of error from this court was allowed,

on petition, by the Chief Justice of that court, citation was signed and served, and the time for filing the record enlarged.

On the same day an order was entered by the court in general term, "that the execution of the sentence of death pronounced against the defendant by the special term of this court on the thirtieth day of July in the year of our Lord one thousand eight hundred and ninety-one, to take place on the twenty-second day of January, 1892, be and the same is hereby postponed until the tenth day of June, 1892, between the same hours specified in the said judgment of the said special term."

The case comes before us on motion to dismiss the writ of error.

Under acts of Congress, the Supreme Court of the District of Columbia consists of one chief justice and six associate justices, appointed by the President, by and with the advice and consent of the Senate, and holding their offices during good behavior. Special and general terms of the court, and appeals from the former to the latter, are provided for. General terms may be held by three justices, two constituting a quorum, while special terms are held by one justice. Any one of the justices may hold a criminal court for the trial of all crimes and offences arising in the District. Rev. Stat. Dist. Col. §§ 750, 753, 754, 757, 762, 763, 772; 19 Stat. 240, c. 69, § 2; 20 Stat. 320, c. 99, § 1.

By the act of July 7, 1838, 5 Stat. 306, c. 192, a Criminal Court was established in the District of Columbia; and it was held in *Ex parte Bradley*, 7 Wall. 364, at our December term, 1868, that under the act of March 3, 1863, 12 Stat. 762, c. 91, by which the courts of the District were reorganized, the Criminal Court still remained a separate and independent court, although held by a justice of the Supreme Court of the District created by the act, and that the only jurisdiction of the Supreme Court in criminal cases was in an appellate form. But by the act of June 21, 1870, 16 Stat. 160, c. 141, it was provided, as now embodied in section 753 of the Revised Statutes of the District, that the several general terms

and special terms of the various courts, circuit, district, and criminal, should be considered terms of the Supreme Court of the District, and that the judgments, decrees, sentences, etc., of the general terms, and of the special terms, and of the various courts should be the judgments, decrees, sentences, etc., of the Supreme Court, but that this should not affect the right of appeal as provided by law.

Section 772 reads: "Any party aggrieved by any order, judgment or decree, made or pronounced at any special term, may, if the same involve the merits of the action or proceeding, appeal therefrom to the general term of the supreme court, and upon such appeal the general term shall review such order, judgment or decree, and affirm, reverse or modify the same, as shall be just."

And under section 770: "The supreme court in general term, shall adopt such rules as it may think proper to regulate the time and manner of making appeals from the special term to the general term," etc.

The act of February 25, 1879, 20 Stat. 320, c. 99, forbade any justice to sit in general term to hear an appeal from any judgment or decree or order which he may have rendered at special term.

By the act of 1838 a writ of error lay to the Criminal Court from the Circuit Court of the District, and postponement of execution in capital cases was provided for, and this was carried into § 845 of the District Revised Statutes.

The Supreme Court sitting at special term and the Supreme Court sitting in general term are the same tribunal, but the court in general term exercises appellate powers and is an appellate court, although it may also exercise jurisdiction in hearing matters in the first instance, (Rev. Stat. Dist. Col. §§ 770, 800,) and the final judgments or decrees which may be brought here by appeal or writ of error are those rendered by the general term. Such review may be had when the matter in dispute exceeds $5000, (Rev. Stat. § 705; 20 Stat. 320, c. 99, § 4; 23 Stat. 443, c. 355, § 1; Rev. Stat. Dist. Col. §§ 846, 847;) but necessarily this does not apply to criminal cases.

The language of sections 846, 847 of the Revised Statutes of the District of Columbia in reference to the reëxamination of the final orders, judgments or decrees of the Supreme Court of the District is taken from the act of March 3, 1863, 12 Stat. 762, 764, c. 91, § 11, which was itself adopted from section 8 of the act of February 27, 1801, 2 Stat. 103, c. 15, repeated in the act of February 25, 1879, 20 Stat. 320, c. 99, § 4, and referred to in the act of March 3, 1885, 23 Stat. 443, c. 355, and is always coupled with the provision that the appellate jurisdiction should not be exercised except where the matter in dispute exceeds a certain sum, or, under the act of 1885, where the validity of a patent or copyright is involved or the validity of a treaty or statute of or authority exercised under the United States is drawn in question.

We have, of course, no general authority to review, on error or appeal, the judgments of the Circuit Courts of the United States in cases within their criminal jurisdiction, or those of the Supreme Court of the District of Columbia or of the Territories; and when such jurisdiction is intended to be conferred, it should be done in clear and explicit language. *Farnsworth* v. *Montana*, 129 U. S. 104; *United States* v. *Sanges*, 144 U. S. 310, 320; *United States* v. *More*, 3 Cranch, 159.

United States v. *More* was decided in February, 1805, and from that time it has been assumed that criminal cases could not be brought from the courts of the District to this court.

In such cases, remarked Mr. Justice Miller in *Ex parte Bigelow*, 113 U. S. 328, 329, "The act of Congress has made the judgment of that court conclusive, as it had a right to do, and the defendant having one review of his trial and judgment has no special reason to complain."

By sections 651 and 697 of the Revised Statutes provision was made for a review of questions arising in criminal cases under certificates of division of opinion, and this was so provided as early as 1802. Act of April 29, 1802, § 6, 2 Stat. 156, 159, c. 31. But this provision has never been supposed to refer to the courts of the District of Columbia.

By section five of the Judiciary Act of March 3, 1891, 26

Stat. 826, c. 517, it is provided that appeals and writs of error may be taken "from the District Courts or from the existing Circuit Courts directly to this court in cases of conviction of a capital or otherwise infamous crime;" and we have been constrained to hold that the judgments of the Supreme Court of the District of Columbia in criminal cases are not embraced by the provisions of that section. *In re Heath, Petitioner*, 144 U. S. 92. Unless, therefore, as is indeed not disputed, this writ of error comes within the act of Congress of February 6, 1889, entitled "An act to abolish Circuit Court powers of certain District Courts of the United States and to provide for writs of error in capital cases and for other purposes," 25 Stat. 655, c. 113, it cannot be maintained. This act contains seven sections, of which the first five relate, in substance, to the establishment of Circuit Courts for the Eastern District of Arkansas, the Northern District of Mississippi, and the Western District of South Carolina, and the withdrawal of Circuit Court powers from certain District Courts. The seventh provides when the act shall take effect.

Section six is as follows: "That hereafter in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be reëxamined, reversed or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as said court may prescribe. Every such writ of error shall be allowed as of right and without the requirement of any security for the prosecution of the same or for costs. Upon the allowance of every such writ of error, it shall be the duty of the clerk of the court to which the writ of error shall be directed to forthwith transmit to the Clerk of the Supreme Court of the United States a certified transcript of the record in such case, and it shall be the duty of the Clerk of the Supreme Court of the United States to receive, file and docket the same. Every such writ of error shall during its pendency operate as a stay of proceedings upon the judgment in respect of which it is sued out. Any such writ of error may be filed and docketed

in said Supreme Court at any time in a term held prior to the term named in the citation as well as at the term so named; and all such writs of error shall be advanced to a speedy hearing on motion of either party. When any such judgment shall be either reversed or affirmed the cause shall be remanded to the court from whence it came for further proceedings in accordance with the decision of the Supreme Court, and the court to which such cause is so remanded shall have power to cause such judgment of the Supreme Court to be carried into execution. No such writ of error shall be sued out or granted unless a petition therefor shall be filed with clerk of the court in which the trial shall have been had during the same term or within such time, not exceeding sixty days next after the expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record." Taking the sixth section in connection with the others, it would be quite within accepted rules of construction to conclude that it refers only to Circuit and District Courts of the United States, and this is worthy of mention, though not the ground of our decision.

It is contended on behalf of the government that the writ of error will not lie because the Supreme Court of the District of Columbia is not a court of the United States, within the intent and meaning of the section. *McAllister* v. *United States*, 141 U. S. 174, is cited with the decisions referred to therein, as sustaining that view; but it is to be remembered that that case referred to territorial courts only; and, moreover, if the disposal of the motion turned on this point, the words "any court of the United States" are so comprehensive that, used as they are in connection with convictions subject to the penalty of death, the conclusion might be too technical that Congress intended to distinguish between courts of one class and of the other. But the difficulty with the section is that it manifestly does not contemplate the allowance of a writ of error to any appellate tribunal, but only to review the final judgment of the court before which the respondent was tried, where such judgment could not otherwise be reviewed by writ of error or appeal. It is the final judgment

of the trial court that may be reëxamined upon the application of the respondent, and it is to that court the cause is to be remanded, and by that court that the judgment of this court is to be carried into execution. The obvious object was to secure a review by some other court than that which passed upon the case at *nisi prius.* Such review by two other courts was not within the intention, as the Judiciary Act of March 3, 1891, shows. This is made still clearer by the further provision that no such writ of error "shall be sued out or granted unless a petition therefor shall be filed with the clerk of the court in which the trial shall have been had during the same term or within such time, not exceeding sixty days next after the expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record." This language is entirely inapplicable to the prosecution of a writ of error to the judgment of an appellate tribunal affirming the judgment of the trial court. And the case before us shows this.

The Supreme Court of the District of Columbia sitting in general term in review of the sentences of the Criminal Court held by one of the justices, occupies the same position as any other court with appellate jurisdiction. It has in this case affirmed the judgment of the Criminal Court. The writ of error from this court was not granted upon a petition filed during the term, or within sixty days next after the expiration of the term, of the court at which the trial was had and sentence pronounced, yet the statute is explicit that no such writ of error shall be sued out or granted unless thus applied for. *Ball* v. *United States*, 140 U. S. 118, 129. What happened here would happen in most, if not all, cases if appellate tribunals were embraced by the section. Compliance with the law would be wellnigh, if not altogether, impossible.

It is to be observed that the writ runs to the judgment of the general term, yet if this man goes to his death, it is not by force of the judgment of the general term, but of the sentence of the criminal term. The court in general term did indeed postpone the execution of the sentence to another day, a postponement rendered necessary by the granting of this writ, but its judgment

was one of affirmance merely. We have recently had occasion to consider the distinction between such a judgment and the original sentence, in *Schwab* v. *Berggren* and *Fielden* v. *Illinois*, 143 U. S. 442, 452. It was ruled in those cases that the presence of defendants condemned to death was not essential when the judgments were affirmed against them by the appellate court, and that the sentences were not vacated by the writs of error, but only their execution stayed pending proceedings in the higher court. The Supreme Court of Illinois, under statutory authority, fixed another day when the punishment prescribed by the judgments which it affirmed should be inflicted, but it was held that that did not affect the question raised, as no re-sentence was required; and, besides, that the time and place of execution were not strictly parts of the judgment or sentence unless made so by statute. 143 U. S. 452.

In the light of these considerations, we cannot entertain any other view of the purview of this section than that above expressed. We are of opinion that the act of February 6, 1889, did not authorize the issue of this writ, and we are therefore compelled to order the writ of error to be

Dismissed.

OTERI *v.* SCALZO.

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

No. 166. Argued April 8, 1892. — Decided May 16, 1892.

A bill in equity set forth the making of a partnership between the plaintiffs S. and R. and the defendant O., each to contribute $5000. It charged fraud, misappropriation of money and mismanagement on the part of O.; that he had vilified and traduced them, for which they reserved their right of action, and it prayed (1) for a receiver; (2) that the $15,000 capital so contributed should be paid into court; (3) for an injunction restraining O. from using the partnership name, etc.; (4) for a dissolution. The cause was referred to a master to take proof and report. The master found that there had been violations of the partnership agreement by the plaintiffs in not paying up their contributions to the capital at the times agreed upon and by O. in various ways set forth,

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but that these had been condoned in November, 1884, the plaintiffs paying up their capital in full; that the partnership therefore was to be regarded as continuing uninterruptedly from July 1, 1884, to February 2, 1885, when O. was called to answer in the state court the suit of his copartners for its dissolution, from which time it was to be regarded as dissolved; and that the plaintiffs had incurred expenses on behalf of the firm amounting to $2538.52. On the coming in of this report, it appearing that R. had assigned all his interest in the suit to S., the court decreed that S. for himself, and as subrogee of R., recover from O. $10,000, with interest; that in other respects the report be confirmed; and "that the complainants' bill of complaint be dismissed without prejudice to their right in some other form of action, as they may be advised, to prosecute the matter of defamation of character set forth in the bill of complaint." *Held*,

(1) That equity has jurisdiction, where a person has been induced, by fraudulent representations, to enter into a partnership, to rescind the contract at his instance, and put an end to it *ab initio;*

(2) That if the case, upon the evidence, did not entitle complainants to a return of their capital, and to be placed in the same situation, as far as practicable, as if they had never entered into the partnership, but did authorize the ordinary decree for a dissolution and accounting, relief could be awarded in the latter aspect, even though the bill were not framed with precision, in the alternative, for a cancellation or for a dissolution and accounting; and that if the specific prayer were insufficient, such a decree could be maintained under the prayer for general relief, since it would be conformable to the case made by the bill;

(3) That the Circuit Court did not err in rendering a decree at variance with the conclusions of the master (*Kimberly* v. *Arms*, 129 U. S. 512, distinguished);

(4) That the evidence did not furnish sufficient ground for decreeing that complainants are entitled to the return of their capital, within the principle of the rule which has sometimes been applied in such cases;

(5) That the master was correct in holding that the preponderance of evidence was to the effect that O.'s action early in October, in regard to continuing the business in his own name, was condoned, and the difficulties between the partners adjusted for the time being;

(6) That the case was one for an accounting rather than necessarily for a return of capital; and that complainants should not be reinstated at defendant's expense in the same position as if they had not entered upon an enterprise which turned out to be unfortunate.

THE court stated the case as follows:

Vincenzo Scalzo and the firm of Randazzo & Di Christina,

composed of Vincenzo Randazzo and Antonio Di Christina, aliens, filed their bill of complaint against Joseph Oteri, a citizen of the State of Louisiana, in the United States Circuit Court for the Eastern District of Louisiana, June 11, 1885, alleging that on June 24, 1884, complainants entered into a contract of copartnership with defendant to carry on a general commission business and import fruits from Europe, as set forth, under the firm name of Joseph Oteri & Co.; that Scalzo, Di Christina and Oteri went to Europe thereafter in the summer of 1884 to make arrangements for such copartnership, and after various contracts had been made in the firm name, Scalzo was authorized by his copartners to remain a longer time to make additional contracts, which he did; and that thereafter consignments under said contracts coming to Joseph Oteri & Co. were declined by Oteri against the protest of complainants, who were obliged to care for and protect the same. It was further averred that on October 7, 1884, defendant, in violation of the contract of copartnership, "(and with malice, without cause, probable or otherwise, and in bad faith, for which orators reserve their action for damages,)" after said contracts had been made in good faith for the firm and before any partnership assets or capital had been used, wrote to various parties in Italy that all contracts made for the firm should enure to his private benefit, and he would not recognize his firm therein; that Oteri had refused to make or cause to be made, as the general manager of the affairs of the firm, monthly trial balances as agreed upon, notwithstanding complainants' demand; that defendant had vilified and traduced their character and injured their credit and business reputation, and refused to carry out contracts for the firm, made with his knowledge and consent; that he held in his hands complainants' money amounting to $10,000, and refused to return the same, although duly demanded; and that "they are entitled to be refunded their said capital with legal interest from the 24th day of June, 1884."

The bill further alleged that, apart from the acts of the defendant in refusing various consignments made to the firm under their contracts in Europe, they were not aware until

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a short time since of his fraudulent act in declining and refusing to carry on the contract of copartnership. Complainants further set up misconduct as to a cargo, in respect of which defendant declined to attend to the interests of the firm, and involved complainants in loss and damage to the consignors in a large sum, as they were obliged to protect the consignment and save themselves from further loss, the proceeds being paid over to Oteri for the benefit of the consignor. Complainants charged that they were ignorant as to the partnership affairs; that defendant declined to give any knowledge of or concerning the same; that defendant had converted the funds of complainants to his own use, and had not held the same to the credit of the partnership; and that the capital should be deemed to be taken as a part of the assets of the partnership liable to the claims of the creditors thereof, if any existed, or be refunded to complainants with interest, if there were no creditors. Complainants then prayed as follows: "1. That a receiver may be appointed to take charge of all partnership books and papers and accounts, goods, and effects, and to collect the debts due thereto, and to preserve and dispose of the same under the direction of the court. 2. That said Joseph Oteri may be required to bring into this court, to be deposited to the credit of this cause, the aforesaid sum of fifteen thousand dollars and such other sum as may be in his hands arising from profits thereof or thereon, either in the business of said copartnership (if any) or from the use thereof by said Joseph Oteri. 3. That the said Joseph Oteri may by injunction be restrained from using the name of said copartnership, negotiating any bill or note in said copartnership name, or contracting any debt whatsoever on account thereof, or in any manner intermeddling therewith. 4. That said partnership may be decreed to be dissolved as if the same had never been made, by reason of the acts of said defendant; that an account of its business may be taken under the direction of this court, and that its legal liabilities may be paid and charged against the said Joseph Oteri, and that the capital of your orators, with interest, be restored to them in the premises or otherwise at the discretion of the court;" and for general relief.

Statement of the Case.

Defendant filed a general demurrer, which was overruled by the court, and thereupon filed his answer, to which was attached a certified copy of the partnership act. Defendant admitted that Scalzo, Di Christina and himself went to Europe, in furtherance of the partnership business, but denied that Scalzo was authorized to make contracts, and averred that if he made any they were unauthorized by the firm, and not binding upon it or the defendant. He denied refusing to accept consignments coming to the firm, except that he refused to recognize or to be bound by a contract made by Scalzo with his brother in Sicily to ship fruit to the firm, which contract Scalzo had no right or authority to make; and denied that he wrote to Italy as alleged, or that monthly balances had not been furnished, or that he had vilified and traduced complainants, or converted their money, or involved them in loss and damage in respect of the sale of a particular cargo. Defendant also denied that complainants were not aware of how the partnership funds were invested, and alleged that books of account were kept which were always open to the examination of complainants, and he annexed the last trial balance from the books; a statement of the assets and liabilities of the firm; a statement of the profit and loss account; and a statement of what was due to each partner, all as of the first day of June, 1885. Defendant averred that since June 1, 1885, and for a long time prior thereto, he had transacted no business for the firm on account of complainants having sued for a dissolution February 4, 1885; and he alleged that the statements annexed correctly exhibited the state of the affairs of the firm at their date.

These statements showed cash on hand $3517.26, after deducting an outstanding liability of $140, and uncollected assets to the amount of $5029.39, including the note of one Zuccas for $2320.75; expenses, $3542.98, and other items of profit and loss, resulting in a loss of $2658.74. Oteri was credited with $5000 and a cash item of $74.61, and debited with cash drawn, $1465.07; one-third of loss, $886.24; one-third of assets uncollected, $1676.46; and a balance of cash due him of $1046.84.

Statement of the Case.

Scalzo was credited with $5000, and cash, $1026.93; and charged with cash drawn, $2197.33; one-third loss, $886.24; one-third uncollected assets, $1676.47; and a balance of cash due him of $1266.88.

Randazzo and Di Christina were credited with $5000 and a cash item of $15; and charged with cash drawn, $1248.75; one-third loss, $886.25; one-third assets uncollected, $1676.46; and a balance of cash due them of $1203.54.

The act of copartnership was annexed, signed by the parties and stating that they appeared before a notary public, and "declared that they hereby agree to enter into a copartnership for the purpose of carrying on a general commission business and the importation of fruit from Europe and for all matters and things thereto appertaining under the following stipulations and conditions, to wit:

"First. The partnership is to be carried on under the firm name of Joseph Oteri & Co., is to be domiciled in the city of New Orleans, and is to exist and continue for the space of two years, to be computed as commencing on and from the first day of July, eighteen hundred and eighty-four, unless sooner dissolved by mutual consent.

"Second. The capital invested in this copartnership consists of a sum of fifteen thousand dollars ($15,000) in United States currency and has been contributed by the parties hereto in the manner following, to wit:

"Five thousand dollars each of said Oteri and Scalzo, and the remaining five thousand dollars by said firm of Randazzo and Di Christina.

"It is hereby agreed that in the event more capital should be needed at any time during the existence of the contract to carry on said business the said Joseph Oteri shall, if he deems proper and not otherwise, furnish same surplus capital thus needed, and shall be entitled to and charge interest thereon at the rate of eight per cent per annum.

