
T
94960169 6

REPORTS

OF

CASES ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

DECEMBER TERM, 1859.

BY BENJAMIN C. HOWARD,
COUNSELLOR AT LAW AND REPORTER OF THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

VOL. XXII.

WASHINGTON, D. C.
W. H. & O. H. MORRISON,
LAW PUBLISHERS AND BOOKSELLERS.
1860.

BUELL & BLANCHARD, PRINTERS.
C. W. MURRAY, STEREOTYPER.
WASHINGTON, D. C.
STEREOTYPED BY BLANCHARD'S NEW PROCESS.

SUPREME COURT OF THE UNITED STATES.

HON. ROGER B. TANEY, Chief Justice.
HON. JOHN McLEAN, Associate Justice.
HON. JAMES M. WAYNE, Associate Justice.
HON. JOHN CATRON, Associate Justice.
HON. PETER V. DANIEL, Associate Justice.
HON. SAMUEL NELSON, Associate Justice.
HON. ROBERT C. GRIER, Associate Justice.
HON. JOHN A. CAMPBELL, Associate Justice.
HON. NATHAN CLIFFORD, Associate Justice.

JEREMIAH S. BLACK, ESQ., Attorney General.

WILLIAM THOMAS CARROLL, ESQ., Clerk.

BENJAMIN C. HOWARD, ESQ., Reporter.

WILLIAM SELDEN, ESQ., Marshal.

LIST OF ATTORNEYS AND COUNSELLORS

ADMITTED DECEMBER TERM, 1859.

Duane Williams,	*Pennsylvania.*
S. B. Ransom,	*New Jersey.*
John H. Reynolds,	*New York.*
Edward M. Dewey,	*Illinois.*
J. F. Farnsworth,	*Illinois.*
Thomas D. Eliot,	*Massachusetts.*
Robert McKnight,	*Pennsylvania.*
Marcus P. Norton,	*New York.*
C. C. Clay, Jun.,	*Alabama.*
Charles J. Faulkner,	*Virginia.*
John W. Noell,	*Missouri.*
John L. T. Sneed,	*Tennessee.*
Charles E. Phelps,	*Maryland.*
Charles J. McDonald,	*Georgia.*
Obadiah C. Gibson,	*Georgia.*
Samuel Tyler,	*Maryland.*
Experience Estabrook,	*Nebraska.*
A. J. Hamilton,	*Texas.*
Alexander Wilson,	*Pennsylvania.*
George Barker,	*New York.*
Dexter A. Hawkins,	*New York.*
Henry M. Rector,	*Arkansas.*
Lyman Trumbull,	*Illinois.*
Daniel Clark,	*New Hampshire.*
John W. Dwinelle,	*New York.*
G. A. Brandreth,	*New York.*
C. Beckwith,	*Illinois.*
John T. Lomax,	*Alabama.*
J. Stillwell,	*Arkansas.*

Alphonso Taft,	*Ohio.*
R. J. Gittings,	*Maryland.*
George C. Goddard,	*New York.*
William S. Stansbury,	*Louisiana.*
Henry Ledyard,	*Michigan.*
John D. McPherson,	*Maryland.*
William Vandever,	*Iowa.*
L. H. Rickard,	*Iowa.*
Adolphus D. Grimwood,	*California.*
Martin Tschudy,	*Pennsylvania.*
Albert G. Porter,	*Indiana.*
John W. Caldwell,	*Ohio.*
William Archer Cocke,	*Virginia.*
William F. Clark,	*New York.*
John W. Mills,	*New York.*
James Irvine,	*Ohio.*
Etherington T. Spangler,	*Ohio.*
Charles Andrews,	*New York.*
William S. C. Otis,	*Ohio.*
Theodotus Burnwell,	*New York.*
Charles P. James,	*Ohio.*
J. Augustus Page,	*New York.*
Samuel S. Fisher,	*Ohio.*
H. P. Hepburn,	*California.*
B. W. Leigh,	*California.*
Simon Yandes,	*Indiana.*
J. B. Finlay,	*Pennsylvania.*
Henry P. Haun,	*California.*
Charles F. Adams,	*Massachusetts.*
William Dean,	*New Yark.*
W. T. Forrest,	*Ohio.*
Milton Whitney,	*Maryland.*
Robert Dodge,	*New York.*
W. M. Dunn,	*Indiana.*
George William Wright,	*New York.*
George P. Russell,	*Michigan.*
C. C. Hewitt,	*Washington Territory.*
W. Penn Clarke,	*Iowa.*
A. Austin Smith,	*Washington, D. C.*
O. S. Halstead,	*New Jersey.*