"Third. It is hereby furthermore agreed that said Oteri shall be the manager of said firm and as such have the exclusive control and direction of its affairs, as also of signing all documents of whatsoever nature or kind, without any excep-

tion or reservation whatsoever, pertaining to the business of the said firm and be, as he is, alone entitled to sign the name of said firm on all checks, bills of exchange, acceptances, bills of lading, promissory notes or other obligations of said firm; and that in the event of any other partner or partners infringing or violating this agreement by sending any orders to Europe or elsewhere or by signing any other documents whatsoever, then, and in such an event, the interest of the defaulting partner or partners shall at once cease and determine.

"Fourth. That said Oteri shall, as he is hereby empowered to, delegate all or part of his powers herein by power of attorney to one or more persons wherever in his judgment he shall deem the same expedient.

"Fifth. Books of account shall be kept in which all the dealings and transactions of said firm shall be entered from day to day and fairly written, from which trial balances shall be taken monthly and a final balance at the end of each year, which books shall be kept at all times open to the inspection of all parties in interest.

"Sixth. All profits, gains and increases arising or accruing from said business, and all losses, charges and expenses whatsoever incidental thereto shall be shared and divided and borne out and paid by the parties hereto in the proportions of one-third to each of said Oteri and Scalzo and the remaining one-third to said firm of Randazzo and Di Christina.

"It is furthermore hereby agreed that neither the capital invested in said partnership nor the profits arising therefrom shall be withdrawn by said copartners during the continuance of this contract, save and except that each of said partners shall have the right of withdrawing at the end of each business year one-half of his share in the profits of the concern.

"It is furthermore agreed that in addition to the interest of said Antonio Di Christina as a member of said firm of Randazzo and Di Christina herein he shall be entitled to and receive out of the net profits of the business of said firm of Joseph Oteri & Co. at the end of each of its business years two per cent as an extra compensation for services to be rendered by him to the business of said firm.

Statement of the Case.

"Seventh. In the event of the death of either of said Oteri and Scalzo or both said Randazzo and Di Christina the partnership shall by the fact at once be dissolved and the remaining partner or partners allowed four months from the time of such dissolution to liquidate the affairs of the concern."

The cause being at issue, an examiner was appointed to take testimony, and report the same to the court, and the cause thereafterwards came on to be heard on the pleadings and proofs, and "was thereupon argued by counsel for the respective parties and referred by consent to J. W. Gurley, Esq., as master to pass upon the accounts herein and to report thereon at as early a day as possible." This was on March 4, 1887, and on the 18th of the following May the master filed his report. This report dealt only with the questions relating to the partnership, those arising in reference to damages for defamation of character having been reserved. He found that some time after the formation of the partnership, Oteri, Scalzo, Di Christina, and their bookkeeper, Terni, went to Europe in the business interests of the firm; and that the charge made in the cash book of the firm of $2538.32 for the expenses of the trip, which complainants contended was an overcharge, was correct and should be allowed: that at the time of the departure for Europe, Scalzo had paid into the capital $2000, and Randazzo and Di Christina $2500: "3. That Oteri while in Europe made business arrangements in the interest of the firm. 4. That Vincenzo Scalzo remained in Europe for some time after the departure of Oteri for home," but "had no right to make contracts for the firm." "5. That some time after Scalzo's return from Europe near the middle of September, as near as the master can determine, Scalzo and Randazzo & Di Christina paid the balance due by them on the capital of the firm, viz.: Scalzo $3000 and Randazzo & Di Christina $2500. 6. That the books of the firm were not kept in strictly mercantile manner. 7. That Oteri did for a time after the formation of the partnership and before the 14th of November, 1884, drop the name of the firm and carry on the business in his own name. 8. That Oteri did not furnish his copartners monthly trial balances. 9. That on the 14th November, 1884, both

Terni, the bookkeeper, & A. Di Christina, the partner of Randazzo, wrote, with the approval of Oteri, to their correspondents in Europe that all the troubles between the members of the firm of Joseph Oteri & Co. had been adjusted; that Vincenzo Scalzo and Randazzo and Di Christina had paid in their share of the capital, and that the business would thereafter be conducted in the firm's name." He held that Oteri had violated the act of partnership in the particulars named, and also that there was a violation on the part of the other partners in not completing, until November, the payment of their share of the capital, which was due in July, but that on November 14, 1884, "all the acts theretofore committed, or omitted, by any of the partners in violation of the partnership agreement were mutually condoned, and that harmony was restored between the members of the firm, A. Di Christina himself actively aiding in making the announcement." The report discussed the evidence bearing upon the contention of complainants in avoidance of that adjustment, but concluded that all matters in controversy prior to November 14, 1884, "were amicably adjusted on that day and should be considered settled."

The master further found that the evidence did not show "that Oteri ever profited to the exclusion of his partners, nor an instance in which a loss of money to the firm resulted from an unauthorized act of any of the partners," and was of opinion that all the losses were attributable "to the depressed condition of the fruit market at the time of the arrival of the consignments and not to the acts of any of the partners." He recommended that the results from the books, as stated by witnesses, should be accepted as correct, and held that "the partnership should be considered as continuing uninterrupted from 1st July, 1884, to the 2d Feb'y, 1885, at which date Oteri was called to answer in the state court the suit of his copartners for its dissolution; that from the 2d Feb'y, 1885, Oteri had no authority to enter into any new engagements for, or on behalf of his copartners, but it remained his duty to conduct to conclusion all obligations and contracts made or commenced before that date."

Argument for Appellee.

The master was satisfied from the evidence that no amicable adjustment of the partnership could or would have been made by the partners, but that a suit was necessary to settle their affairs, and recommended that the costs be equally divided between the three.

To this report elaborate exceptions were filed, which were considered by the master and overruled. Randazzo and Di Christina subsequently assigned to Scalzo all their right and interest in the suit. The case having been heard on the exceptions to the master's report, it was decreed "that the complainant Vincenzo Scalzo, for himself and as subrogee of the other complainants, the firm of Randazzo & Di Christina, do have and recover of and from the defendant, Joseph Oteri, the sum of ten thousand dollars ($10,000), the amount put in the partnership by said complainants, less ⅔ of $2538.32, expended in the interest of the partnership, with legal interest, to wit, 5% per annum, thereon from the date of judicial demand, June 11, 1885, until paid; that the other exceptions be overruled, and in other respects that the master's report be approved and confirmed. It is further ordered, adjudged and decreed that the complainants' bill of complaint be dismissed without prejudice to their right in some other form of action, as they may be advised, to prosecute the matter of defamation of character set forth in the bill of complaint. It is further ordered, adjudged and decreed that the costs be paid by the defendant."

A motion for rehearing was made and argued and a rehearing refused, and the case brought up on appeal.

Mr. Joseph P. Hornor and *Mr. Guy M. Hornor*, for appellant.

Mr. George A. King (with whom was *Mr. Charles W. Hornor* on the brief) for appellee.

On the question of our right to a rescission we refer your honors to *Mycock* v. *Beatson*, 13 Ch. D. 384; *Stoughton* v. *Lynch*, 1 Johns. Ch. 466; *Gridley* v. *Conner*, 2 La. Ann. 87; *Pillans* v. *Harkness*, Colles P. C. 442.

"If one partner withdraws or uses the partnership funds in his own private trade or speculations, he must account not only for the interest on the moneys so withdrawn, but for the profits of that trade." *Stoughton* v. *Lynch*, 1 Johns. Ch. 466.

The liability in such a case is as for money converted to his own use. *Reis* v. *Hellman*, 25 Ohio St. 180.

When a partner takes possession of all the stock, books, etc., and in a settlement furnishes no evidence of the insolvency of the debtors or unsuccessful diligence in collecting the claims, they will be regarded as cash in his hands. *Bush* v. *Guion*, 6 La. Ann. 797.

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

Undoubtedly equity has jurisdiction, where a person has been induced, by fraudulent representations, to enter into a partnership, to rescind the contract at his instance, and put an end to it *ab initio*. *Newbigging* v. *Adam*, 34 Ch. Div. 582; *Smith* v. *Everett*, 126 Mass. 304; *Fogg* v. *Johnston*, 27 Alabama, 432; Story Part. §§ 232, 285; 2 Lindley Part. (Wentworth's ed.) 554.

And it is contended that even though the formation of the partnership may have been free from that taint, there may be such fraud, misconduct and breach of duty in the conduct of its affairs from the inception, as to justify, upon dissolution, as between the parties, the restoration of his capital to the injured partner.

This bill alleged that complainants "are entitled to be refunded their said capital, with legal interest from 24th day of June, 1884, and they now make demand therefor;" and it prayed, among other things, that the partnership might "be decreed to be dissolved as if the same had never been made, by reason of the acts of said defendant; that an account of its business may be taken under the direction of this court, and that its legal liabilities may be paid and charged against the said Joseph Oteri, and that the capital of your orators, with interest, [may be,] restored to them in the premises, or otherwise

at the discretion of the court." If the case, upon the evidence, did not entitle complainants to a return of their capital, and to be placed in the same situation, as far as practicable, as if they had never entered into the partnership, but did authorize the ordinary decree for a dissolution and accounting, we are of opinion that relief could be awarded in the latter aspect, even though the bill were not framed with precision, in the alternative, for a cancellation or for a dissolution and accounting. If the specific prayer were insufficient, such a decree could be maintained under the prayer for general relief, since it would be conformable to the case made by the bill.

It is argued that the Circuit Court erred in the rendition of a decree at variance with the conclusions of the master, because the reference was by consent, and the report amounted to a determination by the parties' own tribunal, which could not be disregarded at the mere discretion of the court.

In *Kimberly* v. *Arms*, 129 U. S. 512, 524, it was said by Mr. Justice Field, delivering the opinion of the court: "A reference by consent of parties, of an entire case for the determination of all its issues, though not strictly a submission of the controversy to arbitration — a proceeding which is governed by special rules — is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise." But here the case was referred to the master "to pass upon the accounts herein and to report thereon," and while the master considered the whole case, apparently without objection, we do not regard the rule laid down in *Kimberly* v. *Arms* as applicable. The question whether the partnership should be held void from its inception was not submitted, *Richards* v. *Todd*, 127 Mass. 167, nor whether on other

grounds the whole capital should be returned. If the decree had been in accordance with the conclusions of the master, such concurrent action would indeed have been of wellnigh controlling effect. *Crawford* v. *Neal*, 144 U. S. 585. But there was no such concurrence. The Circuit Court decreed the return of complainants' capital less two-thirds of the amount expended on the European trip in the interest of the partnership, and the decree was evidently based upon the view that defendant had been guilty of such fraud or misconduct or violation of partnership obligations as justified the relief accorded.

The evidence tended to show that proper books of account were not kept, and that monthly trial balances were not furnished, and there is some evidence that towards the last defendant refused complainants access to the books and papers of the firm, but this is denied, and the controversy seems to relate to a letter-book. By the partnership articles, Oteri was to have exclusive control and direction of the company's affairs. He was not himself conversant with the keeping of books, and Terni, who had the confidence of all parties, was entrusted with the duty of doing so, and it is a fair inference that Oteri did not question the right of his partners to examine the books and papers, but only demanded a receipt from them for whatever book or paper they wished to take away for examination. It is also objected that Oteri did not furnish his quota to the capital. He was, however, confessedly responsible, and, as the manager, all the firm's money belonged in his possession, and the record indicates that he raised large amounts upon his own collaterals for the benefit of the business. His accounts cover the entire capital, the proper proportion being credited to each partner. Whether he technically deposited with himself $5000 is not especially material. At all events, we find no adequate support to the conclusion that the complainants suffered any loss by reason of the alleged dereliction of duty in these regards, and we do not think that of themselves they furnish sufficient ground for decreeing that complainants are entitled to the return of their capital, within the principle of the rule which has sometimes

been applied in such cases. The real gist of the controversy, in this view, lies in the conduct of Oteri after his return from Sicily. It appeared that early in October, 1884, he wrote to European correspondents that the business would be continued in his name; that he had dissolved the partnership; that he had decided to withdraw; that he was awaiting the arrival of Scalzo in order to withdraw; and as reasons for these announcements assigned having learned that one of his partners did not have a good reputation, and that the capital had not been paid in in full, as was indeed the fact. But it also appeared that the firm continued to do business, and that on the 14th of November, 1884, letters were written that the capital had been paid in; that the business would go on under the firm name; and that all had been arranged, etc. These letters were written by Terni, the bookkeeper, and by Di Christina, one of the partners, and perhaps by others, for Oteri, who, as we understand, could neither read nor write Italian. Exactly when the balance of capital to be paid by Scalzo and Randazzo and Di Christina was made up is not clear, but Randazzo testifies that he paid in the balance of his share in November, and Scalzo seems to have done so at about that time.

Without discussing the evidence in detail, we think the master was correct in holding that the preponderance of evidence was to the effect that Oteri's action early in October, in regard to continuing the business in his own name, was condoned, and the difficulties between the partners adjusted for the time being. And whatever business had been transacted in his individual name was treated as if there had been no interruption. It may be that complainants were ignorant of Oteri's action in sending the October letters, but they can hardly be permitted to say that they did not know how the business was being conducted, particularly in view of the fact that Di Christina was employed in the business and allowed by the contract two per cent as extra compensation for services. Scalzo resided in St. Louis, and Randazzo was unable to read or write; but, nevertheless, through their own observations, and certainly through Di Christina, they

ought to have had knowledge of what was going on. It is said that Di Christina was young and not of strong mind and easily influenced, but there is no issue of that kind made in the pleadings, and we are not satisfied with that excuse for ignorance. Upon the whole record, we regard the case as one for an accounting rather than necessarily for a return of capital. No fraudulent representations as inducements to the formation of the partnership are alleged to have been made, and whatever objectionable features may have characterized Oteri's conduct and management, a scheme to defraud his copartners is not shown to have existed. In the absence of satisfactory proof that losses were occasioned by his misconduct or that the want of success which attended the business is traceable to that cause, complainants should not be reinstated at his expense in the same position as if they had not entered upon an enterprise which turned out to be unfortunate.

We cannot, however, accept the correctness of the exhibits attached to the answer as so far made out as to justify us in ordering a decree to be entered in accordance therewith. The books consisted of the originals and a new set made from the originals, which seemed in themselves to be practically unintelligible, and the results set forth in the exhibits were arrived at by a friend of the partners, assisted by an accountant. But the new books were made up, the balances struck, and the statements prepared upon the basis of explanations made by Oteri, and we are unwilling to proceed upon these results in the absence of a specific disposition of them by the Circuit Court. Amounts are charged against Scalzo, and Randazzo and Di Christina, the receipt of which they deny, and which appear to require further investigation as to their accuracy; and so as to the indebtedness of one Zuccas, for which, it is contended on one side and denied on the other, that Oteri ought to be held responsible under the circumstances. We think the item of $2538.32 was properly allowed, and that it needs no further consideration. We find in the record that a motion was made for an order on Oteri to pay the cash on hand into court, but we are not informed whether such an order was entered and complied with. No reason is

perceived why this should not have been done, nor, indeed, why Scalzo and Randazzo and Di Christina should not have received the amounts which Oteri conceded belonged to them. In a further accounting the question of interest on this money, if it has remained in Oteri's hands, will present itself for adjustment. *Gridley* v. *Conner*, 2 La. Ann. 87.

We are of opinion that the partnership continued until February 2, 1885, when, it is agreed, complainants filed a bill for dissolution in the state court, (which we assume has been disposed of,) and should be dissolved as of that date; and that an accounting should be had.

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

TEXAS AND PACIFIC RAILWAY COMPANY *v.* COX.

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

No. 327. Argued April 22, 1892. — Decided May 16, 1892.

The proviso in § 6 of the act of March 3, 1887, 24 Stat. 552, c. 373, does not limit the operation of § 3 of that act as corrected by the act of August 13, 1888, 25 Stat. 433, 436, c. 866; and a Circuit Court of the United States may take jurisdiction of an action against a receiver or manager of property appointed by it, without previous leave being obtained, although the action was commenced before the enactment of the statute.

The jurisdiction exists because the suit is one arising under the Constitution and laws of the United States.

A demurrer to a petition upon the ground that it does not set out a cause of action without taking notice of the fact that the suit is brought in the wrong district is a waiver of objection on account of the latter cause.

The rule that an amended declaration which sets forth a new cause of action is subject to the operation of a limitation coming into force after the commencement of the action does not apply to an amendment which sets forth the same cause of action as that set forth originally.

Statement of the Case.

A cause of action founded upon a statute of one State, conferring the right to recover damages for an injury resulting in death, may be enforced in a court of the United States sitting in another State if it is not inconsistent with the statutes or public policy of the State in which the right of action is sought to be enforced.

This cause of action founded upon the statute of Louisiana, conferring such right, is enforceable in Texas, notwithstanding the decisions of the courts of that State, referred to in the opinion in this case, those cases being in construction of the statute of Texas on that subject, and not applicable to the Louisiana statute.

A case should not be withdrawn from the jury unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can properly be taken of the facts which the evidence tends to establish.

This was an action brought by Mrs. Ida May Cox, a citizen of Texas, in the United States Circuit Court for the Eastern District of Texas, on the 3d of September, 1887, against John C. Brown and Lionel L. Sheldon, as receivers of the Texas and Pacific Railway Company, to recover damages for the death of her husband, Charles Cox, resulting from their negligence while operating that company's road. Judgment was rendered against Brown and Sheldon as such receivers, and Sheldon having resigned as receiver, and his resignation having been accepted by the court, Brown, as sole receiver, prosecuted this writ of error. While the writ was pending Brown was discharged as receiver, and the railway company was restored to the possession of its property, and this court, in November, 1889, with the consent of the parties, made an order substituting the Texas and Pacific Railway Company as plaintiff in error in lieu of Brown, receiver. This was done upon a stipulation "that the said Texas and Pacific Railway Company may be substituted as plaintiff in error in the above-entitled cause now pending undetermined upon writ of error in this court; such substitution, however, not to affect any of the questions or controversies presented by the record herein, and the questions and controversies presented by the record are to stand for the decision of this court the same as if such substitution had not been made."

The petition stated that the railway company, its lines running through Texas and Louisiana, and all its properties, were

put in the hands of receivers, December 16, 1885, by order of the Circuit Court for the Eastern District of Louisiana; that Brown and Sheldon were appointed and qualified at once as receivers, and had been ever since and were now such; and that Brown resided in the county of Dallas, Texas, and Sheldon in the State of Louisiana. That Cox was in their employment January 6, 1887, as a freight conductor, and received the injury which resulted in his death on that day while attempting to make a coupling of cars, because of the defective condition of the cross-ties and of the road-bed, through the negligence of the receivers. The injury was alleged to have been inflicted in the State of Louisiana, and it was claimed that the plaintiff was entitled to recover under the law of that State, which was set forth, as well as under that of the State of Texas, it being averred that they were substantially the same. These statutes are given, so far as necessary, in the margin.[1]

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[1] Texas (2 Sayles's Civ. Stats. 26, 27):

"ART. 2899. An action for actual damages on account of injuries causing the death of any person may be brought in the following cases:

"1. When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer or hirer of any railroad, steamboat, stage-coach or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence or carelessness of their servants or agents.

"2. When the death of any person is caused by the wrongful act, negligence, unskilfulness or default of another."

"ART. 2903. The action shall be for the sole and exclusive benefit of the surviving husband, wife, children and parents of the person whose death shall have been so caused, and the amount recovered therein shall not be liable for the debts of the deceased.

"ART. 2904. The action may be brought by all of the parties entitled thereto, or by any one or more of them for the benefit of all."

Louisiana (Voorhies's La. Civ. Code, 1875, 427; acts La. 1884, p. 94):

"ART. 2315. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the surviving minor children and widow of the deceased, or either of them, and in default of these, in favor of the surviving father and mother, or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be.

Statement of the Case.

The petition further stated that Cox left no child or children, nor descendant of a child, nor father nor mother, him surviving, but only the petitioner, his wife and widow. It was also alleged that the deceased suffered severe mental and physical pain from the time he was injured until he died.

The defendants demurred, assigning as grounds: That the petition "does not show that this court has jurisdiction of the cause as between the plaintiff and the defendants; it does not show jurisdiction of the persons;" and that the petition "does not set out a cause of action, because it shows that Chas. Cox, the husband of the plaintiff, was killed in Louisiana and not in the State of Texas;" and also answered, denying the allegations of the petition and charging contributory negligence. On the 16th of February, 1888, Mrs. Cox filed an amended petition, reciting that she, "leave of the court being first had, files this her amended petition and amending her original petition." This pleading expanded the allegations in reference to the appointment of the receivers by the United States Circuit Court for the Eastern District of Louisiana, and stated the entry and confirmation of the order of appointment as receivers, under ancillary proceedings, in the Circuit Court for the Eastern District of Texas, and averred that the court had jurisdiction of subject matter and receivers under the laws of the United States. It was further averred that Cox, in coupling the cars, as it was his duty to do, on account of the draw-head and coupling-pin not being suitable for the purpose for which they were to be used, he being ignorant thereof, and of the defective condition of the tracks, was injured. The defendant filed a general denial to the amended petition, and pleaded the statute of limitations.

The demurrer to the petition and demurrer or plea to the amended petition were overruled, and the case came on for

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"ART. 2316. Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence or his want of skill.

"ART. 2317. We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody."

Argument for Plaintiff in Error.

trial before a jury upon the issues joined. Evidence was adduced on both sides, and it was among other things admitted that the defendants were appointed receivers of the Texas and Pacific Railway Company by the Circuit Court for the Eastern District of Louisiana, and with the powers alleged by plaintiff; and that an ancillary bill was filed in the Circuit Court for the Eastern District of Texas, by direction, in the same case, and orders entered giving that court ancillary jurisdiction over the cause.

A verdict was returned for $15,000, and the defendants moved for a new trial, which, on plaintiff having remitted the sum of $5000 was overruled, and judgment entered for $10,000, a certified copy of which was directed to be forwarded to the clerk of the Circuit Court for the Eastern District of Louisiana, and called to the attention of that court. A motion in arrest was also made and denied.

Fifteen errors were assigned, which question the action of the court: (1) In maintaining jurisdiction. (2) In disallowing the plea of the statute of limitations. (3) In holding the cause of action enforceable in Texas. (4) In refusing to direct the jury to find for the defendants. (5) In refusing to give to the jury on defendants' behalf several specific instructions requested, not material to be here set forth.

Mr. John F. Dillon (with whom was *Mr. Winslow F. Pierce* on the brief) for plaintiff in error.

I. The court below was without jurisdiction.

Not only did the petition fail to show jurisdiction in the court below, but the want of jurisdiction appeared affirmatively upon the face of the petition, and the objection was specifically pointed out by defendants' demurrer. The petition shows that the plaintiff and one of the defendants, John C. Brown, were both residents of the State of Texas. The other defendant was a resident of Louisiana.

It therefore appears affirmatively upon the face of the petition that the court below was without jurisdiction, inasmuch

as the plaintiff and one of the defendants were citizens of the same State.

If it shall be considered that the allegation in the petition that the defendant Brown was a resident of the State of Texas is not equivalent to an allegation that he was a citizen of that State so as to affirmatively show want of jurisdiction in this court, then it is enough to say that the record fails to show affirmatively that there was jurisdiction in the court below. *Ex parte Smith*, 94 U. S. 455; *Bingham* v. *Cabot*, 3 Dall. 382; *Grace* v. *American Central Ins. Co.*, 109 U. S. 278; *Robertson* v. *Cease*, 97 U. S. 646.

With the record only as a guide we can do little more than speculate as to the theory or ground upon which the jurisdiction of the court below was claimed or maintained. It is possible that the assumption may have been indulged that the receivers should be regarded, in their official capacity, as citizens of Louisiana by reason of the fact that they were appointed by the Circuit Court of the United States, sitting in the Eastern District of that State. But it is settled that the personal citizenship of receivers, and other trustees, such as executors, determines the jurisdiction of the Federal courts under the acts of Congress. *Amory* v. *Amory*, 95 U. S. 186; *Davies* v. *Lathrop*, 12 Fed. Rep. 353.

It has been suggested that jurisdiction in the court below was claimed and maintained upon the sole ground that the court had been invested with ancillary jurisdiction of the equity cause in which Brown and Sheldon were appointed receivers, and that neither diversity of citizenship nor any other statutory ground of jurisdiction was asserted or relied upon by court or counsel.

It is hard to understand what bearing the pendency of proceedings upon the equity side of the court, which are ancillary to an equity cause pending in another district, can have upon the jurisdiction of the court in this action at law. The plaintiff did not intervene in the equity cause. She brought a plain and ordinary action at law. It was begun by independent service of personal process, not by intervention in proceedings in which jurisdiction of subject matter had already been

acquired. This action was tried by a jury in the usual way and, we may add, with the usual result. The case is not entitled in the equity cause. It is not a part of the record in that cause. See *Palmer* v. *Scriven*, 21 Fed. Rep. 354.

Plaintiff may rely upon § 3 of the Judiciary Act approved March 3, 1887, 25 Stat. 436.

In this connection we call attention to the fact that the repealing clause of said act contains this proviso:

"*Provided*, that this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any State, or suit commenced in any court of the United States, before the passage hereof, except as otherwise expressly provided in this act."

The receivers were appointed in this case prior to March 3, 1887. If the plaintiff shall claim any advantage by reason of the said 3d section of the act of March 3, 1887, above quoted, our answer is that the receivership suit, being commenced and pending at the time of the passage of the said act, is expressly excepted from its provisions.

This point has been so expressly adjudged in the case of this very receivership by the learned Circuit Court of the Fifth Circuit. See *Missouri Pacific Railway* v. *Texas & Pacific Railway Co.*, 41 Fed. Rep. 311.

It seems to be so plain that pending suits are excepted from the provisions of the act that it would be an attempt to construe a provision too plain for construction to elaborate the point. The result is that the present case must be determined wholly irrespective of the third section of the act of March 3, 1887.

But supposing, for the argument, that we are mistaken on this point, and that the third section of the act of March 3, 1887, applies to the present suit, then we submit that it is clear that the permission which that act gives to sue a receiver without the previous leave of the court in which such receiver was appointed, cannot confer any right to sue such receiver in any court which has not by law jurisdiction over the suit thus to be brought. Note that while the act of March 3, 1887, provides that such suit may be brought without the previous leave of

the court, it does not prevent the claimant from asking for such leave. In the present case no such leave was applied for, nor was the present action brought with the sanction or under the direction of the court that appointed the receivers. The present suit is, therefore, in no sense a proceeding in the equity cause, or a dependency of or an adjunct to it.

II. The alleged cause of action, founded upon the statute of Louisiana, was not enforceable in the Federal court in Texas. The case should have been dismissed on this ground.

The action was founded upon a statute of Louisiana, recited in the petition, conferring a right of action upon the surviving relatives therein described, for damages for injuries resulting in death. The right to maintain such an action in the courts of a State other than that in which the wrongful act was committed and the statutory remedy conferred, has been a question upon which the decisions have been numerous and conflicting. The rule in the several States has never been uniform, but we think it may be safely said that the general tendency of decision in the state courts has been adverse to the doctrine that actions of the character referred to may be maintained in the courts of a State foreign to that where the wrong occurred and the statutory remedy existed.

The rule that the courts of Texas will not take jurisdiction of an action for damages of this character, where the cause arose in another State and under a foreign statute dissimilar in terms to the corresponding Texas statute, or where there is no corresponding Texas statute, has been repeatedly announced by the highest state court in Texas. *Willis* v. *Missouri Pacific Railway*, 61 Texas, 432; *Texas & Pacific Railway* v. *Richards*, 68 Texas, 375; *St. Louis, Iron Mountain &c. Railway* v. *McCormick*, 71 Texas, 661. See also *Turner* v. *Cross*, 18 S. W. Rep. 578; and *Texas & Pacific Railway Co.* v. *Collins*, Opinion of the Supreme Court of Texas, March 22, 1892.

III. Any cause of action which the plaintiff may have had was, in any aspect of the case, barred by the statute of limitation of both the States of Louisiana and Texas.

Mr. W. Hallett Phillips for defendant in error.

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

The Texas and Pacific Railway Company is a corporation deriving its corporate powers from acts of Congress, and was held in *Pacific Railroad Removal Cases*, 115 U. S. 1, to be entitled, under the act of March 3, 1875, to have suits brought against it in the state courts removed to the Circuit Courts of the United States on the ground that they were suits arising under the laws of the United States. The reasoning was that this must be so since the company derived its powers, functions and duties from those acts, and suits against it necessarily involved the exercise of those powers, functions and duties as an original ingredient.

These receivers were appointed by the Circuit Court, and derived their powers from and discharged their duties subject to its orders. Those orders were entered, and all action of the court in the premises taken, by virtue of judicial power possessed and exercised under the Constitution and laws of the United States.

In respect of liability, such as is set up here, the receiver stands in the place of the corporation. As observed by Mr. Justice Brown, delivering the opinion of the court in *McNulta* v. *Lochridge*, 141 U. S. 327, 332: "Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands."

Hence it has been often decided that the jurisdiction of the court appointing a receiver is necessarily exclusive, and that actions at law cannot be prosecuted against him except by leave of that court. *Barton* v. *Barbour*, 104 U. S. 126; *Davis* v. *Gray*, 16 Wall. 203; *Thompson* v. *Scott*, 4 Dillon, 508, 512.

This was the general rule in the absence of statute; but by the third section of the act of Congress of March 3, 1887, 24 Stat. 552, c. 373, as corrected by the act of August 13, 1888, 25 Stat. 433, 436, c. 866, it is provided:

"That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

And we are of opinion that although the injury was inflicted January 6, 1887, the suit, which was commenced on the 3d of September of that year, comes within the section.

McNulta v. *Lochridge*, *supra*, was an action brought in a state court July 13, 1887, against the receiver of a railway, to recover for the death of certain persons, alleged to have been caused by his negligence in the operation of the road, on January 15, 1887. No leave to sue had been granted by the court of the appointment of the receiver, but we held that section 3 applied and there was no foundation for the position that the receiver was not liable to suit without such permission.

Section 6 of the act is as follows:

"That the last paragraph of section five of the act of Congress approved March third, eighteen hundred and seventy-five, entitled 'An act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from state courts, and for other purposes,' and section six hundred and forty of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act, be, and the same are hereby repealed: *Provided*, That this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any State, or suit commenced in any court of the United States, before the passage hereof except as otherwise expressly provided in this act."

It is argued that, under this proviso, the receivership suit having been commenced before and being pending at the time of the passage of the act, was excepted from its provisions, and that leave to sue was still required. We do not think so. The proviso was intended to prevent the loss of jurisdiction by reason of the repeal of prior acts and parts of acts, but

it does not limit the operation of the express provisions of section three.

As jurisdiction without leave is maintainable through the act of Congress, and as the receivers became such by reason of, and derived their authority from, and operated the road in obedience to, the orders of the Circuit Court in the exercise of its judicial powers, we hold that jurisdiction existed because the suit was one arising under the Constitution and laws of the United States; and this is in harmony with previous decisions. *Buck* v. *Colbath*, 3 Wall. 334; *Feibelman* v. *Packard*, 109 U. S. 421; *Bock* v. *Perkins*, 139 U. S. 628. The objections raised in respect of the matter of diverse citizenship cannot, therefore, be sustained.

It is said further that jurisdiction over the receivers, personally, was lacking, because defendant Brown resided in the Northern District of Texas and defendant Sheldon was an inhabitant of Louisiana; and that under the act of 1887 the action could not be instituted in a district whereof neither of the defendants was an inhabitant. If the suit be regarded as merely ancillary to the receivership the objection is without force, but irrespective of that, this immunity is a personal privilege which may be waived. The defendants not only demurred but answered, and the second ground of demurrer was that the petition did not set out a cause of action. Under such circumstances they could not thereafter challenge the jurisdiction of the court on the ground that the suit had been brought in the wrong district. *St. Louis &c. Railway Co.* v. *McBride*, 141 U. S. 127; *Fitzgerald Construction Co.* v. *Fitzgerald*, 137 U. S. 98; *First Nat. Bank* v. *Morgan*, 132 U. S. 141.

The statutory limitation in Louisiana and in Texas, upon the right of action asserted in this case, was one year, and that defence was interposed to the amended petition, which was not filed until that period had elapsed. It is put, in argument, upon two grounds: (1) that jurisdiction did not appear by the original petition; (2) that the amended petition set up a new cause of action. Assuming that the first ground is open to consideration, as brought to our attention, it is sufficient to say that, in the light of the observations already

made, the fact that jurisdiction existed was sufficiently apparent on the first pleading. As to the second ground, it is true that if the amended petition, which may, perhaps, be treated as equivalent to a second count in a declaration, had brought forward a new and independent cause of action, the bar might apply to it, *Sicard* v. *Davis*, 6 Pet. 124; yet, as the transaction set forth in both counts was the same, and the negligence charged in both related to defective conditions in respect of coupling cars in safety, we are not disposed by technical construction to hold that the second count alleged another and different negligence from the first.

Counsel further urge, with much earnestness, that the cause of action founded upon the statute of Louisiana conferring the right to recover damages for an injury resulting in death, was not enforceable in Texas.

The action, being in its nature transitory, might be maintained if the act complained of constituted a tort at common law, but as a statutory delict, it is contended that it must be justiciable not only where the act was done, but where redress is sought. If a tort at common law where suit was brought, it would be presumed that the common law prevailed where the occurrence complained of transpired; but if the cause of action was created by statute, then the law of the forum and of the wrong must substantially concur in order to render legal redress demandable.

In *The Antelope*, 10 Wheat. 66, 123, Mr. Chief Justice Marshall stated the international rule, with customary force, that: "The courts of no country execute the penal laws of another," but we have held that that rule cannot be invoked as applicable to a statute of this kind, which merely authorizes "a civil action to recover damages for a civil injury." *Dennick* v. *Railroad Company*, 103 U. S. 11. This was a case instituted in New York to recover damages for injuries received and resulting in death in New Jersey, and it was decided that a right arising under or a liability imposed by either the common law or the statute of a State may, where the action is transitory, be asserted and enforced in any court having jurisdiction of such matters and of the parties.

And notwithstanding some contrariety of decision upon the point, the rule thus stated is generally recognized and applied where the statute of the State in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the State in which the right of action is sought to be enforced.

The statutes of these two States on this subject are not essentially dissimilar, and it cannot be successfully asserted that the maintenance of jurisdiction is opposed to a settled public policy of the State of Texas.

In *Willis* v. *Railroad Company*, 61 Texas, 432, it was held by the Supreme Court of Texas that suit could not be brought in that State for injuries resulting in death inflicted in the Indian Territory, where no law existed creating such a right of action. The opinion goes somewhat further than this in expression, but in that regard has not been subsequently adopted.

In *Texas & Pacific Railway* v. *Richards*, 68 Texas, 375, it was said that while there was some conflict of decision, it seemed to be generally held that a right given by the statutes of one State would be recognized and enforced in the courts of another State, whose laws gave a like right under the same facts. In *St. Louis, Iron Mountain &c. Railroad* v. *McCormick*, 71 Texas, 660, the Supreme Court declined to sustain a suit in Texas by a widow for damages for the negligent killing of her husband in Arkansas, for the reason that the statutes of Arkansas were so different from those of Texas in that regard that jurisdiction ought not to be taken, but the court indicated that it would be a duty to do so in transitory actions where the laws of both jurisdictions were similar. The question, however, is one of general law, and we regard it as settled in *Dennick* v. *Railroad Company*, *supra*.

But it is insisted that the general rule ought not to be followed in this case because the statute of Texas, giving a right of action for the infliction through negligence of injuries resulting in death, does not apply to persons engaged as receivers in the operation of railroads, and reference is made to *Turner* v. *Cross*, decided February 5, 1892, and reported in

advance of the official series in 18 S. W. Rep. 578, (followed by *Railway Company* v. *Collins*, decided March 22, 1892, and furnished to us in manuscript,) in which the Supreme Court of Texas so held upon the ground that a receiver is not a "proprietor, owner, charterer or hirer" of the railroad he has in charge, and so not within the terms of the Texas statute. Without questioning the correctness of this view, still it would be going much too far to attribute to these decisions the effect of a determination that an action could not be maintained against receivers in the enforcement of a cause of action arising in Louisiana, whose statute is not open to such a construction.

We are brought then to consider whether reversible error intervened in the conduct of the trial. The contention on this branch of the case is chiefly that the court should have directed a verdict for the defendants because there was no evidence of negligence on their part while there was evidence of contributory negligence on the part of Cox.

The case should not have been withdrawn from the jury unless the conclusion followed, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish. *Dunlap* v. *Northeastern Railroad*, 130 U. S. 649, 652; *Kane* v. *Northern Central Railway*, 128 U. S. 91; *Jones* v. *East Tennessee, Virginia & Georgia Railroad*, 128 U. S. 443.

We think the evidence given in the record tended to establish that the coupling apparatus and the track were in an unsafe and dangerous condition; that the injury happened in consequence; and that these defects were such as must have been known to the defendants under proper inspection, and unless they were negligently ignorant. No conflict appears as to the condition of the road-bed in the railroad yard, but there was testimony on defendants' behalf indicating that the coupling apparatus was not substantially defective.

The bill of exceptions does not purport to contain all the evidence, and it would be improper to hold that the court should have directed a verdict for defendants for want of that which may have existed.

No exception was taken to the admission or exclusion of evidence, and none to any part of the charge of the court which is given in full. Among other things, the court instructed the jury:

"If you shall find either that the road-bed was not unsafe or dangerous, although not of the best character, or that the coupling-pin used was not unsafe or dangerous, although not as well adapted for use as a round pin, then you will find for defendant.

"And, again, if you shall find from the evidence that both the road-bed and coupling-pin were unsafe and dangerous, yet if you shall find from the evidence that neither of these causes resulted in the death of Chas. Cox nor were the proximate causes producing the injuries whereof he died, then you will find for the defendant.

"It is incumbent on the plaintiff before she can recover not only to prove that the defects complained of existed, but also that they or one of them were the cause of death.

"If the death was the result of accident, misadventure, or the want of care or prudence on the part of deceased or other cause not complained of, plaintiff cannot recover.

"You must ascertain the true nature of the case and the actual cause of death from the evidence as adduced before you and render your verdict in accordance therewith."

Twelve specific instructions were asked on behalf of defendants and refused and exceptions taken, but, except as stated, they are not insisted upon in argument, and we think they were substantially covered by the charge as given.

Some emphasis is put upon the fact that the car which inflicted the injury was from another road, but that circumstance does not call for special mention in the view we take of the case, and does not seem to have been relied on in the court below. The Circuit Court correctly applied well settled principles in the disposition of the questions of law arising upon the trial, and it would subserve no useful purpose to retraverse, in exposition of those principles, ground so often covered. *Washington & Georgetown Railroad* v. *McDade*, 135 U. S. 554; *Northern Pacific Railroad* v. *Herbert*, 116 U. S. 642;

Inland &c. Coasting Co. v. *Tolson*, 139 U. S. 551; *Kane* v. *Northern Central Railway*, 128 U. S. 91; *Hough* v. *Railway Co.*, 100 U. S. 213; *Indianapolis &c. Railroad* v. *Horst*, 93 U. S. 291. *Judgment affirmed.*

MEAGHER *v.* MINNESOTA THRESHER MANUFACTURING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 1545. Submitted May 2, 1892. — Decided May 16, 1892.

A judgment of the Supreme Court of the State of Minnesota overruling a demurrer interposed by one of many defendants, and remanding the case to the trial court for further proceedings, is not a final judgment which can be reviewed by this court.

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

Mr. Cushman K. Davis and *Mr. Frank W. M. Cutcheon* for the motion.

Mr. Horace G. Stone opposing.