John McConville,	*New York.*
Thomas A. R. Nelson,	*Tennessee.*
Richard R. Battee,	*Maryland.*
Lewis A. Thomas,	*Iowa.*
James B. Haggin,	*California.*
B. Frank Browne,	*New York.*
William Stewart,	*Pennsylvania.*
William F. Watson,	*Virginia.*
Henry T. King,	*Pennsylvania.*
Henry Buist,	*South Carolina.*
R. H. Duell,	*New York.*
Dennis Foley,	*Ohio.*
Nathaniel Bennett,	*California.*
R. M. Edwards,	*Tennessee.*
Philander M. Crandall,	*New York.*
William S. Rockwell,	*Georgia.*
Gilman Marston,	*New Hampshire.*
William S. Holman,	*Indiana.*
Francis Brichta,	*Texas.*
John F. Kinney,	*Nebraska Territory.*
Nicholas Headington,	*Ohio.*
John M. Landrum,	*Louisiana.*
Frederick R. Coudert,	*New York.*
John F. Ennis,	*Washington, D. C.*

LIST OF CASES REPORTED.

PAGE.

Adams, Adm. of Hagan, *v.* Preston and Wife - - - - - - 473
Addison *v.* U. S. ex relatione Crawford - - - - - - - 174
Aspinwall et al. *v.* Commissioners of Daviess County - - - - - 364

Bank of Pittsburgh *v.* Neal et al. - - - - - - - - - 96
Berthold et al. *v.* McDonald et al. - - - - - - - - - 334
Bondies *v.* Sherwood et al. - - - - - - - - - - 214
Boston Belting Company *v.* Chaffee - - - - - - - - - 217
Bowen et al. *v.* Clark et al. - - - - - - - - - - 270
Brewster *v.* Wakefield - - - - - - - - - - - 118
Bullitt et al. *v.* Kimbro - - - - - - - - - - - 256

Carroll's Lessee *v.* Thompson et al. - - - - - - - - - 422
Chaffee *v.* Boston Belting Company - - - - - - - - - 217
Chapman et al. *v.* Roach et al. - - - - - - - - - - 129
Cheek et al. *v.* Overton et al. - - - - - - - - - - 46
City of New Orleans *v.* Gaines - - - - - - - - - - 141
Claflin et al. *v.* Lawler - - - - - - - - - - - 23
Clark et al. *v.* Bowen et al. - - - - - - - - - - 270
Coleman *v.* Verden - - - - - - - - - - - - 192
Collins *v.* Thompson et al. - - - - - - - - - - 246
Commissioners of Daviess County *v.* Aspinwall - - - - - - 364
Cone et al. *v.* Morrill - - - - - - - - - - - 75
Cucullu *v.* Emmerling - - - - - - - - - - - 83

Dalton *v.* United States - - - - - - - - - - - 436
Davenport et al. *v.* Foster et al. - - - - - - - - - 244
Davenport et al. *v.* Sinnot et al. - - - - - - - - - 227
De Haro's Heirs *v.* United States - - - - - - - - - 293

Emerson *v.* Slater - - - - - - - - - - - - - 28
Emmerling *v.* Cucullu - - - - - - - - - - - 83
Emmerling *v.* Kock - - - - - - - - - - - - 69

PAGE.