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

One McKusick recovered judgment in the District Court of Washington County, Minnesota, against the corporation of Seymour, Sabin & Co., and in aid of execution brought an action praying for a sequestration of the stock, property, things in action and effects of the corporation, and the appointment of a receiver to take charge thereof and carry on its business until sale or other disposition. A receiver was accordingly appointed, qualified and entered upon the administration of the company's affairs and effects. An order was entered by the court requiring the creditors of the corporation to exhibit their claims in the action, which was done, among others, by the Minnesota Thresher Manufacturing Company to a very large

amount. Subsequently the latter company filed an intervening petition or complaint in the general winding-up action, setting forth the names of some sixty shareholders of the Seymour-Sabin corporation, and the amounts of their holdings of stock, and praying that the court make those named, and all other persons who might subsequently be found to be shareholders, parties to the action; require them to answer the petition; and enforce the liability in respect of stock held by them which the petition claimed the constitution of the State imposed. It was also prayed that the court determine the amount of the assets of the Seymour-Sabin Company available for the satisfaction of the claims of creditors; the amount of its indebtedness; the number of shares of its capital outstanding between July 5, 1881, and May 10, 1884, during which time the indebtedness represented by the claims filed was incurred; the names of the various holders of stock between those dates; what shareholders were insolvent; what non-resident; what persons were entitled to share in the assets and to what extent; and the amount of any other indebtedness on the part of any of the defendants to the Seymour-Sabin Company.

The District Court made an order impleading the parties named as defendants in the action, and requiring them to enter their appearance and answer within a time limited. Among the numerous persons thus made defendants, the plaintiffs in error in this case were included, and they demurred to the intervening petition or supplemental complaint upon the ground, among others, that the facts stated were not sufficient to constitute a cause of action. The petition charged that defendants were liable upon their stock to the extent of a sum equal to the par value thereof for the debts of the Seymour-Sabin corporation under section 3, article 10 of the constitution of Minnesota, which provided: "Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him."

The demurring defendants contended that this was a mere direction to the legislature of the State to impose such a liability and was not self-executing.

The demurrers of plaintiffs in error and of other defendants were sent by order of the District Court to a referee to hear and determine, and make, report and file such order as might be proper. Consent by stipulation was given to the making and entry of this order, subject to the right, thereby reserved, "of either party to move, amend, plead over or appeal, as he or they shall be advised after notice of the order determining said issues: Provided, however, that this stipulation shall not be construed to be or operate as the waiver of any rights of any party or parties thereto or of any objection to the jurisdiction of said court which said party or parties now has or might now urge;" and this stipulation was signed by the attorneys for upwards of sixty defendants.

The demurrers were overruled with leave to answer over within twenty days from the entry of the order, and the present plaintiffs in error took an appeal to the Supreme Court of Minnesota. That court held that the constitutional provision was self-executing and created an individual liability on the part of the stockholder for corporate debts to an amount equal to the amount of stock held or owned by him, and affirmed the order of the District Court. Thereupon the writ of error from this court was sued out.

We are of opinion that the judgment of the Supreme Court of Minnesota was not a final judgment within section 709 of the Revised Statutes. It is a judgment affirming with costs an order which overruled a demurrer. Rule XVIII of the Supreme Court of Minnesota provides: "Upon the reversal, affirmance, or modification of any order or judgment of the District Courts by this court there will be a *remittitur* to the District Court, unless otherwise ordered." 12 Minn. XIV; Manual of Practice, 1872, Rule XVIII. The plaintiffs in error upon the return of the case to the District Court could plead over, as the order below allowing time for so doing had, before its expiration, been superseded by the appeal. Moreover, the record discloses that in this instance the parties, in view of taking the appeal, expressly stipulated "that after the decision on said appeal by said Supreme Court any of said defendants may answer in the court below if they see fit to do so, and

may, after said decision on appeal, take any action in said lower court which they might take at the present time."

It will be observed that plaintiffs in error are only a portion of the defendants who were proceeded against by the intervening petition, and what has become of the others does not appear. The case should have been determined as to all, before our interposition, if justifiable in any view, could be invoked.

Under the complaint, accountings must be had and proofs taken as to the amount of the proceeds of the insolvent corporation's estate; the rights of claimants therein; the liability of directors and shareholders, if any, upon other accounts, etc., and the amount to be paid by each shareholder must be decreed. If this were a decree of the Circuit Court, it would come within the rule that to be final the court below should have nothing to do but to execute it if affirmed. *Keystone Iron Co.* v. *Martin*, 132 U. S. 91. And as a judgment of reversal by a state court with leave for further proceedings in the court of original jurisdiction is not subject to review here, *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Rice* v. *Sanger*, 144 U. S. 197, this is also true of a judgment merely affirming an interlocutory order, however apparently decisive of the merits.

Writ of error dismissed.

MEEHAN *v.* VALENTINE.

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

No. 12. Argued November 11, 12, 1890. — Decided May 16, 1892.

One who lends a sum of money to a partnership under an agreement that he shall be paid interest thereon at all events, and shall also be paid one tenth of the yearly profits of the partnership business if those profits exceed the sum lent, does not thereby become liable as a partner for the debts of the partnership.

THIS was an action of assumpsit brought by Thomas J. Meehan, a citizen of Maryland, against John K. Valentine,

executor of William G. Perry, both citizens of Pennsylvania, alleging Perry to have been a partner with Lawrence W. Counselman and Albert L. Scott, under the name of L. W. Counselman & Co., and counting on promissory notes of various dates from August 10, 1883, to November 25, 1884, signed by that firm, endorsed to the plaintiff, and amounting in all to about $10,000, with interest. The defendant denied that Perry was a partner in the firm.

At the trial, the plaintiff put in evidence the following agreement:

"L. W. Counselman. Albert L. Scott.

"Office of L. W. Counselman & Co., oyster and fruit packers, corner Philpot and Will streets.

"Baltimore, Md., March 15, 1880.

"For and in consideration of loans made and to be made to us by Wm. G. Perry, of Philadelphia, amounting in all to the sum of ten thousand dollars, for the term of one year from the date of said loans, we agree to pay to said Wm. G. Perry, in addition to the interest thereon, one tenth of the net profits over and above the sum of ten thousand dollars on our business for the year commencing May 1st, 1880, and ending May 1st, 1881, — *i.e.* if our net profits for said year's business exceed the sum of ten thousand dollars, then we are to pay to said W. G. Perry one tenth of said excess of profits over and above the said sum of ten thousand dollars; and it is further agreed that if our net profits do not exceed the sum of ten thousand dollars, then he is not to be paid more than the interest on said loan, the same being added to notes at the time they are given, which are to date from the time of said loans and payable one year from date.

"L. W. Counselman & Co."

Also the following endorsement thereon: "March 2, 1881. This contract and agreement is to continue one year longer on the same basis — *i.e.* from May 1st, 1881, until May 1st, 1882. L. W. Counselman & Co."

Statement of the Case.

Also three further renewals of the agreement from year to year, the first of which was by letter, dated March 18, 1882, from L. W. Counselman & Co. to Perry, with the same heading as the original agreement, and saying: "We hereby renew the agreement made with you May 1, 1880, which is to the effect that we will guarantee you ten per cent interest upon loans amounting to $10,000, and that if the net profits of our business is over $10,000 for the year commencing May 1, 1882, and ending April 30th, 1883, we will in lieu of the ten per cent interest give you ten per cent of the profits. We have two propositions for partnership May 1st, and if we accept either we will then, if you desire, return your loan."

The other renewals, dated April 4, 1883, and March 15, 1884, were substantially like the original agreement of March 15, 1880, except that in the agreement of April 4, 1883, the rate of interest was specified as six per cent.

The plaintiff further offered in evidence six promissory notes, amounting in the aggregate to $10,600, given by the firm to Perry in the months of March, May and June, 1884.

The plaintiff also called Scott as a witness, who testified that the firm was composed of L. W. Counselman and himself; that it was engaged in "the fruit and vegetable packing and oyster business" in Baltimore; that Perry was in the stationery business in Philadelphia; that the $10,000 mentioned in the agreement was paid by him to the firm, receiving their notes for it, and remained in the business throughout, no part of it having been repaid; that from time to time he lent other sums to the firm, which were repaid; that he was an intimate friend of the witness and visited him every few weeks; that these visits were not specially connected with the business, though on such occasions Perry "usually went down to the place of business and talked business;" that he annually asked and received from the firm accounts of profit and loss; that the accounts showed an annual profit, which varied from year to year, amounting for the second year to $11,000 or $12,000; that it being then found difficult to tell at the end of the year exactly what the profits would be, it was agreed with Perry that he should thenceforth receive $1000

each year, leaving the final settlement until the whole business was settled up; and that he received under the agreement about $1500 the first year and $1000 each subsequent year. On cross-examination, the witness stated that the firm made an assignment to the plaintiff for the benefit of creditors on April 30, 1885; that their liabilities were from $60,000 to $70,000, about half of which was with collateral security, and he did not know whether it had been paid out of such security; that the assets realized less than $2000; that, so far as he knew, no dividend had been paid; and, in regard to the $10,000 received from Perry, the witness testified as follows: "Q. Mr. Counselman and yourself did owe this $10,000 to the estate of Mr. Perry, did you? A. They had my notes for it. Q. Did you or did you not owe it? A. It was capital he had in the business the same as ours. We owed it to him. Of course we owed it to him if we did not lose it."

At the close of the plaintiff's evidence, the defendant moved for a nonsuit, on the ground that there was no evidence to show that Perry was liable as a partner. The court so ruled, and ordered a nonsuit. 29 Fed. Rep. 276. The plaintiff duly excepted to the ruling, and sued out this writ of error.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson* for plaintiff in error.

In *Baylis* v. *Travellers' Ins. Co.*, 113 U. S. 316, 321, this court says: "The right of trial by jury in the courts of the United States is expressly secured by the Seventh Article of Amendment to the Constitution, and Congress has, by statute, provided for the trial of issues of fact in cases by the court without the intervention of a jury, only when the parties waive their right to a jury by a stipulation in writing." And in *Marshall* v. *Hubbard*, 117 U. S. 415, it said, in effect, that it is the duty of the court to give to the party the benefit of every inference that could be fairly drawn from the evidence, written and oral; and that it is only when the party is so given the benefit of every such inference, that could be fairly drawn from the evidence, that the court is justified in withdrawing the case from the jury.

Argument for Plaintiff in Error.

We are, therefore, remitted to the question whether the evidence for the plaintiff, as disclosed by the record, was of such a conclusive character as that, after giving to the plaintiff the benefit of every inference that could be drawn from it, it was of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to grant the nonsuit which was granted.

The original contract, and its extensions, gave Perry an interest in the profits as such. In this regard, the contracts were not a mere method of securing to him usurious interest, or of measuring his compensation. Taken by itself, this makes out a *prima facie* case of partnership.

The leading case on this point in this court is *Berthold* v. *Goldsmith*, 24 How. 536, which has ever since been recognized by this court and the other Federal courts as authority, and the leading one, upon the questions as to what tests guide in determining the question of partnership. In that case it was said: "Actual participation in the profits as principal, we think, creates a partnership as between the parties and third persons, whatever may be their intentions in that behalf, and notwithstanding the dormant partner was not expected to participate in the losses beyond the amount of the profits. Every man who has a share of the profits of a trade or business ought, also, to bear his share of the loss, for the reason that, in taking a part of the profits, he takes a part of the fund of the trade on which the creditor relies for payment. *Grace* v. *Smith*, 2 W. Bl. 998; *Waugh* v. *Carver*, 2 H. Bl. 235. Actual partnership, as between the creditor and the dormant partner, is considered by the law to subsist where there has been a participation in the profits, although the participant may have expressly stipulated with his associates against all the usual incidents of that relation. *Pond* v. *Pittard*, 3 M. & W. 357. That rule, however, has no application whatever to a case of service or special agency where the employé has no power as partner in the firm and no interest in the profits as property, but is simply employed as a servant or special agent, and is to receive a given sum out of the profits, or a portion of the same, as compensation for his services."

This case was decided in 1860, the same year in which the case of *Cox* v. *Hickman*, 8 H. L. Cas. 268, was decided, and although the court below seemed to regard that case as deciding that a participation in the profits as profits, as distinguished from a stipulation for their being paid as a means of measuring compensation, did not show a partnership, as held in *Berthold* v. *Goldsmith*, yet we do not see that it did so decide, or that the case is at all in conflict, for our purposes, with the case of *Berthold* v. *Goldsmith*.

The English case was one where the question was whether certain "scheduled creditors," (who were to be paid a share of such profits as should accrue from their debtor's business, under a deed creating a trustee,) should be deemed partners; and the House of Lords held that they were not made partners in the business; just as this court, stating the rule in the case already quoted from, says, that where the employé has no power as partner in the firm business, and no interest in the profits as profits, but is simply employed as a servant or agent, there the party receiving a share of the profits is not made a partner. But, aside from this, this court has, since the decision in *Cox* v. *Hickman*, recognized the accuracy of the opinion in *Berthold* v. *Goldsmith*. It is so recognized in the cases of *Seymour* v. *Freer*, 8 Wall. 202, 221; *Hunt* v. *Oliver*, 118 U. S. 211, 221.

In *Hackett* v. *Stanley*, 115 N. Y. 625, a partnership was held to arise out of a written contract in no material respects different from the one in the case at bar. See also *Richardson* v. *Hughitt*, 76 N. Y. 55; *Burnett* v. *Snyder*, 76 N. Y. 344; *Curry* v. *Fowler*, 87 N. Y. 33; *Cassidy* v. *Hall*, 97 N. Y. 159; *Clift* v. *Barrow*, 108 N. Y. 187.

See also *Parker* v. *Canfield*, 37 Connecticut, 250, where the facts are very similar to those in the case at bar.

For the decisions in Massachusetts see *Pratt* v. *Langdon*, 12 Allen, 544; *S. C.* 93 Am. Dec. 61; *Fitch* v. *Harrington*, 13 Gray, 468; *S. C.* 74 Am. Dec. 641; *Holmes* v. *Old Colony Railroad*, 5 Gray, 58; *Brigham* v. *Clark*, 100 Mass. 430; *Getchell* v. *Foster*, 106 Mass. 42; *Pettee* v. *Appleton*, 114 Mass. 114.

For the rule in Ohio see *Wood* v. *Vallette*, 7 Ohio St. 172; *Farmers' Insurance Co.* v. *Ross*, 29 Ohio St. 429.

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As to Maryland, see *Rowland* v. *Long*, 45 Maryland, 439.

Wilson v. *Edmonds*, 130 U. S. 472, in no degree conflicts with our present position, that being a case where the alleged contract of partnership did no more than secure to Edmonds 10 per cent interest on vouchers bought for him by his agent, Squires.

In *Hazard* v. *Hazard*, 1 Story, 371, (1840,) it was held that a partnership as to third persons might arise between the parties by mere operation of law, against the intention of the parties; whereas, as between the parties it would exist only when such is the actual intention of the parties. See also *Cheap* v. *Cramond*, 4 B. & Ald. 663; *Peacock* v. *Peacock*, 16 Ves. 49; *Ex parte Hamper*, 17 Ves. 403; *Ex parte Hodgkinson*, 19 Ves. 291; *Ex parte Langdale*, 18 Ves. 300; *Heskeith* v. *Blanchard*, 4 East, 44; *Muzzy* v. *Watson*, 10 Johns. 226; *Dob* v. *Halsey*, 16 Johns. 34; *S. C.* 8 Am. Dec. 293.

Thus it appears to be settled that the written contract entitling Perry to a share of the net profits, at least, makes out a *prima facie* case of partnership, and therefore entitled the plaintiff to introduce, as against Perry's estate, the declarations of his copartners, as is held in *Pleasants* v. *Fant*, 22 Wall. 116, 120, where it is said that "one of the most approved criteria of the existence of the partnership, in such cases, is the right to compel an account of profits in equity." In the case at bar such a result follows in equity, from the covenant in the written contract that Perry should have one-tenth of the net profits in excess of $10,000.

While it is true that, as between creditors and copartners, it is immaterial, as bearing upon the liability of secret partners to creditors, whether the creditors, when they give trust to the firm, knew of the partnership of the secret partner or not, and it is also immaterial as to whether the partners meant to make a partnership; yet it is also true, in cases like the present, that the question as to what was the intention of the partners, regarding the formation and existence of a partnership, is a material circumstance in the case. *Clift* v. *Barrow*, 108 N. Y. 92.

In view of this principle of law, as well as in view of all the

evidence which was withdrawn from the consideration of the jury by the court, it seems to us quite impossible to reach the conclusion that there was not error in the withdrawal of these questions of fact from the jury.

Mr. Richard C. Dale and *Mr. Samuel Dickson* (with whom was *Mr. Henry P. Brown* on the brief) for defendant in error.

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

The granting of a nonsuit by the Circuit Court, because in its opinion the plaintiff had given no evidence sufficient to maintain his action, was in accordance with the law and practice of Pennsylvania prevailing in the courts of the United States held within that State, and is subject to the revision of this court on writ of error. *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 38–40. The real question in this case, therefore, is whether the evidence introduced by the plaintiff would have been sufficient to sustain a verdict in his favor.

The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits. *Ward* v. *Thompson*, 22 How. 330, 334.

Some of the principles applicable to the question of the liability of a partner to third persons were stated by Chief Justice Marshall in a general way as follows: "The power of an agent is limited by the authority given him; and if he transcends that authority, the act cannot affect his principal; he acts no longer as an agent. The same principle applies to partners. One binds the others so far only as he is the agent of the others." "A man who shares in the profit, although his name may not be in the firm, is responsible for all its debts." "Stipulations [restricting the powers of partners] may bind the partners, but ought not to affect those to whom they are unknown, and who trust to the general and well

established commercial law." *Winship* v. *Bank of United States*, 5 Pet. 529, 561, 562. And the Chief Justice referred to *Waugh* v. *Carver*, 2 H. Bl. 235; *Ex parte Hamper*, 17 Ves. 403, 412; and Gow on Partnership, 17.

How far sharing in the profits of a partnership shall make one liable as a partner has been a subject of much judicial discussion, and the various definitions have been approximate rather than exhaustive.

The rule formerly laid down, and long acted on as established, was that a man who received a certain share of the profits as profits, with a lien on the whole profits as security for his share, was liable as a partner for the debts of the partnership, even if it had been stipulated between him and his copartners that he should not be so liable; but that merely receiving compensation for labor or services, estimated by a certain proportion of the profits, did not render one liable as a partner. Story on Partnership, c. 4; 3 Kent Com. 25 note, 32–34; *Ex parte Hamper*, above cited; *Pott* v. *Eyton*, 3 C. B. 32, 40; *Bostwick* v. *Champion*, 11 Wend. 571, and 18 Wend. 175, 184, 185; *Burckle* v. *Eckart*, 1 Denio, 337, and 3 N. Y. 132; *Denny* v. *Cabot*, 6 Met. 82; *Fitch* v. *Harrington*, 13 Gray, 468, 474; *Brundred* v. *Muzzy*, 1 Dutcher (25 N. J. Law) 268, 279, 674. The test was often stated to be whether the person sought to be charged as a partner took part of the profits as a principal, or only as an agent. *Benjamin* v. *Porteus*, 2 H. Bl. 590, 592; Collyer on Partnership (1st ed.) 14; Smith Merc. Law (1st ed.) 4; Story on Partnership, § 55; *Loomis* v. *Marshall*, 12 Conn. 69, 78; *Burckle* v. *Eckart*, 1 Denio, 337, 341; *Hallet* v. *Desban*, 14 La. Ann. 529.

Accordingly, this court, at December term, 1860, decided that a person employed to sell goods under an agreement that he should receive half the profits, and that they should not be less than a certain sum, was not a partner with his employer. "Actual participation in the profits as principal," said Mr. Justice Clifford in delivering judgment, "creates a partnership as between the parties and third persons, whatever may be their intentions in that behalf, and notwithstanding the dormant partner was not expected to participate in the loss beyond the

amount of the profits," or "may have expressly stipulated with his associates against all the usual incidents to that relation. That rule, however, has no application whatever to a case of service or special agency, where the employé has no power as a partner in the firm and no interest in the profits, as property, but is simply employed as a servant or special agent, and is to receive a given sum out of the profits, or a proportion of the same, as a compensation for his services." *Berthold* v. *Goldsmith*, 24 How. 536, 542, 543. See also *Seymour* v. *Freer*, 8 Wall. 202, 215, 222–226; *Beckwith* v. *Talbot*, 95 U. S. 289, 293; *Edwards* v. *Tracy*, 62 Penn. St. 374; *Burnett* v. *Snyder*, 81 N. Y. 550, 555.