Fearn *v.* United States - - - - - - - - - - - - 299
Foster et al. *v.* Davenport et al. - - - - - - - - - - 244
Fuentes *v.* United States - - - - - - - - - - - - 443

Gaines *v.* City of New Orleans - - - - - - - - - - - 141
Gaines et al. *v.* Hale - - - - - - - - - - - - 144
Galbraith et al. *v.* United States - - - - - - - - - - 89
Garcia *v.* United States - - - - - - - - - - - - 274
Gonzales *v.* United States - - - - - - - - - - - - 161
Greenway et al. *v.* Howland et al. - - - - - - - - - - 491

Hale *v.* Gaines et al. - - - - - - - - - - - - 144
Hartnell's Executors *v.* Uuited States - - - - - - - - 286
Hewitt et al. *v.* Jeter - - - - - - - - - - - - 352
Hodge et al. *v.* Williams - - - - - - - - - - - - 87
Hopkins *v.* United States - - - - - - - - - - - - 299
Howland et al. *v.* Greenway et al. - - - - - - - - - - 491

Insurance Company of the Valley of Virginia *v.* Mordecai - - - - - 111

Jeter *v.* Hewitt et al. - - - - - - - - - - - - - 352

Kane *v.* Parker - - - - - - - - - - - - - - 1
Kilbourne et al. *v.* State Savings Institution - - - - - - - - 503
Kimbro *v.* Bullitt et al. - - - - - - - - - - - - 256
Knox Insurance Company *v.* Ogilvie - - - - - - - - - 380
Kock *v.* Emmerling - - - - - - - - - - - - - 69

Lawler *v.* Claflin et al. - - - - - - - - - - - - 23
Le Roy et al. *v.* Tatham et al. - - - - - - - - - - - 132
Leland et al. *v.* Nelson et al. - - - - - - - - - - - 48
Lytle et al. *v.* State of Arkansas et al. - - - - - - - - - 193

Maxwell et al. *v.* Moore et al. - - - - - - - - - - - 185
McDonald et al. *v.* Berthold et al. - - - - - - - - - - 334
McMicken's Executors *v.* Perin - - - - - - - - - - - 282
Moore et al. *v.* Maxwell et al. - - - - - - - - - - - 185
Mordecai *v.* Insurance Company of the Valley of Virginia - - - - 111
Morrill *v.* Cone et al. - - - - - - - - - - - - - 75

Neal et al. *v.* Bank of Pittsburgh - - - - - - - - - - 96
Nelson et al. *v.* Leland et al. - - - - - - - - - - - 48
New York and Baltimore Transportation Company *v.* Philadelphia and Savannah Steamship Company - - - - - - - - - - 461

Ogilvie *v.* Knox Insurance Company - - - - - - - - - 380
Overton et al. *v.* Cheek et al. - - - - - - - - - - - 46

PAGE.

Pacheco et al. *v.* United States - - - - - - - - - - 225
Parker *v.* Kane - - - - - - - - - - - - - 1
Perin *v.* McMicken's Executors - - - - - - - - - 282
Philadelphia and Savannah Steamship Company *v.* New York and Baltimore Transportation Company - - - - - - - - - 461
Pico *v.* United States - - - - - - - - - - - 406
Preston and Wife *v.* Adams, Adm'r. of Hagan - - - - - - - 473

Quick et al. *v.* Springfield Township - - - - - - - - - 56

Refeld *v.* Woodfolk - - - - - - - - - - - - 318
Rey et al. *v.* Simpson - - - - - - - - - - - 341
Roach et al. *v.* Chapman et al. - - - - - - - - - - 129

Sherwood et al. *v.* Bondies et al. - - - - - - - - - 214
Sinnot et al. *v.* Davenport et al. - - - - - - - - - 227
Simpson *v.* Rey et al. - - - - - - - - - - - 341
Slater *v.* Emerson - - - - - - - - - - - - 28
Springfield Township *v.* Quick et al. - - - - - - - - 56
State of Arkansas et al. *v.* Lytle et al. - - - - - - - - 193
State Savings Institution *v.* Kilbourne et al. - - - - - - 503

Tatham et al. *v.* Le Roy et al. - - - - - - - - - - 132
Teschmaker *v.* United States - - - - - - - - - - 392
Thompson *v.* Carroll's Lessee - - - - - - - - - - 422
Thompson et al. *v.* Collins - - - - - - - - - - 246
Thompson *v.* Ward - - - - - - - - - - - - 330

United States, ex relatione Crawford *v.* Addison - - - - - 174
United States *v.* Dalton - - - - - - - - - - - 436
United States *v.* De Haro's Heirs - - - - - - - - - 293
United States *v.* Fearn - - - - - - - - - - - 299
United States *v.* Fuentes - - - - - - - - - - - 443
United States *v.* Galbraith et al. - - - - - - - - - 89
United States *v.* Garcia - - - - - - - - - - - 274
United States *v.* Gonzales - - - - - - - - - - 161
United States *v.* Hartnell's Executors - - - - - - - - 286
United States *v.* Hopkins - - - - - - - - - - - 299
United States *v.* Pacheco et al. - - - - - - - - - 225
United States *v.* Pico - - - - - - - - - - - 406
United States *v.* Teschmaker - - - - - - - - - - 392
United States *v.* Vallejo - - - - - - - - - - - 416
United States *v.* Walker - - - - - - - - - - - 299
United States *v.* West's Heirs - - - - - - - - - - 315
United States *v.* Yturbide's Executors - - - - - - - - 290

Vallejo *v.* United States - - - - - - - - - - - 416

PAGE.

Verden *v.* Coleman - - - - - - - - - - - - 192

Wakefield *v.* Brewster - - - - - - - - - - - 118
Walker *v.* United States - - - - - - - - - - - 299
West's Heirs *v.* United States - - - - - - - - - - 315
White et al. *v.* Wright et al. - - - - - - - - - - 19
Williams *v.* Hodge et al. - - - - - - - - - - - 87
Wood *v.* Thompson - - - - - - - - - - - - 330
Woodfolk *v.* Refeld - - - - - - - - - - - - 318
Wright et al *v.* White et al. - - - - - - - - - - 19

Yturbide's Executors *v.* United States - - - - - - 290

THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

AT

DECEMBER TERM, 1859.

JOEL PARKER, PLAINTIFF IN ERROR, *v.* ALONZO L. KANE.

Where a deed for land in Wisconsin was voluntarily destroyed by the parties without its being recorded, and adverse parties were bona fide purchasers without notice, (according to the decision of the Supreme Court of Wisconsin,) the destroyed deed was inoperative under the statutes of Wisconsin in relation to the registry of deeds.

A deed which conveyed "an undivided fourth part of the following described parcel or tract of land, viz: lots number one and six, being that part of the northeast quarter lying east of the Milwaukee river," conveys only lots one and six, and not that part of the northeast quarter which is not included within the lots one and six.

Where a sale was made by an administrator under the authority and pursuant to an order of the Probate Court of the county where the land laid, and the proceedings were regular except that no guardian was appointed to represent the heirs, the Supreme Court of Wisconsin decided that this defect was not sufficient to prevent the title from vesting in the purchaser, and this court adopts their decision.

Where a decree for the partition of lands was made by a State court having jurisdiction over the subject matter and the parties, which decree was affirmed by the Supreme Court of the State, this court cannot inquire, in a collateral action, whether errors or irregularities exist in the proceedings.

THIS was a writ of error to the District Court of the United States for the district of Wisconsin.

The plaintiff in error commenced an action of ejectment to recover an undivided moiety of land in Milwaukee county, in-