Mr. Justice Story, at the beginning of his Commentaries on Partnership, first published in 1841, said: "Every partner is an agent of the partnership; and his rights, powers, duties and obligations are in many respects governed by the same rules and principles as those of an agent. A partner, indeed, virtually embraces the character both of a principal and of an agent. So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deemed a principal; and so far as he acts for his partners he may as properly be deemed an agent. The principal distinction between him and a mere agent is, that he has a community of interest with the other partners in the whole property and business and responsibilities of the partnership; whereas an agent, as such, has no interest in either. Pothier considers partnership as but a species of mandate, saying, *Contractus societatis, non secus ac contractus mandati.*" Afterwards, in discussing the reasons and the limits of the rule by which one may be charged as a partner by reason of having received part of the profits of the partnership, Mr. Justice Story observed that the rule was justified, and the cases in which it had been applied reconciled, by considering that "a participation in the profits will ordinarily establish the existence of a partnership between the parties in favor of third persons, in the absence of all other opposing circumstances," but that it is not "to be regarded as anything more than mere presumptive proof thereof, and therefore liable to be repelled and overcome by other circumstances, and not as

of itself overcoming or controlling them;" and therefore that "if the participation in the profits can be clearly shown to be in the character of agent, then the presumption of partnership is repelled." And again: "The true rule, *ex æquo et bono*, would seem to be that the agreement and intention of the parties themselves should govern all the cases. If they intended a partnership in the capital stock, or in the profits, or in both, then that the same rule should apply in favor of third persons, even if the agreement were unknown to them. And on the other hand, if no such partnership were intended between the parties, then that there should be none as to third persons, unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons." Story on Partnership, §§ 1, 38, 49.

Baron Parke (afterwards Lord Wensleydale) appears to have taken much the same view of the subject as Mr. Justice Story. Both in the Court of Exchequer, and in the House of Lords, he was wont to treat the liability of one sought to be charged as a dormant partner for the acts of the active partners as depending on the law of principal and agent. *Beckham* v. *Drake* (1841) 9 M. & W. 79, 98; *Wilson* v. *Whitehead* (1842) 10 M. & W. 503, 504; *Ernest* v. *Nicholls* (1857) 6 H. L. Cas. 401, 417; *Cox* v. *Hickman* (1860) 8 H. L. Cas. 268, 312. And in *Cox* v. *Hickman* he quoted the statements of Story and Pothier from Story on Partnership, § 1, above cited.

In that case, two merchants and copartners, becoming embarrassed in their circumstances, assigned all their property to trustees, empowering them to carry on the business, and to divide the net income ratably among their creditors, (all of whom became parties to the deed,) and to pay any residue to the debtors, the majority of the creditors being authorized to make rules for conducting the business or to put an end to it altogether. The House of Lords, differing from the majority of the judges who delivered opinions at various stages of the case, held that the creditors were not liable as partners for debts incurred by the trustees in carrying on the business

under the assignment. The decision was put upon the ground that the liability of one partner for the acts of his copartner is in truth the liability of a principal for the acts of his agent; that a right to participate in the profits, though cogent, is not conclusive, evidence that the business is carried on in part for the person receiving them; and that the test of his liability as a partner is whether he has authorized the managers of the business to carry it on in his behalf. *Cox* v. *Hickman*, 8 H. L. Cas. 268, 304, 306, 312, 313; *S. C. nom. Wheatcroft* v. *Hickman*, 9 C. B. (N. S.) 47, 90, 92, 98, 99.

This new form of stating the general rule did not at first prove easier of application than the old one; for in the first case which arose afterwards one judge of three dissented; *Kilshaw* v. *Jukes*, 3 B. & S. 847; and in the next case the unanimous judgment of four judges in the Common Bench was reversed by four judges against two in the Exchequer Chamber. *Bullen* v. *Sharp*, 18 C. B. (N. S.) 614, and L. R. 1 C. P. 86. And, as has been pointed out in later English cases, the reference to agency as a test of partnership was unfortunate and inconclusive, inasmuch as agency results from partnership rather than partnership from agency. Kelly, C. B. and Cleasby, B., in *Holme* v. *Hammond*, L. R. 7 Ex. 218, 227, 233; Jessel, M. R., in *Pooley* v. *Driver*, 5 Ch. D. 458, 476. Such a test seems to give a synonym, rather than a definition; another name for the conclusion, rather than a statement of the premises from which the conclusion is to be drawn. To say that a person is liable as a partner, who stands in the relation of principal to those by whom the business is actually carried on, adds nothing by way of precision, for the very idea of partnership includes the relation of principal and agent.

In the case last above cited, Sir George Jessel said: "You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners; a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity." And in a very recent case the Court of Appeals of New York, than which no court

has more steadfastly adhered to the old form of stating the rule, has held that a partnership, though not strictly a legal entity as distinct from the persons composing it, yet being commonly so regarded by men of business, might be so treated in interpreting a commercial contract. *Bank of Buffalo* v. *Thompson*, 121 N. Y. 280.

In other respects, however, the rule laid down in *Cox* v. *Hickman* has been unhesitatingly accepted in England, as explaining and modifying the earlier rule. *Re English & Irish Society*, 1 Hem. & Mil. 85, 106, 107; *Mollwo* v. *Court of Wards*, L. R. 4 P. C. 419, 435; *Ross* v. *Parkyns*, L. R. 20 Eq. 331, 335; *Ex parte Tennant*, 6 Ch. D. 303; *Ex parte Delhasse*, 7 Ch. D. 511; *Badeley* v. *Consolidated Bank*, 38 Ch. D. 238. See also *Davis* v. *Patrick*, 122 U. S. 138, 151; *Eastman* v. *Clark*, 53 N. H. 276; *Wild* v. *Davenport*, 19 Vroom (48 N. J. Law) 129; *Seabury* v. *Bolles*, 22 Vroom (51 N. J. Law) 103, and 23 Vroom (52 N. J. Law) 413; *Morgan* v. *Farrel*, 58 Conn. 413.

In the present state of the law upon this subject, it may perhaps be doubted whether any more precise general rule can be laid down than, as indicated at the beginning of this opinion, that those persons are partners, who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow, that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. And participating in profits is presumptive, but not conclusive, evidence of partnership.

In whatever form the rule is expressed, it is universally held

that an agent or servant, whose compensation is measured by a certain proportion of the profits of the partnership business, is not thereby made a partner, in any sense. So an agreement that the lessor of a hotel shall receive a certain portion of the profits thereof by way of rent does not make him a partner with the lessee. *Perrine* v. *Hankinson*, 6 Halst. (11 N. J. Law) 181; *Holmes* v. *Old Colony Railroad*, 5 Gray, 58; *Beecher* v. *Bush*, 45 Michigan, 188. And it is now equally well settled that the receiving of part of the profits of a commercial partnership, in lieu of or in addition to interest, by way of compensation for a loan of money, has of itself no greater effect. *Wilson* v. *Edmonds*, 130 U. S. 472, 482; *Richardson* v. *Hughitt*, 76 N. Y. 55; *Curry* v. *Fowler*, 87 N. Y. 33; *Cassidy* v. *Hall*, 97 N. Y. 159; *Smith* v. *Knight*, 71 Illinois, 148; *Williams* v. *Soutter*, 7 Iowa, 435, 446; *Boston & Colorado Smelting Co.* v. *Smith*, 13 R. I. 27; *Mollwo* v. *Court of Wards*, and *Badeley* v. *Consolidated Bank*, above cited.

In some of the cases most relied on by the plaintiff, the person held liable as a partner furnished the whole capital on which business was carried on by another, or else contributed part of the capital and took an active part in the management of the business. *Beauregard* v. *Case*, 91 U. S. 134; *Hackett* v. *Stanley*, 115 N. Y. 625, 627, 628, 633; *Pratt* v. *Langdon*, 12 Allen, 544, and 97 Mass. 97; *Rowland* v. *Long*, 45 Maryland, 439. And in *Mollwo* v. *Court of Wards*, above cited, after speaking of a contract of loan and security, in which no partnership was intended, it was justly observed: "If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals, and putting forward, as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability; for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character." L. R. 4 P. C. 438. But in the case at bar no such element is found.

Throughout the original agreement and the renewals thereof, the sum of $10,000 paid by Perry to the partnership, and for

which they gave him their promissory notes, is spoken of as a loan, for which the partnership was to pay him legal interest at all events, and also pay him one tenth of the net yearly profits of the partnership business if those profits should exceed the sum of $10,000. The manifest intention of the parties, as apparent upon the face of the agreements, was to create the relation of debtor and creditor, and not that of partners. Perry's demanding and receiving accounts and payments yearly was in accordance with his right as a creditor. There is nothing in the agreement itself, or in the conduct of the parties, to show that he assumed any other relation. He never exercised any control over the business. The legal effect of the instrument could not be controlled by the testimony of one of the partners to his opinion that "it was capital he had in the business the same as ours; we owed it to him; of course we owed it to him if we did not lose it."

Upon the whole evidence, a jury would not be justified in inferring on the part of Perry, either "actual participation in the profits as principal," within the rule as laid down by this court in *Berthold* v. *Goldsmith;* or that he authorized the business to be carried on in part for him or on his behalf, within the rule as stated in *Cox* v. *Hickman*, and the later English cases. There being no partnership, in any sense, and Perry never having held himself out as a partner to the plaintiff or to those under whom he claimed, the Circuit Court rightly ruled that the action could not be maintained. *Pleasants* v. *Fant*, 22 Wall. 116; *Thompson* v. *Toledo Bank*, 111 U. S. 529.

Judgment affirmed.

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

CASES ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES AT OCTOBER TERM, 1891, NOT OTHERWISE REPORTED, INCLUDING CASES DISMISSED IN VACATION PURSUANT TO RULE 28.

No. 959. ADAMS *v.* FREEDMAN'S AID AND SOUTHERN EDUCATION SOCIETY. Appeal from the Circuit Court of the United States for the Eastern District of Tennessee. July 24, 1891: Dismissed, pursuant to the 28th rule. *Mr. Xenophon Wheeler* for appellants. *Mr. William Henry De Witt* for appellees.

No. 1201. ADAMS *v.* UNITED STATES. Error to the District Court of the United States for the District of Kansas. October 19, 1891: Judgment reversed, and cause remanded for a new trial, on motion of *Mr. Solicitor General* for defendant in error. *Mr. J. R. Shields* for plaintiff in error. *Mr. Attorney General* for defendant in error.

No. 110. ALEXANDER *v.* GLENN, TRUSTEE. Error to the Circuit Court of the United States for the Western District of North Carolina. November 20, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. W. E. Earle*, *Mr. W. D. Davidge* and *Mr. Reginald Fendall* for plaintiff in error. *Mr. Charles Marshall* and *Mr. John Howard* for defendant in error.

No. 102. AMADOR QUEEN MINING COMPANY *v.* DEWITT. Error to the Supreme Court of the State of California. November 17, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. William M. Stewart* for plaintiff in error. No appearance for defendant in error.

Cases not Otherwise Reported.

No. 290. AMERICAN ARTIFICIAL STONE PAVEMENT COMPANY *v.* VULCANITE PAVING COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. March 28, 1892: Decree reversed, with costs, per stipulation, and cause remanded to be proceeded in according to law. *Mr. Hector T. Fenton* for appellant. *Mr. George Harding* for appellees.

No. 337. ATTORNEY GENERAL OF MASSACHUSETTS *v.* WESTERN UNION TELEGRAPH COMPANY. Appeal from the Circuit Court of the United States for the District of Massachusetts. January 28, 1892: Dismissed, per stipulation. *Mr. A. E. Pillsbury* for appellant. *Mr. Wager Swayne* for appellee.

No. 1220. AYRES *v.* MANNING. Appeal from the Circuit Court of the United States for the Southern District of Illinois. April 1, 1892: Dismissed, with costs, on motion of *Mr. John M. Harlan* for appellants. *Mr. G. W. Smith* and *Mr. John M. Harlan* for appellants. *Mr. Samuel P. Wheeler* for appellees.

No. 1512. BAILY *v.* SUNDBERG. March 7, 1892: Petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit denied. *Mr. F. C. Partridge* and *Mr. Willard R. Cray* for petitioners. *Mr. John Lind* for respondent.

No. 199. BANQUE FRANCO-EGYPTIENNE *v.* BROWN. Appeal from the Circuit Court of the United States for the Southern District of New York. March 1, 1892: Dismissed, per stipulation. *Mr. Joseph H. Choate* for appellants. *Mr. Francis Lynde Stetson*, *Mr. Joseph Larocque*, *Mr. Frederic B. Jennings* and *Mr. Charles H. Russell, Jr.*, for appellees.

No. 271. BARNEY *v.* WATERBURY. Error to the Circuit Court of the United States for the Southern District of New

York. March 14, 1892: Dismissed, with costs, on motion of *Mr. Solicitor General* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. Samuel F. Phillips* and *Mr. A. W. Griswold* for defendants in error.

No. 247. BEER *v.* MACKIN. Error to the Circuit Court of the United States for the District of Nebraska. April 4, 1892: Judgment affirmed, with costs and interest, by a divided court. *Mr. Jefferson Chandler* and *Mr. John L. Webster* for plaintiff in error. *Mr. John F. Dillon* and *Mr. Harry Hubbard* for defendant in error.

No. 293. BELT *v.* CUMMING. Appeal from the Circuit Court of the United States for the Southern District of Georgia. April 7, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. Henry Wise Garnett* for appellant. No appearance for appellees.

No. 218. BENNETT *v.* BAKER. Error to the Circuit Court of the United States for the Northern District of Illinois. March 10, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. A. McCoy*, *Mr. C. B. McCoy* and *Mr. C. E. Pope* for plaintiffs in error. No appearance for defendant in error.

No. 351. BERRY *v.* REILLY. Error to the Supreme Court of the Territory of Arizona. April 27, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. A. T. Britton* and *Mr. A. B. Browne* for plaintiffs in error. *Mr. W. Hallett Phillips* and *Mr. Joseph K. McCammon* for defendant in error.

No. 174. BERRY *v.* WOOD. Error to the Supreme Court of the Territory of Montana. January 21, 1892: Dismissed

with costs, pursuant to the 10th rule, and remanded to the Supreme Court of the State of Montana. *Mr. T. L. Napton* for plaintiff in error. *Mr. J. N. Dolph* for defendant in error.

No. 200. BISCHOFFSHEIM *v.* BROWN. Appeal from the Circuit Court of the United States for the Southern District of New York. March 1, 1892: Dismissed, per stipulation. *Mr. Joseph H. Choate* for appellant. *Mr. Francis Lynde Stetson* for appellees.

No. 352. BLACKMORE *v.* REILLY. Error to the Supreme Court of the Territory of Arizona. April 27, 1892: Dismissed, with costs, pursuant to the tenth rule. *Mr. A. T. Britton* and *Mr. A. B. Browne* for plaintiff in error. *Mr. W. Hallett Phillips* and *Mr. Joseph K. McCammon* for defendant in error.

No. 131. BLOOMER *v.* TODD. Appeal from the Supreme Court of the Territory of Washington. December 16, 1891: Dismissed, with costs, per stipulation of the parties. *Mr. A. S. Austin's* appearance entered for appellant. No appearance for appellees.

No. 101. BRADFORD GAS LIGHT AND HEATING COMPANY *v.* CITIZEN'S LIGHT AND HEAT COMPANY. Appeal from the Circuit Court of the United States for the Western District of Pennsylvania. November 16, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. R. B. Stone* for appellant. No appearance for appellee.

No. 160. BROOKE *v.* PENICK. Appeal from the Circuit Court of the United States for the District of West Virginia. January 13, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. Randolph Coyle* for appellant. No appearance for appellees.

Cases not Otherwise Reported.

No. 274. BRUCE *v.* VINTON. Appeal from the Circuit Court of the United States for the District of Indiana. July 3, 1891: Dismissed, pursuant to the 28th rule. *Mr. Ferdinand Winter* and *Mr. Attorney General* for appellants. *Mr. Solomon Claypool* for appellee.

No. 230. BRUMBACK *v.* BROADBENT. Appeal from the Supreme Court of the Territory of Idaho. July 28, 1891: Dismissed, pursuant to the 28th rule. *Mr. S. S. Burdett* for appellants. *Mr. George Ainslie* for appellee.

No. 707. CENTRAL TRUST COMPANY OF NEW YORK *v.* BACON. Appeal from the Circuit Court of the United States for the Eastern District of Tennessee. May 16, 1892: Dismissed, per stipulation. *Mr. Edgar M. Johnson* and *Mr. W. M. Baxter* for appellant. *Mr. H. H. Ingersoll* and *Mr. R. M. Edwards* for appellee.

No. 1218. CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *v.* DEY. Appeal from the Circuit Court of the United States for the Southern District of Iowa. March 10, 1892: Dismissed, with costs, on authority of counsel for appellant. *Mr. Joseph W. Blythe* for appellant. No appearance for appellees.

No. 1142. CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *v.* SMITH. Appeal from the Circuit Court of the United States for the Southern District of Iowa. March 10, 1892: Dismissed, with costs, on authority of counsel for appellant. *Mr. Joseph W. Blythe* for appellant. No appearance for appellees.

No. 1141. CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *v.* STATE OF IOWA. Appeal from the Circuit Court of the United States for the Southern District of Iowa. March

10, 1892: Dismissed, with costs, on authority of counsel for appellant. *Mr. Joseph W. Blythe* for appellant. No appearance for appellee.

No. 1147. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY *v.* SMITH. Appeal from the Circuit Court of the United States for the Southern District of Iowa. March 30, 1892: Dismissed, with costs, on motion of counsel for appellant. *Mr. John W. Cary* for appellant. No appearance for appellees.

No. 1146. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY *v.* STATE OF IOWA. Appeal from the Circuit Court of the United States for the Southern District of Iowa. March 30, 1892: Dismissed, with costs, on motion of counsel for appellant. *Mr. John W. Cary* for appellant. No appearance for appellee.

No. 1144. CHICAGO AND NORTHWESTERN RAILWAY COMPANY *v.* SMITH. Appeal from the Circuit Court of the United States for the Southern District of Iowa. March 10, 1892: Dismissed, with costs, on motion of *Mr. W. C. Goudy* for appellant. *Mr. W. C. Goudy* and *Mr. N. M. Hubbard* for appellant. No appearance for appellee.

No. 1143. CHICAGO AND NORTHWESTERN RAILWAY COMPANY *v.* STATE OF IOWA. Appeal from the Circuit Court of the United States for the Southern District of Iowa. March 10, 1892: Dismissed, with costs, on motion of *Mr. W. C. Goudy* for appellant. *Mr. W. C. Goudy* and *Mr. N. M. Hubbard* for appellant. No appearance for appellee.

No. 1140. CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY *v.* SMITH. Appeal from the Circuit Court of the United States for the Southern District of Iowa. April 4, 1892: Dismissed, with costs, on motion of counsel for appellant. *Mr. Thomas F. Withrow* for appellant. No appearance for appellees.

Cases not Otherwise Reported.

No. 1139. CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY *v.* STATE OF IOWA. Appeal from the Circuit Court of the United States for the Southern District of Iowa. April 4, 1892: Dismissed, with costs, on motion of counsel for appellant. *Mr. Thomas F. Withrow* for appellant. No appearance for appellee.

No. 1455. CHICAGO WIRE AND SPRING COMPANY *v.* AMERICAN WIRE COMPANY. Error to the Circuit Court of the United States for the Northern District of Illinois. November 23, 1891: Dismissed, with costs, on motion of *Mr. C. W. Needham* for plaintiff in error. *Mr. M. R. Powers* for plaintiff in error. No appearance for defendant in error.

No. 268. CHOTEAU *v.* KANSAS CITY STOCK YARDS COMPANY. Error to the Circuit Court of the United States for the Western District of Missouri. March 30, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. A. Comingo* for plaintiff in error. *Mr. Wallace Pratt* and *Mr. Frank Hagerman* for defendant in error.

No. 258. CHURCH *v.* SWANN. Appeal from the Circuit Court of the United States for the Southern District of Alabama. March 28, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. T. A. Hamilton* for appellants. *Mr. Isaac P. Martin* for appellee.

No. 359. CITIZENS' STREET RAILWAY COMPANY OF PINE BLUFF, ARKANSAS *v.* JONES. Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. March 9, 1892: Dismissed with costs, on motion of counsel for appellant. *Mr. Jefferson Chandler* and *Mr. J. M. Taylor* for appellant. No appearance for appellee.

No. 340. CITY OF AUGUSTA *v.* BARD. Error to the Circuit Court of the United States for the District of Kansas. April

21, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. S. O. Thacher* for plaintiff in error. *Mr. A. T. Britton*, *Mr. A. B. Browne* and *Mr. George R. Peck* for defendant in error.

No. 127. COLEMAN *v.* WALKER. Appeal from the Circuit Court of the United States for the Northern District of California. December 14, 1891: Dismissed, with costs, per stipulation. *Mr. Hall McAllister* and *Mr. W. W. Cope* for appellant. *Mr. Sidney N. Smith, Jr.*, for appellee.

No. 243. COMMERCIAL NATIONAL BANK *v.* BROWN. Appeal from the Circuit Court of the United States for the Northern District of Ohio. March 24, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. C. C. Baldwin* for appellants. No appearance for appellees.

No. 18. COOKE *v.* GLOBE FILES COMPANY. Appeal from the Circuit Court of the United States for the Southern District of New York. October 13, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. W. E. Gleeson* and *Mr. M. S. Hopkins* for appellant. *Mr. R. H. Parkinson*, *Mr. J. G. Parkinson* and *Mr. William A. McKenney* for appellees.

No. 80. COUNTY OF BAY *v.* DOUGLASS. Error to the Circuit Court of the United States for the Eastern District of Michigan. November 4, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. Ashley Pond* for plaintiff in error. No appearance for defendant in error.

No. 1493. COUNTY OF CASS, IN THE STATE OF MISSOURI *v.* PARKER. Appeal from the Circuit Court of the United States for the Western District of Missouri. January 18, 1892: Docketed and dismissed, with costs, on motion of *Mr. S. S. Burdett* for appellee.

Cases not Otherwise Reported.

No. 195. COVERT *v.* SARGENT. Appeal from the Circuit Court of the United States for the Southern District of New York. March 4, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. William H. King* for appellant. No appearance for appellees.

No. 180. CRAMER *v.* UNITED STATES. Appeal from the Court of Claims. January 29, 1892: Dismissed, pursuant to the 10th rule. *Mr. George A. King* for appellant. *Mr. Attorney General* for appellee.

No. 1546. CRIDER *v.* STEELE. Appeal from the United States Court for the Indian Territory. April 18, 1892: Docketed and dismissed, with costs, on motion of *Mr. Charles Blood Smith* for appellees.

No. 457. DARST *v.* BOGGS. Error to the Circuit Court of the United States for the District of Nebraska. May 16, 1892: Dismissed, per stipulation. *Mr. C. S. Montgomery* for plaintiff in error. *Mr. W. J. Connell* for defendants in error.

No. 1446. DENVER AND RIO GRANDE WESTERN RAILWAY COMPANY *v.* DODGE. Error to the Supreme Court of the Territory of Utah. January 18, 1892: Judgment affirmed, with costs, by a divided court. *Mr. John A. Marshall* for plaintiff in error. *Mr. P. L. Williams* for defendant in error.

No. 1244. DUMONT *v.* FRY. Appeal from the Circuit Court of the United States for the Southern District of New York. December 7, 1891: Dismissed, per stipulation, without costs to either party. *Mr. F. R. Coudert* for appellants. *Mr. John M. Bowers* for appellees.

Cases not Otherwise Reported.

No. 234. EDELHOFF *v.* ROBERTSON. Error to the Circuit Court of the United States for the Southern District of New York. February 1, 1892: Judgment so far as complained against by Edelhoff *et al.*, reversed, with costs, upon confession of error by defendant in error, and cause remanded, with directions to grant a new trial, on motion of *Mr. Solicitor General* for defendant in error. *Mr. H. E. Tremain* and *Mr. M. W. Tyler* for plaintiffs in error. *Mr. Attorney General* for defendant in error.

No. 100. EDWARD BARR COMPANY *v.* NEW YORK AND NEW HAVEN AUTOMATIC SPRINKLER COMPANY. Appeal from the Circuit Court of the United States for the Southern District of New York. November 16, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. Randall Hagner* and *Mr. P. R. Voorhees* for appellants. No appearance for appellee.

No. 1379. EICHEL *v.* WALLACE. Error to the Circuit Court of the United States for the District of Kentucky. April 29, 1892: Dismissed, with costs, on authority of counsel for plaintiffs in error. *Mr. T. F. Hargis* and *Mr. G. B. Eastin* for plaintiffs in error. *Mr. Michael H. Cardozo* for defendants in error.

No. 1044. EICHORN *v.* HOOVER. Error to the Supreme Court of the District of Columbia. January 7, 1892: Dismissed, per stipulation, costs to be paid by defendants in error, on motion of *Mr. A. S. Worthington* for defendants in error. *Mr. M. F. Morris*, *Mr. George E. Hamilton* and *Mr. C. C. Cole* for plaintiff in error. *Mr. A. S. Worthington* and *Mr. A. A. Birney* for defendants in error.

Nos. 14 and 15. ELDREDGE *v.* UNITED STATES. Appeals from the Supreme Court of the Territory of Utah. March 31, 1892: Dismissed, on motion of counsel for appellants. *Mr.*

Franklin S. Richards, *Mr. Le Grand Young* and *Mr. R. A. Howard* for appellants. *Mr. Attorney General* for appellee.

No. 1428. ERHARDT *v.* COHN. Error to the Circuit Court of the United States for the Southern District of New York. October 26, 1891: Dismissed, with costs, on motion of *Mr. Solicitor General* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. No appearance for defendants in error.

No. 588. EUREKA SPINDLE COMPANY *v.* SAWYER SPINDLE COMPANY. Appeal from the Circuit Court of the United States for the District of Massachusetts. November 5, 1891: Dismissed, per stipulation. *Mr. John Lowell, Jr.*, for appellant. *Mr. T. L. Livermore* and *Mr. F. P. Fish* for appellee.

No. 43. FALL RIVER, WARREN AND PROVIDENCE RAILROAD COMPANY *v.* PAGE. Error to the Circuit Court of the United States for the District of Rhode Island. November 30, 1891: Judgment reversed, per stipulation, and cause remanded for such action therein as may be consistent with law. *Mr. J. H. Benton, Jr.*, for plaintiff in error. *Mr. A. A. Ranney* for defendants in error.

No. 419. FARMERS' LOAN AND TRUST COMPANY *v.* MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY. Appeal from the Circuit Court of the United States for the Northern District of Texas. March 25, 1892: Dismissed, per stipulation. *Mr. Herbert B. Turner* for appellant. *Mr. Charles H. Tweed* for appellees.

No. 1087. FIDELITY AND CASUALTY COMPANY OF NEW YORK *v.* MORRIS. Error to the Circuit Court of the United States for the District of Colorado. January 11, 1892: Judgment

affirmed, with costs and interest, by a divided court. *Mr. C. S. Thomas* for plaintiff in error. *Mr. S. P. Rose* for defendant in error.

No. 387. First National Bank of Pine Bluff, Arkansas, *v.* Hanover National Bank of the City of New York. Error to the Circuit Court of the United States for the Eastern District of Arkansas. March 9, 1892: Dismissed, with costs, on motion of counsel for plaintiffs in error. *Mr. Jefferson Chandler* and *Mr. John M. Taylor* for plaintiffs in error. *Mr. John McClure* for appellee.

No. 298. Flaherty *v.* United States. Appeal from the Supreme Court of the Territory of Montana. April 11, 1892: Dismissed, with costs, pursuant to the 10th rule, and remanded to the Supreme Court of the State of Montana. *Mr. C. W. Holcomb* and *Mr. J. H. McGowan* for appellant. *Mr. Attorney General* for appellee.

No. 353. Foote *v.* Glenn. Error to the Circuit Court of the United States for the District of New Jersey. April 27, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. Alfred Mills* for plaintiff in error. *Mr. Charles Marshall* and *Mr. John Howard* for defendant in error.

No. 192. Forbes *v.* Thomas. Error to the Supreme Court of the State of Nebraska. March 3, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. Randolph Coyle* and *Mr. F. J. Lavender* for plaintiff in error. *Mr. John L. Webster* for defendant in error.

No. 1429. Forked Deer Milling Company *v.* Rickerson Roller Mill Company. Appeal from the Circuit Court of

the United States for the Western District of Tennessee. October 19, 1891: Docketed and dismissed, with costs, on motion of *Mr. Isham G. Harris* for appellee.

No. 215. Fowler Manufacturing Company *v.* Cameron. Appeal from the Circuit Court of the United States for the Southern District of New York. December 14, 1891: Dismissed, with costs, on authority of counsel for appellants. *Mr. Thomas H. Rodman*, *Mr. Charles D. Adams* and *Mr. W. C. Witter* for appellants. No appearance for appellee.

No. 49. Francis *v.* United States. Appeal from the Court of Claims. October 16, 1891: Dismissed, pursuant to the 10th rule. *Mr. George A. King* for appellant. *Mr. Attorney General* for appellee.

No. 1352. Francoeur *v.* Newhouse. Error to the Circuit Court of the United States for the Northern District of California. March 21, 1892: Dismissed, with costs, per stipulation, on motion of *Mr. S. S. Burdett* for defendant in error. *Mr. A. L. Hart* for plaintiff in error. *Mr. S. S. Burdett* for defendant in error.

No. 53. Gage *v.* Kellogg. Appeal from the Circuit Court of the United States for the Northern District of New York. October 22, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. John Dane, Jr.*, for appellant. *Mr. John W. Munday* and *Mr. Edmund Adcock* for appellees.

No. 209. Gilman *v.* Lake. Appeal from the Circuit Court of the United States for the Northern District of California. January 11, 1892: Dismissed, with costs, on authority of counsel for appellant. *Mr. M. A. Wheaton* for appellant. No appearance for appellees.

Cases not Otherwise Reported.

No. 214. GLOBE TELEPHONE COMPANY OF NEW YORK *v.* AMERICAN BELL TELEPHONE COMPANY. Appeal from the Circuit Court of the United States for the Southern District of New York. March 10, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. D. Humphreys* for appellants. *Mr. George L. Roberts* and *Mr. James J. Storrow* for appellees.

No. 1396. HALL *v.* BRADFORD. Appeal from the Circuit Court of the United States for the Southern District of Mississippi. February 1, 1892: Decree reversed, at the cost of the appellee, for errors confessed, per stipulation, and cause remanded for further proceedings in accordance with law. *Mr. Sidney C. Eastman* for appellant. *Mr. J. J. Bradford* for appellee.

No. 1406. EX PARTE HALLINGER. Appeal from the Circuit Court of the United States for the District of New Jersey. November 23, 1891: Dismissed. No appearance for appellant. *Mr. C. H. Winfield* for the State of New Jersey.

No. 1560. HALLINGER *v.* BIRDSALL. Appeal from the District Court of the United States for the District of New Jersey. May 2, 1892: Docketed and dismissed, with costs, on motion of *Mr. C. H. Winfield* for appellee.

No. 233. HAMILTON *v.* CUTTS. Appeal from the Supreme Court of the District of Columbia. March 9, 1892: Dismissed, per stipulation. *Mr. J. J. Darlington* for appellant. *Mr. Moorfield Storey* and *Mr. Blair Lee* for appellees.

No. 82. HAYWARD *v.* BOLTON. Appeal from the Supreme Court of the Territory of Idaho. November 5, 1891: Dismissed, with costs, on authority of counsel for appellant, and

cause remanded to the Supreme Court of the State of Idaho. *Mr. F. S. Richards* for appellant. No appearance for appellees.

No. 98. HEDDEN *v.* HORSMAN. Error to the Circuit Court of the United States for the Southern District of New York. October 19, 1891: Dismissed, with costs, on motion of *Mr. Solicitor General* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. Edward Hartley* and *Mr. W. H. Coleman* for defendant in error.

No. 164. HERSHEY *v.* BLAKESLEY. Appeal from the Circuit Court of the United States for the District of Connecticut. January 15, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. Joshua Pusey* for appellants. *Mr. J. J. Jennings* for appellee.

No. 161. HILTON *v.* JONES. Appeal from the Circuit Court of the United States for the District of Nebraska. January 14, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. Joseph R. Webster*, *Mr. S. S. Gregory*, *Mr. William N. Booth*, *Mr. James S. Harlan* and *Mr. W. Hallett Phillips* for appellants. *Mr. N. S. Harwood* and *Mr. John H. Ames* for appellees.

No. 26. HOUSTON *v.* SIMPSON. Error to the Superior Court of Union County, North Carolina. October 14, 1891: Dismissed, with costs, on authority of counsel for plaintiffs in error. *Mr. John W. Hinsdale* for plaintiffs in error. *Mr. W. W. Flemming* for defendants in error.

No. 875. HOUSTON, EAST AND WEST TEXAS RAILWAY COMPANY *v.* BINZ. Error to the Supreme Court of the State of Texas. February 29, 1892: Dismissed, without costs to either party, per stipulation, on motion of *Mr. William A. McKen-*

ney, in behalf of counsel. *Mr. James Parker* for plaintiff in error. *Mr. A. W. Houston* and *Mr. W. C. Oliver* for defendants in error.

No. 1114. HUNTER *v.* COYLE. Error to the Circuit Court of the United States for the Western District of Missouri. October 30, 1891: Dismissed, with costs, on authority of counsel for plaintiffs in error. *Mr. H. M. Pollard* for plaintiffs in error. No appearance for defendant in error.

No. 81. INNIS *v.* BOLTON. Appeal from the Supreme Court of the Territory of Idaho. November 5, 1891: Dismissed, with costs, on authority of counsel for appellant, and cause remanded to the Supreme Court of the State of Idaho. *Mr. F. S. Richards* for appellant. No appearance for appellees.

No. 167. JACKSON *v.* CHANDLER. Appeal from the Circuit Court of the United States for the District of Massachusetts. December 7, 1891: Dismissed, with costs, on motion of *Mr. Frank W. Hackett* for appellants. *Mr. Godfrey Morse* for appellants. *Mr. Alfred D. Chandler* for appellee.

No. 1079. JOHNSTON *v.* SHIELDS. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. July 18, 1891: Dismissed, pursuant to the 28th rule. *Mr. David P. Dyer* for appellants. *Mr. Given Campbell* for appellee.

No. 851. KAIN *v.* NIMICK. Appeal from the Circuit Court of the United States for the District of West Virginia. May 16, 1892: Dismissed, with costs, on motion of counsel for appellant. *Mr. T. S. Riley* for appellant. No appearance for appellees.

Cases not Otherwise Reported.

No. 807. KANSAS CITY, ST. JOSEPH AND COUNCIL BLUFFS RAILROAD COMPANY *v.* CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY. Appeal from the Circuit Court of the United States for the Western District of Missouri. November 9, 1891: Decree reversed, each party to pay one-half of the costs in this court, per stipulation, and cause remanded to be proceeded in according to law and justice. *Mr. J. M. Woolworth* and *Mr. C. A. Mosman* for appellant. *Mr. D. D. Burnes*, *Mr. Frank Hagerman* and *Mr. C. W. Bunn* for appellee.

No. 168. KENNEDY *v.* MCTAMMANY. Appeal from the Circuit Court of the United States for the District of Massachusetts. January 15, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. J. E. Maynadier* for appellants. *Mr. Charles Theodore Russell* for appellee.

No. 354. KEPNER *v.* DUSTIN. Appeal from the Circuit Court of the United States for the Northern District of Ohio. April 28, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. R. W. Tayler* for appellant. No appearance for appellee.

No. 264. KIDD *v.* HORRY. Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. March 29, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. Francis Rawle* and *Mr. A. Q. Keasbey* for appellant. *Mr. F. Carroll Brewster* for appellees.

No. 136. KIDD *v.* RANSOM. Appeal from the Circuit Court of the United States for the Northern District of Illinois. October 19, 1891: Decree reversed, and cause remanded with directions to dismiss the bill, per stipulation. *Mr. C. K. Offield* for appellant. *Mr. J. W. Merriam* for appellee.

No. 281. KITTERINGHAM *v.* BLAIR TOWN LOT AND LAND COMPANY. Error to the Supreme Court of the State of Iowa.

April 1, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. J. Lyman* for plaintiff in error. *Mr. E. S. Bailey* for defendant in error.

No. 361. KLEINSCHMIDT *v.* DAVENPORT. Appeal from the Supreme Court of the Territory of Montana. April 28, 1892: Dismissed, with costs, and remanded to the Supreme Court of the State of Montana. *Mr. T. H. Carter* and *Mr. J. B. Clayberg* for appellants. No appearance for appellees.

No. 331. KULP *v.* SONDER. Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. April 19, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. Jerome Carty* for appellant. No appearance for appellee.

No. 231. LAMB *v.* MCGUIRE. Appeal from the Supreme Court of the Territory of Idaho. March 22, 1892: Dismissed, with costs, pursuant to the 10th rule, and remanded to the Supreme Court of the State of Idaho. *Mr. S. S. Burdett* for appellant. No appearance for appellee.

No. 73. LANG *v.* WOODS. Error to the Circuit Court of the United States for the Northern District of Texas. November 16, 1891: Judgment affirmed, with costs and interest, by a divided court. *Mr. M. L. Crawford* and *Mr. John Johns* for plaintiffs in error. No appearance for defendant in error.

No. 83. LARSON *v.* COX. Error to the Supreme Court of the State of Kansas. November 5, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. Oscar Foust* for plaintiff in error. No appearance for defendant in error.

No. 1315. LOGAN *v.* KNIGHT. Appeal from the Circuit Court of the United States for the Northern District of Texas.

April 11, 1892: Dismissed, with costs, on motion of *Mr. H. J. May* for appellants. *Mr. A. H. Garland* and *Mr. H. J. May* for appellants. *Mr. Attorney General* for appellee.

No. 295. LYNDE *v.* SPERLING. Appeal from the Supreme Court of the Territory of Montana. April 8, 1892: Dismissed, with costs, pursuant to the 10th rule, and remanded to the Supreme Court of the State of Montana. *Mr. J. H. McGowan* and *Mr. C. W. Holcomb* for appellants. No appearance for appellee.

No. 133. MACKALL *v.* RICHARDS. Appeal from the Supreme Court of the District of Columbia. December 17, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. W. Willoughby* for appellant. *Mr. Enoch Totten* for appellee.

No. 816. MAGONE *v.* BLYDENBURGH. Error to the Circuit Court of the United States for the Southern District of New York. April 11, 1892: Dismissed, with costs, on motion of *Mr. Solicitor General* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. No appearance for defendant in error.

No. 1516. MARINE *v.* PACKHAM. Appeal from the Circuit Court of the United States for the District of Maryland. March 15, 1892: Dismissed, with costs, on motion of *Mr. Solicitor General* for appellant. *Mr. Attorney General* for appellant. No appearance for appellees.

No. 1353. MARINE *v.* ROBSON. Appeal from the Circuit Court of the United States for the District of Maryland. March 18, 1892: Dismissed, with costs, on motion of *Mr. Solicitor General* for appellant. *Mr. Attorney General* for appellant. No appearance for appellee.

Cases not Otherwise Reported.

No. 469. MARSH *v.* SCOTT. Error to the Supreme Court of the State of Illinois. March 1, 1892: Dismissed, per stipulation. *Mr. R. A. Parker* for plaintiffs in error. *Mr. Lyman Trumbull* for defendant in error.

No. 1236. MCCALLA *v.* BANE. Appeal from the Circuit Court of the United States for the District of Oregon. February 29, 1892: Dismissed, with costs, on authority of counsel for appellant. *Mr. Zera Snow* for appellant. *Mr. J. N. Dolph* for appellees.

No. 1299. MCCLOSKEY *v.* HURST. Error to the Circuit Court of the United States for the Eastern District of Louisiana. May 16, 1892: Dismissed for the want of jurisdiction. *Mr. A. J. Murphy* for plaintiff in error. *Mr. J. D. Rouse* and *Mr. William Grant* for defendant in error

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No. 1115. MCELVAINE *v.* BRUSH. Appeal from the Circuit Court of the United States for the Southern District of New York. December 7, 1891: Dismissed, with costs, per stipulation. *Mr. A. C. Astarita* and *Mr. George M. Curtis* for appellant. *Mr. Charles F. Tabor* for appellee.

No. 396. MCINTYRE *v.* ROESCHLAUB. Appeal from the Circuit Court of the United States for the District of Colorado. November 2, 1891: Dismissed, with costs, on motion of *Mr. W. Hallett Phillips* in behalf of counsel for appellants. *Mr. E. T. Wells* for appellants. No appearance for appellee.

No. 1452. MCNUTT *v.* BOSWORTH. Appeal from the Circuit Court of the United States for the Eastern District of Tennessee. January 26, 1892: Dismissed, with costs, on motion of *Mr. A. H. Garland* for appellant. *Mr. Tully R. Cornick, Jr.*, *Mr. A. H. Garland* and *Mr. H. J. May* for appellant. No appearance for appellees.

Cases not Otherwise Reported.

No. 1453. McNutt *v.* Cardiff Coal and Iron Company. Appeal from the Circuit Court of the United States for the Eastern District of Tennessee. January 16, 1892: Dismissed, with costs, on motion of *Mr. A. H. Garland* for appellant. *Mr. Tully R. Cornick, Jr.*, *Mr. A. H. Garland* and *Mr. H. J. May* for appellant. No appearance for appellee.

No. 16. Mecartney *v.* Crittenden. Error to the Circuit Court of the United States for the Northern District of California. October 13, 1891: Dismissed, with costs, pursuant to the 19th rule. *Mr. S. W. Halladay* for plaintiff in error. No appearance for defendants in error.

No. 1226. Melton *v.* Capital City Bank of Nashville. Appeal from the Circuit Court of the United States for the Middle District of Tennessee. January 12, 1892: Dismissed, with costs, per stipulation. *Mr. John Ruhm* for appellant. *Mr. S. Watson*, *Mr. G. N. Tillman* and *Mr. S. A. Champion* for appellees.

No. 108. Morehead *v.* Glenn. Error to the Circuit Court of the United States for the Western District of North Carolina. November 19, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. W. E. Earle*, *Mr. W. D. Davidge* and *Mr. Reginald Fendall* for plaintiff in error. *Mr. Charles Marshall* and *Mr. John Howard* for defendant in error.

No. 46. Moses *v.* State of Mississippi. Error to the Supreme Court of the State of Mississippi. December 4, 1891: Dismissed, with costs, per stipulation. *Mr. E. H. Farrar*, *Mr. B. F. Jonas* and *Mr. E. B. Kruttschnitt* for plaintiff in error. *Mr. T. M. Miller* for defendant in error.

No. 350. Mountain Maid Mining Company *v.* Reilly. Error to the Supreme Court of the Territory of Arizona.

April 27, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. A. T. Britton* and *Mr. A. B. Browne* for plaintiff in error. *Mr. W. Hallett Phillips* and *Mr. Joseph K. McCammon* for defendant in error.

No. 1444. MURRAY *v.* FIRST NATIONAL BANK OF MONTAGUE, TEXAS. Error to the United States Court for the Indian Territory. October 30, 1891: Docketed and dismissed, with costs, on motion of *Mr. Halbert E. Paine* for defendant in error.

No. 1000. MUTUAL RESERVE FUND LIFE ASSOCIATION *v.* WOODSON. Error to the Circuit Court of the United States for the Eastern District of Virginia. November 9, 1891: Judgment reversed, clerk's costs to be paid by plaintiff in error, per stipulation, and cause remanded, with directions to remand the cause to the state court. *Mr. William L. Royall* for plaintiff in error. *Mr. Legh R. Page* for defendants in error.

No. 280. MYERS *v.* HAWLEY. Appeal from the Circuit Court of the United States for the Southern District of New York. March 1, 1892: Dismissed, per stipulation. *Mr. John A. Grow* for appellant. *Mr. B. E. Valentine* and *Mr. J. A. Burr, Jr.*, for appellee.

No. 1159. MYERS *v.* KINGSTON COAL COMPANY. Error to the Supreme Court of the State of Pennsylvania. December 21, 1891: Dismissed for the want of jurisdiction. *Mr. A. Ricketts* for plaintiffs in error. *Mr. H. W. Palmer* and *Mr. H. B. Payne* for defendant in error.

No. 1484. NEW CHESTER WATER COMPANY *v.* HOLLY MANUFACTURING COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. March 15, 1892: Dismissed, with costs, per stipulation. *Mr.*

R. C. Dale and *Mr. Samuel Dickson* for appellants. *Mr. R. L. Ashhurst* for appellee.

No. 68. NEW ORLEANS WATER WORKS COMPANY *v.* MAGINNIS OIL AND SOAP WORKS. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. November 16, 1891: Decree affirmed, with costs, by a divided court. *Mr. J. R. Beckwith* for appellant. *Mr. T. L. Bayne*, *Mr. George Denegre*, *Mr. C. W. Hornor*, *Mr. W. S. Benedict* and *Mr. George A. King* for appellee.

No. 67. NEW ORLEANS WATER WORKS COMPANY *v.* PEOPLE'S ICE MANUFACTURING COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. November 16, 1891: Decree affirmed, with costs, by a divided court. *Mr. J. R. Beckwith* for appellant. *Mr. Alfred Goldthwaite* for appellee.

No. 66. NEW ORLEANS WATER WORKS COMPANY *v.* SOUTHERN BREWING COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. November 16, 1891: Decree affirmed, with costs, by a divided court. *Mr. J. R. Beckwith* for appellant. *Mr. Alfred Goldthwaite* for appellee.

No. 8. NETHERCLIFT *v.* ROBERTSON. Error to the Circuit Court of the United States for the Southern District of New York. October 13, 1891: Dismissed, with costs, on authority of counsel for plaintiffs in error, on motion of *Mr. Solicitor General* for defendant in error. *Mr. Henry E. Tremain* and *Mr. A. J. Willard* for plaintiffs in error. *Mr. Attorney General* for defendant in error.

No. 213. O'DONNELL *v.* TOWN OF SOUTHFIELD. Error to the Circuit Court of the United States for the Eastern District of

New York. March 1, 1892: Dismissed, per stipulation. *Mr. Charles C. Bull* for plaintiff in error. *Mr. Henry Greenfield* for defendant in error.

No. 79. OLESON *v.* COX. Error to the Supreme Court of the State of Kansas. November 3, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. Oscar Foust* for plaintiff in error. No appearance for defendant in error.

No. 95. PACIFIC EXPRESS COMPANY *v.* TAXING DISTRICT OF SHELBY COUNTY, TENNESSEE. Error to the Supreme Court of the State of Tennessee. November 9, 1891: Judgment reversed, with costs, per stipulation, and cause remanded, to be proceeded with according to law and justice. *Mr. R. J. Morgan* for plaintiff in error. *Mr. S. P. Walker* for defendant in error.

No. 333. PERKINS *v.* HANEY MANUFACTURING COMPANY. Appeal from the Circuit Court of the United States for the Western District of Michigan. April 20, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. C. J. Hunt* for appellant. *Mr. Edward Taggart* for appellees.

No. 1066. PITRAT *v.* HULL. Appeal from the Circuit Court of the United States for the Southern District of Ohio. September 8, 1891: Dismissed, pursuant to the 28th rule. *Mr. O. M. Gottschall* for appellants. *Mr. Alfred Russell* for appellee.

No. 1559. POST *v.* COUNTY OF PULASKI. May 16, 1892: Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied, with costs. *Mr. John F. Dillon* and *Mr. Harry Hubbard* for petitioner. *Mr. Lewis M. Bradley* for respondent.

Cases not Otherwise Reported.

No. 219. PRICE *v.* DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY. Error to the Circuit Court of the United States for the Eastern District of Michigan. March 28, 1892: Judgment affirmed, with costs, by a divided court. *Mr. Don M. Dickinson* and *Mr. Elliot G. Stevenson* for plaintiff in error. *Mr. Elijah W. Meddaugh* and *Mr. W. A. Day* for defendant in error.

No. 273. QUONG LEE LUM *v.* RANKIN. Appeal from the Circuit Court of the United States for the Northern District of California. March 31, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. Thomas D. Riordan* for appellant. No appearance for appellee.

No. 942. RALSTON *v.* BRITISH AND AMERICAN MORTGAGE COMPANY. Appeal from the Circuit Court of the United States for the Western District of Louisiana. November 9, 1891: Dismissed, with costs, pursuant to the 15th rule. *Mr. Wade R. Young* for appellant. *Mr. James Lowndes* for appellees.

No. 1245. REYNES *v.* FRY. Appeal from the Circuit Court of the United States for the Southern District of New York. December 7, 1891: Dismissed, per stipulation, without costs to either party. *Mr. John E. Parsons* for appellant. *Mr. John M. Bowers* for appellee.

No. 1054. RICHARDSON *v.* BRYAN. Error to the Superior Court of the State of Massachusetts. January 26, 1892: Dismissed, with costs, on authority of counsel for plaintiff in error. *Mr. Lewis S. Dabney* and *Mr. Frederic Cunningham* for plaintiff in error. No appearance for defendant in error.

No. 537. RICHMOND AND DANVILLE RAILROAD COMPANY *v.* DYKEMAN. Error to the Circuit Court of the United States

for the Northern District of Georgia. December 14, 1891: Dismissed, per stipulation, on motion of *Mr. Linden Kent* for plaintiff in error. *Mr. Linden Kent* for plaintiff in error. *Mr. N. J. Hammond* for defendant in error.

No. 203. RUMFORD CHEMICAL WORKS *v.* MUTH. Appeal from the Circuit Court of the United States for the District of Maryland. October 26, 1891: Dismissed, with costs, on authority of counsel for appellant. *Mr. Rowland Cox* for appellant. No appearance for appellees.

No. 321. ST. JOHN *v.* CITY OF TOLEDO, OHIO. Error to the Circuit Court of the United States for the Northern District of Ohio. April 14, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. R. P. Ranney* for plaintiff in error. *Mr. W. H. H. Read* and *Mr. Clarence Brown* for defendants in error.

No. 367. ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY *v.* HUMPHREYS. Error to the Circuit Court of the United States for the Southern District of New York. March 7, 1892: Dismissed, per stipulation. *Mr. John F. Dillon* for plaintiff in error. *Mr. George De Forest Lord* for defendants in error.

No. 438. ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY *v.* STATE OF MINNESOTA *ex rel.* CITY OF MINNEAPOLIS. Error to the District Court of Hennepin County, State of Minnesota. January 4, 1892: Dismissed, with costs, per stipulation. *Mr. M. D. Grover* for plaintiff in error. *Mr. Robert D. Russell* for defendant in error.

No. 22. SCHILLINGER *v.* CRANFORD. Appeal from the Supreme Court of the District of Columbia. October 13, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. J. E.*

McDonald, *Mr. R. J. Bright*, *Mr. J. C. Fay* and *Mr. U. M. Young* for appellants. *Mr. Enoch Totten* for appellees.

No. 91. SCHUYLER'S STEAM TOW BOAT LINE *v.* SALISBURY. Error to the Supreme Court of the State of New York. November 6, 1891: Dismissed, with costs, for failure to comply with the order of this court of October 19, 1891, requiring new bond on writ of error. *Mr. W. Frothingham* for plaintiff in error. *Mr. J. Rider Cady* for defendant in error.

No. 179. SCRUGGS *v.* UNITED STATES. Appeal from the Court of Claims. January 28, 1892: Dismissed, pursuant to the 10th rule. *Mr. George A. King* for appellant. *Mr. Attorney General* for appellee.

No. 141. SHORT *v.* SULLY. Error to the Circuit Court of the United States for the Northern District of Texas. December 14, 1891: Dismissed, with costs, on authority of counsel for plaintiff in error. *Mr. A. S. Lathrop* for plaintiff in error. *Mr. Van H. Manning* for defendants in error.

No. 1145. SIOUX CITY AND PACIFIC RAILWAY COMPANY *v.* SMITH, COMMISSIONERS, &C. Appeal from the Circuit Court of the United States for the Southern District of Iowa. March 10, 1892: Dismissed, with costs, on motion of *Mr. W. C. Goudy* for appellant. *Mr. W. C. Goudy* and *Mr. N. M. Hubbard* for appellant. No appearance for appellees.

No. 1015. SLOAN *v.* STRICKLER. Error to the Supreme Court of the State of Colorado. December 14, 1891: Dismissed, for the want of jurisdiction. *Mr. L. S. Dixon* and *Mr. W. T. Hughes* for plaintiffs in error. *Mr. V. D. Markham* for defendant in error.

Cases not Otherwise Reported.

No. 388. SMITH *v.* NAVE-MCCORD CATTLE COMPANY. Error to the Circuit Court of the United States for the Western District of Texas. August 19, 1891: Dismissed, pursuant to the 28th rule. *Mr. John B. Rector* for plaintiffs in error. *Mr. S. R. Fisher* for defendant in error.

No. 4. SPALDING *v.* STODDER. Error to the Circuit Court of the United States for the Northern District of Illinois. October 13, 1891: Judgment affirmed, with costs and interest, on motion of *Mr. Solicitor General* for the plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. Percy L. Shuman* and *Mr. Henry E. Tremain* for defendants in error.

No. 193. SPALDING LUMBER COMPANY *v.* UNITED STATES. Error to the Circuit Court of the United States for the Western District of Michigan. May 16, 1892: Dismissed, on motion of *Mr. Attorney General* for defendant in error, and consent of counsel for plaintiff in error. *Mr. F. O. Clark* for plaintiff in error. *Mr. Attorney General* for defendant in error.

No. 111. SPRINGS *v.* GLENN. Error to the Circuit Court of the United States for the Western District of North Carolina. November 20, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. W. E. Earle*, *Mr. W. D. Davidge* and *Mr. Reginald Fendall* for plaintiff in error. *Mr. Charles Marshall* and *Mr. John Howard* for defendant in error.

No. 162. STANDARD LIFE AND ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN *v.* HUTCHCRAFT. Error to the Circuit Court of the United States for the Southern District of Ohio. January 14, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. John Atkinson* for plaintiff in error. No appearance for defendant in error.

Cases not Otherwise Reported.

No. 105. STEIN *v.* BORST. Appeal from the Circuit Court of the United States for the Northern District of New York. November 18, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. George W. Hey* for appellants. No appearance for appellee.

No. 239. SYRACUSE CHILLED PLOW COMPANY *v.* ROBINSON. Appeal from the Circuit Court of the United States for the Northern District of New York. March 24, 1892: Dismissed, with costs, for want of prosecution. *Mr. T. K. Fuller* for appellant. *Mr. Theodore Bacon* for appellees.

No. 1336. TAFT *v.* MARSILY. Error to the Supreme Court of the State of New York. October 3, 1891: Dismissed, pursuant to the 28th rule. *Mr. Henry D. Hotchkiss* for plaintiff in error. *Mr. D. M. Porter* for defendants in error.

No. 888. TATEM *v.* CHADWICK. Appeal from the Supreme Court of the State of Montana. December 21, 1891: Dismissed for the want of jurisdiction. *Mr. M. F. Morris* and *Mr. J. C. Robinson* for appellants. *Mr. Henry E. Davis* for appellee.

No. 1304. TOMS *v.* OWEN. Appeal from the Circuit Court of the United States for the Eastern District of Michigan. October 28, 1891: Dismissed, with costs, on motion of *Mr. C. I. Walker* for appellant. *Mr. C. I. Walker* for appellant. No appearance for appellee.

No. 363. TOPLITZ *v.* MERRITT. Error to the Circuit Court of the United States for the Southern District of New York. April 29, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. Stephen G. Clarke* for plaintiffs in error. *Mr. Attorney General* for defendant in error.

Cases not Otherwise Reported.

No. 94. TORRENT *v.* DULUTH LUMBER COMPANY. Appeal from the Circuit Court of the United States for the District of Minnesota. November 6, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. R. A. Parker* for appellant. No appearance for appellee.

No. 1198. TOWNSHIP OF PLEASANT HILL, LANCASTER COUNTY, SOUTH CAROLINA *v.* MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY. Appeal from the Circuit Court of the United States for the District of South Carolina. February 29, 1892: Dismissed, with costs, by consent of counsel for appellant, on motion of *Mr. James Lowndes* for appellee. *Mr. Charles Richardson Miles* for appellant. *Mr. Samuel Lord* for appellee.

No. 788. TRAVELLERS' INSURANCE COMPANY *v.* MCCONKEY. Error to the Circuit Court of the United States for the Northern District of Iowa. September 1, 1891: Dismissed, pursuant to the 28th rule. *Mr. Bradley D. Lee* and *Mr. John P. Ellis* for plaintiff in error. *Mr. William G. Thompson* and *Mr. H. B. Fouke* for defendant in error.

No. 330. TRESTER *v.* MISSOURI PACIFIC RAILWAY COMPANY. Error to the Circuit Court of the United States for the District of Nebraska. January 26, 1892: Dismissed, per stipulation. *Mr. Walter J. Lamb* for plaintiff in error. *Mr. B. P. Waggener* for defendant in error.

No. 284. UNION PACIFIC RAILWAY COMPANY *v.* CENTRAL TRUST COMPANY OF NEW YORK. Appeal from the Circuit Court of the United States for the District of Nevada. January 4, 1892: Dismissed, with costs, on motion of *Mr. John F. Dillon* for appellant. *Mr. John F. Dillon* for appellant. No appearance for appellees.

Cases not Otherwise Reported.

No. 286. UNION PACIFIC RAILWAY COMPANY *v.* PIDCOCK. Error to the Supreme Court of the Territory of Utah. December 7, 1891: Dismissed, with costs, on motion of *Mr. John F. Dillon* for plaintiff in error. *Mr. John F. Dillon* for plaintiff in error. *Mr. J. G. Sutherland* for defendant in error.

No. 45. UNION PACIFIC RAILWAY COMPANY *v.* REDDON. Error to the Supreme Court of the Territory of Utah. October 26, 1891: Judgment affirmed, with costs, by a divided court. *Mr. John F. Dillon*, *Mr. Harry Hubbard*, *Mr. Samuel Shellabarger* and *Mr. J. M. Wilson* for plaintiff in error. *Mr. Arthur Brown* for defendant in error.

No. 74. UNION PACIFIC RAILWAY COMPANY *v.* THOMPSON. Appeal from the Circuit Court of the United States for the District of Colorado. October 30, 1891: Dismissed, with costs, on motion of *Mr. John F. Dillon* for appellant. *Mr. John F. Dillon* for appellant. *Mr. A. C. Thompson* for appellees.

No. 813. UNION TRUST COMPANY OF NEW YORK *v.* BINZ. Error to the Supreme Court of the State of Texas. February 29, 1892: Dismissed, without costs to either party, per stipulation, on motion of *Mr. William A. McKenney* in behalf of counsel. *Mr. Wheeler H. Peckham* for plaintiff in error. *Mr. A. W. Houston* and *Mr. W. C. Oliver* for defendants in error.

No. 1383. UNITED STATES *v.* BASHAW. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. April 18, 1892: Dismissed, on motion of *Mr. Solicitor General* for appellant. *Mr. Attorney General* for appellant. *Mr. Thomas C. Fletcher* for appellee.

No. 1538. UNITED STATES *v.* BAXTER. Error to the Circuit Court of the United States for the District of Minnesota.

April 18, 1892: Dismissed, on motion of *Mr. Solicitor General* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. No appearance for defendant in error.

No. 19. UNITED STATES *v.* BOSTON AND ALBANY RAILROAD COMPANY. Error to the Circuit Court of the United States for the District of Massachusetts. April 11, 1892: Dismissed, on motion of *Mr. Solicitor General* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. E. R. Hoar* and *Mr. Samuel Hoar* for defendant in error.

No. 1502. UNITED STATES *v.* CLOUGH. Appeal from the Circuit Court of the United States for the Western District of Tennessee. April 18, 1892: Dismissed, on motion of *Mr. Solicitor General* for appellant. *Mr. Attorney General* for appellant. No appearance for appellee.

No. 1077. UNITED STATES *v.* FAULKNER. Appeal from the District Court of the United States for the Middle District of Tennessee. May 16, 1892: Decree reversed, per stipulation, and cause remanded to be proceeded in according to law, on motion of *Mr. Attorney General* for appellant. *Mr. Attorney General* for appellant. *Mr. George A. King* for appellee.

No. 1358. UNITED STATES *v.* FINN. Appeal from the Court of Claims. January 11, 1892: Dismissed, on motion of *Mr. Solicitor General* for appellant. *Mr. Attorney General* for appellant. No appearance for appellee.

No. 1297. UNITED STATES *v.* FITCH. Appeal from the Circuit Court of the United States for the Western District of Michigan. April 18, 1892: Dismissed, on motion of *Mr. Solicitor General* for appellants. *Mr. Attorney General* for appellant. No appearance for appellee.

Cases not Otherwise Reported.

No. 1431. UNITED STATES *v.* GOODRICH. Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. April 18, 1892: Dismissed, on motion of *Mr. Solicitor General* for appellant. *Mr. Attorney General* for appellant. *Mr. U. M. Rose* and *Mr. G. B. Rose* for appellee.

No. 1348. UNITED STATES *v.* HAZELTINE. Appeal from the Court of Claims. November 9, 1891: Dismissed, per stipulation, on motion of *Mr. Solicitor General* for appellant. *Mr. Attorney General* for appellant. *Mr. C. C. Lancaster* for appellee.

No. 1028. UNITED STATES *v.* JULIAN. Appeal from the District Court of the United States for the Middle District of Tennessee. May 2, 1892: Decree reversed, per stipulation, and cause remanded to be proceeded in according to law. *Mr. Attorney General* for appellant. *Mr. George A. King* for appellee.

No. 1029. UNITED STATES *v.* JULIAN. Appeal from the District Court of the United States for the Middle District of Tennessee. May 2, 1892: Decree reversed, per stipulation, and cause remanded to be proceeded in according to law. *Mr. Attorney General* for appellant. *Mr. George A. King* for appellee.

No. 1030. UNITED STATES *v.* JULIAN. Appeal from the Circuit Court of the United States for the Middle District of Tennessee. May 2, 1892: Decree reversed, per stipulation, and cause remanded to be proceeded in according to law. *Mr. Attorney General* for appellant. *Mr. George A. King* for

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No. 594. UNITED STATES *v.* MCLEAN. Error to the Circuit Court of the United States for the District of Kansas. October 26, 1891: Dismissed, on motion of *Mr. Solicitor General*

for plaintiff in error. *Mr. Attorney General* for plaintiff in error. No appearance for defendant in error.

No. 704. UNITED STATES *v.* NORRELL. Appeal from the Third Judicial District Court of the Territory of Utah. February 1, 1892: Decree reversed as to the docket fees charged therein, and affirmed as to the residue of the fees therein, per stipulation, and cause remanded, with directions to enter a decree in accordance with the stipulation of counsel, on motion of *Mr. Solicitor General* for appellant. *Mr. Attorney General* for appellant. *Mr. O. B. Hallam* for appellee.

No. 1474. UNITED STATES *v.* PERRY. Appeal from the Circuit Court of the United States for the District of Kansas. April 18, 1892: Dismissed, on motion of *Mr. Solicitor General* for appellant. *Mr. Attorney General* for appellant. No appearance for appellee.

No. 142. UNITED STATES *v.* RUGGLES. Error to the Circuit Court of the United States for the Southern District of New York. December 7, 1891: Dismissed, on motion of *Mr. Solicitor General* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. T. W. Osborn* for defendants in error.

No. 76. UNITED STATES *v.* UNION COAL COMPANY. Appeal from the Circuit Court of the United States for the District of Colorado. November 23, 1891: Decree affirmed by a divided court. *Mr. Attorney General* and *Mr. Assistant Attorney General Maury* for appellant. *Mr. John F. Dillon* and *Mr. Harry Hubbard* for appellee.

No. 238. WALL *v.* DISTRICT OF COLUMBIA. Appeal from the Supreme Court of the District of Columbia. March

23, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. W. W. Upton* for appellant. No appearance for appellees.

No. 1450. WAUTON *v.* DEWOLF. Appeal from the Circuit Court of the United States for the Northern District of California. November 3, 1891: Docketed and dismissed, with costs, on motion of *Mr. A. B. Browne* for appellees.

No. 237. WEDGE BLOCK PAVEMENT COMPANY *v.* CITY OF CLEVELAND. Appeal from the Circuit Court of the United States for the Northern District of Ohio. October 26, 1891: Dismissed, with costs, on authority of counsel for appellant. *Mr. J. E. Ingersoll* for appellant. No appearance for appellees.

No. 107. WILLIAMS *v.* GLENN. Error to the Circuit Court of the United States for the Western District of North Carolina. November 19, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. W. E. Earle*, *Mr. W. D. Davidge* and *Mr. Reginald Fendall* for plaintiff in error. *Mr. Charles Marshall* and *Mr. John Howard* for defendant in error.

No. 112. WILLIAMS *v.* GLENN. Error to the Circuit Court of the United States for the Western District of North Carolina. November 23, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. W. E. Earle*, *Mr. W. D. Davidge* and *Mr. Reginald Fendall* for plaintiff in error. *Mr. Charles Marshall* and *Mr. John Howard* for defendant in error.

No. 1422. WILLIAMS *v.* WILLIAMS. Appeal from the Circuit Court of the United States for the District of Kansas. October 13, 1891: Docketed and dismissed, with costs, on motion of *Mr. W. T. S. Curtis* for appellee.

Cases not Otherwise Reported.

No. 251. WILSON *v.* HAMMACHER. Appeal from the Circuit Court of the United States for the District of Massachusetts. January 20, 1892: Dismissed, with costs, per stipulation. *Mr. M. F. Dickinson, Jr.*, for appellant. *Mr. D. S. Linscott* for appellee.

No. 1558. WISE *v.* BENNETT. May 16, 1892: Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied, with costs. *Mr. James Thomson* for petitioner. *Mr. Robert H. Smith* for respondents.

No. 85. WOODRUFF *v.* CARR. Appeal from the Circuit Court of the United States for the District of Minnesota. November 5, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. C. K. Offield* for appellant. No appearance for appellee.

No. 320. WORTHINGTON *v.* ESTES. Appeal from the Circuit Court of the United States for the Southern District of New York. January 28, 1892: Dismissed, per stipulation, on motion of *Mr. G. G. Frelinghuysen* for appellees. *Mr. E. E. Anderson* for appellant. *Mr. J. L. S. Roberts* and *Mr. G. G. Frelinghuysen* for appellees.

No. 109. WRISTON *v.* GLENN. Error to the Circuit Court of the United States for the Western District of North Carolina. November 20, 1891: Dismissed, with costs, pursuant to the 10th rule. *Mr. W. E. Earle*, *Mr. W. D. Davidge* and *Mr. Reginald Fendall* for plaintiff in error. *Mr. Charles Marshall* and *Mr. John Howard* for defendant in error.

APPENDIX.

SUMMARY STATEMENT OF BUSINESS OF THE SUPREME COURT OF THE UNITED STATES FOR OCTOBER TERM, 1891, ENDING MAY 16, 1892.

1. *Original Docket.*

Number of cases	13
Number of cases disposed of	7
Leaving undisposed of	6

2. *Appellate Docket.*

Number of cases on the appellate docket at the close of October Term, 1890, not disposed of	1190
Number of cases docketed during October Term, 1891	379
Total	1569
Number of cases disposed of, October Term, 1891	496
Number of cases remaining undisposed of	1073
Number of cases continued under advisement from October Term, 1890	12
Argued	242
Submitted	78
Continued	30
Passed	11
Affirmed	185
Reversed	103
Dismissed — settled, and by authority of appts. and P. E.	97
Dismissed after submission on briefs and under various rules,	105
Questions answered	2
Denial of petitions for writs of certiorari under act of March 3, 1891	4

INDEX.

INDIAN.

The treaty of Prairie du Chien, 7 Stat. 320, made grants of lands to certain Indians, upon condition that they should never be leased or conveyed by the grantees or their heirs, to any persons whatever, without the permission of the President of the United States. One of those grantees conveyed his land in 1858 by a deed which had endorsed upon it the approval of the President, given in 1871. The state court of Illinois held that the Indian had no authority to convey the land without permission from the President previously obtained. *Held*, (1) that this ruling of the state court raised a Federal question; (2) that the permission thus given by the President to the conveyance, after its execution and delivery, was retroactive, and was equivalent to permission before execution and delivery, as no third parties had acquired an interest in the lands. *Pickering* v. *Lomax*, 310.

See PUBLIC LAND, 1.

INSOLVENT LAWS.

See CONSTITUTIONAL LAW, 6.

INTERSTATE COMMERCE.

1. The issue by a railway company engaged in interstate commerce of a "party-rate ticket" for the transportation of ten or more persons from a place situated in one State or Territory to a place situated in another State or Territory, at a rate less than that charged to a single individual for a like transportation on the same trip, does not thereby make "an unjust and unreasonable charge" against such individual within the meaning of § 1 of the act of February 4, 1887, to regulate commerce, 24 Stat. 379, c. 104; nor make an "unjust discrimination" against him within the meaning of § 2 of that act; nor give "an undue or unreasonable preference or advantage" to the purchasers of the party-rate ticket within the meaning of § 3. *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad*, 263.
2. Section 22 of that act, as amended by the act of March 2, 1889, 25 Stat. 855, 862, c. 382, § 9, provides that discriminations in favor of certain persons therein named shall not be deemed unjust, but it does not forbid discriminations in favor of others under conditions and circumstances so substantially alike as to justify the same treatment. *Ib.*
3. So far as Congress, in the act to regulate commerce, adopted the language of the English Traffic Act, it is to be presumed that it had in mind the construction given by the English courts to the adopted language, and intended to incorporate it into the Statute. *Ib.*

See CONSTITUTIONAL LAW, 1, 5.

INTOXICATING LIQUORS.

See CONTRACT, 2.

IOWA.

See BOUNDARY.

JUDICIAL SALE.

1. Every reasonable inducement will be made in favor of a judicial sale, so as to secure, if it can be done consistently with legal rules, the object they were intended to accomplish. *Cox* v. *Hart*, 376.
2. Where it is doubtful to which of two tracts of land in the same neighborhood, both the property of the execution debtor, the description in the marshal's deed applies, extrinsic evidence may be admitted to show which was intended, and the question left to the jury under proper instructions. *Ib.*

See EQUITY, 2, 3, 4, 6, 7, 8, 10.

JURISDICTION.

A. OF THE SUPREME COURT.

1. When the jurisdiction of this court depends upon the amount in controversy, it is to be determined by the amount involved in the particular case, and not by any contingent loss which may be sustained by either one of the parties through the probative effect of the judgment, however certain it may be that such loss will occur. *New England Mortgage Security Co.* v. *Gay*, 123.
2. The plaintiff made a loan to the defendant upon his promissory notes to the amount of $8500, secured by a mortgage of real estate in Georgia of the value of over $20,000. In assumpsit to recover on the notes the jury found the transaction to have been usurious and gave judgment for the sum actually received by the debtor which was $1700 less than the amount claimed, and for interest and costs. The effect of that judgment, if not reversed, is, under the laws of Georgia, to invalidate the mortgage given as security, in proceedings to enforce it. *Held*, that notwithstanding such indirect effect this court has no jurisdiction, the amount directly in dispute in this action being only the usurious sum. *Ib.*
3. When, in an action to recover an instalment of rent, the judgment below is for less than $5000, this court is without appellate jurisdiction although the judgment involved the existence and validity of the contract of lease, and thus indirectly an amount in excess of the jurisdictional limit. *Clay Center* v. *Farmers' Loan and Trust Co.*, 224.
4. The granting or refusing of an application for continuance by the court below is not subject to review here. *Cox* v. *Hart*, 376.
5. When the judgment in the Supreme Court of a Territory exceeds $5000 this court has jurisdiction of an appeal, although the judgment in the trial court may have been for a less sum and the jurisdictional amount reached in the appellate court by adding interest to that judgment. *Benson Mining Co.* v. *Alta Mining Co.*, 428.
6. Under the act of February 6, 1889, "to provide for writs of error in

in 1873. The entry was cancelled in 1879 for want of final proof within the seven years. In 1880 the act of June 15, 1880, was passed, 21 Stat. 236, c. 227, authorizing persons who had made homestead entries to entitle themselves to the lands on paying the government price therefor. G.'s widow made application for a patent under this act, and her application was rejected. In 1881 W. entered the tract, and in 1882 received a patent for it. In 1884 the widow made an application for a rehearing under the act of 1880, and her application was rejected in the same year. The land having greatly increased in value by the growth of the city of Tacoma, C., claiming through conveyances from W., filed a bill to quiet title, making the widow a defendant. The widow answered setting up as a prior right the homestead entry. *Held*, (1) that it was doubtful whether the widow of G. was entitled to the benefit of the act of June 15, 1880; but that, without deciding that question, (2) in view of the rapid and enormous increase in value of the tract, and her knowledge of all the circumstances, which must be assumed from her near residence to the property, a court of equity would not disturb a title legally perfect, created by the general government after a decision adverse to any reservation of the homestead right, and on the faith of which costly improvements had been made. *Ib.*

See PUBLIC LAND, 1.

LEASE.

See RAILROAD, 1 to 4.

LIMITATION, STATUTES OF.

The rule that an amended declaration which sets forth a new cause of action is subject to the operation of a limitation coming into force after the commencement of the action does not apply to an amendment which sets forth the same cause of action as that set forth originally. *Texas & Pacific Railway Co.* v. *Cox*, 593.

See CORPORATION, 1;
LOCAL LAW, 1;
PATENT FOR INVENTION, 12.

LOCAL LAW.

1. In 1838 R. L., a resident of Ohio, received a patent from the United States of public lands in Illinois. In 1842 he made his will in Ohio, where he continued to reside until his death in 1843. After disposing of other property he devised his Illinois lands and bequeathed the remainder of his personal estate to his wife J. N. L. and to the heirs of her body, to be equally divided between them, share and share alike, and he appointed her sole executrix of the will. He left no issue surviving him, (although he had had children,) but he left brothers and the issue of deceased brothers. His will was duly proved in Ohio, and the widow, who elected to take under it, qualified

as executrix in 1843. In 1846 the Illinois lands were sold for non-payment of taxes assessed in 1845. The county records show no judgment for the tax sale. The lands were purchased at the tax sale by a brother-in-law of the widow, who assigned the certificate to the widow, and the deed was made to her directly. She then, through her attorney in fact, made sales of various tracts of this land, at various times, until all were disposed of. The purchasers duly entered into possession, and took title, and they and those claiming under them continued in possession and paid all taxes on the lands occupied by them respectively for periods ranging from 29 to 33 years. In 1853 a deed of a part of the tract from the widow to one M. was put on record, in which it was recited that the land conveyed by that deed had been held by R. L. and had been devised by him. The county records also contained a copy of the Book of Land Entries, furnished by the auditor to the county clerk for the purpose of taxation: but, with these exceptions, those records contained nothing pointing to the patent to R. L., or to his will, or to the interest devised by it to his widow, J. N. L., until 1866, when what purported to be a copy of the will was filed in the office of the recorder of the county. To this copy were attached copies of the affidavits of the subscribing witnesses to the will in proof of its execution, and a certificate signed by the judge and by the clerk of the probate court in Ohio that these were copies of the will and affidavits and order and proceedings taken from the originals in that court; but there was no copy of the order and of the proceedings admitting the will to probate. The widow died in 1888, not having married again, and leaving no issue. Up to that time no one of the several purchasers, nor any one claiming under them, had actual notice that R. L. had been seized of these lands through a patent from the United States, or of his will, or of its provisions, nor any constructive notice thereof other than is to be implied from the public records of the United States and of the county. On the death of the widow the direct descendants of the brothers of R. L., being his only heirs at law, brought these actions of ejectment against the several persons occupying and claiming title to said several tracts of land, to recover possession of the same, maintaining that the tenancy of the widow and of all claiming under her was a life estate for the term of her life, and that the statute of limitations did not begin to run against the remaindermen until the expiration of the life estate. *Held*, (1) that the sheriff's deed for the land sold for taxes, being regular on its face, and purporting to convey the title to the land described in it was sufficient color of title to meet the requirements of the statute of limitations of the State of Illinois without proof of a judgment for the taxes; (2) that the book of land-entries in the county clerk's office furnished by the auditor to the county clerk for the purposes of taxation was not constructive notice of the issue of the patent for the public lands to R. L.; (3) that the will of

PARTY.

See CORPORATION, 2.

PATENT FOR INVENTION.

PRINCIPAL AND AGENT.

PUBLIC LAND.

1. F., a half-breed of the Sioux nation, received in 1857 a certificate of land-scrip under the treaty of July 15, 1830, 7 Stat. 328, and under the act of July 17, 1854, 10 Stat. 304, c. 83, which enacted that "no transfer or conveyance of any of said certificates or scrip shall be valid." In March, 1860, she executed a power of attorney in blank, and a quitclaim deed in blank, the name of the attorney, the description of the land, and the name of the grantee in the deed being omitted. These came into the possession of P., on the payment of $150, who inserted the name of R. as attorney, and his own name as grantee, and a tract of 120 acres in Omaha, of which he was already in possession but without valid title, as the description. The deed was then delivered to him by R. and was put upon record. P. never informed F. of this location, or of the record of these several instruments, but remained in possession of the located tract, either personally or through his grantees. Congress, on the procurement of P., confirmed his title to the tract. 15 Stat. 186, c. 240; 269, c. 21. The half-breed was ignorant of all this until August, 1887, when the Sioux Indians became citizens of the United States by virtue of article 6 of the treaty of April 29, 1868, 15 Stat. 637. In 1888 the representatives of F., who had deceased, filed a bill in equity against P., setting forth these facts; averring that the power of attorney and quitclaim deed had been fraudulently procured by some persons unknown, and praying that P. should be decreed to have taken the title in trust for F., and that the power of attorney and the quitclaim deed should be declared to be fraudulent and a cloud upon plaintiff's title, and that the defendants be directed to surrender the estate to plaintiffs. To this the defendants demurred, and the court below dismissed the bill. *Held*, (1) that P. was chargeable with notice that the power and the quitclaim deed were intended as devices to evade the law against the assignment of the scrip, and that he acquired no title through them; (2) that he acquired no additional rights through the confirmatory acts of Congress; (3) that having no right to locate the scrip for his own benefit, he must be deemed to have located it for F. and as her representative; (4) that this implied trust did not prevent him from taking and holding possession of the land adversely to her, and for his

RAILROAD.

REBELLION.

RECEIVER.

1. A receiver appointed by order of a court of chancery is obliged to take possession of a leasehold estate, if it be included within the order of the court; but he does not thereby become the assignee of the term, or liable for the rent, but holds the property as the hand of the court, and is entitled to a reasonable time to ascertain its value, before he can be held to have accepted it. *Quincy, Missouri & Pacific Railroad Co.* v. *Humphreys*, 82.
2. The Wabash Company controlled 3600 miles of road, made up by the consolidation and leasing of many different railroads, upon nearly every one of which there existed one or more mortgages. Among them was the Quincy road, 77 miles in length, which was leased by the Wabash in August, 1879, for a term of 99 years, with privilege of renewal, acquiring with the lease a majority of the stock. The Quincy road at the time of the lease had issued mortgage bonds to the amount of $2,000,000, on which there was a large amount of interest in arrear. To provide for this and other floating debts, and to extend the road, a new issue of mortgage bonds were provided for as part of the arrangement, which were issued, and the road was completed, and entered into and formed part of the Wabash system. In May, 1884, the Wabash company filed a bill in equity, alleging that it was insolvent and could not procure the means to pay its floating debts and interest due, and praying the court to take possession of its property and administer it as a whole. Receivers were thereupon appointed, who took possession. They were directed to pay out of the income which should come into their hands rental which had accrued or which might accrue upon all the company's leased lines, but to keep accounts showing the source of income and revenue with reference to expenditure. In June, 1884, the trustees under a general mortgage, which the Wabash company had made of its whole system, filed a cross-bill praying for the foreclosure of their mortgage and the appointment of receivers; but the court declined to appoint receivers other than those already appointed. On the 26th of January, 1884, the receivers informed the court of their inability to pay interest falling due on certain classes of bonds and interest on certain stocks, and made a statement in regard to several of the consolidated and leased roads from which it appeared that the earnings of the Quincy road had at no time since its acquisition been sufficient to pay its operating expenses, the cost of its maintenance and the interest upon its mortgage bonds. The receivers further petitioned the court for its advice, and they were thereupon ordered to keep separate accounts of the earnings, incomes, operating expenses, cost of maintenance, taxes, etc., of each of such lines, and to make quarterly reports thereof. These reports, when made, showed, as to the Quincy Company, that in May, 1885, there was a deficit of $20,251.09 in nine months' working. The court thereupon made a general order, as to all the properties, which pro-

REVERSIONER.