cluded in the fractional section twenty-one, in township seven north, of range twenty-two east. This fractional quarter contains one hundred and twenty-nine acres, and lies east of Milwaukee river. It is subdivided into three lots. The northern portion is called lot number one. The southern half of the quarter is divided into the east half of the south half of the quarter, which is also designated as lot number six, and the southwest quarter of the northeast fractional quarter of the section. A patent for this land issued to William E. Dunbar, in August, 1837, by the description of lot number one, and the south half of the northeast quarter of section twenty-one, in township seven north, of range twenty-two east, in the district of land subject to sale at Green Bay. It appears from the case that Richard Montague was equally interested with Dunbar in the entry of this parcel of land at the land office; and in the spring of 1836, Dunbar executed to him a deed for the undivided half of the fractional quarter, which he did not place on the records of the county. Subsequently, under a contract between Dunbar and Montague, the interest of the latter was reduced to one-fourth of the fractional quarter, and thereupon Montague surrendered his first deed, and received one in December, 1837, for one equal undivided fourth part of the following described parcel or tract of land, viz: lots one (1) and six, (6,) being that part of the northeast quarter lying east of the Milwaukee river, in section number twenty-one, in township number seven (7) north, of range twenty-two (22) east of the fourth principal meridian, in Milwaukee county. This undivided interest was claimed through mesne conveyances by the plaintiff in this suit; and it became a question whether, upon a construction of this deed, a fourth part of the entire fractional quarter passed, or only a fourth part of the parcels, lots one and six.

The plaintiff, in addition to the right of Montague, also acquired a title to a fourth part of the fractional quarter, from assigns of Dunbar; so that his title to an undivided moiety of lots one and six, and to an undivided fourth part of the remainder of the fractional quarter, being the southwest quarter of the fraction, was not disputed. After the death of Dunbar,

the undivided half of the entire fraction, and an additional fourth of the southwest quarter of the fraction, vested in persons with whom the defendant was connected. The only controversy at this stage of the transaction was for the one-fourth part of the southwest quarter of the section, arising out of the ambiguous description in the deed of Dunbar to Montague, and the sale by the guardian of the children of Dunbar of the fourth part which was claimed by Montague and his assigns in that portion of the fraction. In 1850, the claimants of three-eighths of the parcels one and six, filed a bill in the Circuit Court of Milwaukee county for a partition against the known and unknown owners of the remaining interests, the plaintiff in this suit being made a party. Publication was made of the proceeding, and the owners appeared to the bill. The plaintiff, Parker, answered, claiming to have one-half. In June, 1851, an order of the court describes the interest of the respective parties, and that of the plaintiff (Parker) is recognised. On the same day, a report of the clerk, that the greater part of the land was so situated as to be susceptible of division, but that the water power on the Milwaukee river could not be divided, and that ten acres, or whatever was necessary to the water power, should be sold, was submitted to the court. This report was made pursuant to an order of the court previously made. Three commissioners were appointed to make the partition. The proceedings were continued until April, 1854, when the commissioners made their report. In this report, thirty-seven and four hundred and ninety-seven thousandths acres were allotted by metes and bounds to the plaintiff, "the same being, quality and quantity relatively considered, one full equal one-half part of the said lands, except the portion set apart to be sold in connection of the water power on and appurtenant to the land. There were two and thirty-six hundredths acres in this parcel. This report was confirmed in April, 1854; and the several parcels vested in the several allottees, to be had, held, and enjoyed, by them and their heirs. In May, 1854, the plaintiff, upon affidavits filed, moved to set aside the order of confirmation:

1. Because the commissioners appointed herein have not

designated the several shares and portions of the different parties, by posts, stones, or other permanent monument.

2. Because their report does not describe the lands divided and the shares allotted with sufficient certainty.

3. Because said commissioners have not divided the real estate in their report mentioned, allotting to the respective parties herein the several portions, quality and quantity respectively considered, according to the respective rights and interest of the parties, as adjudged and decreed by this court, but that said division is manifestly unfair, and against the rights of the defendant.

4. Because, by said division, this defendant does not receive, either in quantity, quality, or value, one-half of the lands divided by said commissioners, but receives less than one-half of said land.

The adverse parties also filed affidavits. The surveyor was required to remove the first objection by placing the monuments prescribed by the statute; and in January, 1855, the report was again ratified and confirmed, and the partition decreed to be valid. From this decree an appeal was taken to the Supreme Court, and that court affirmed the decree, and remanded the cause, with directions to establish posts and monuments according to the partition made.

The parties who filed the bill for partition of the lots one and six, filed another bill for the partition of the southwest quarter of the fractional quarter section. To this bill, the plaintiff, Parker, was also made a party, and filed an answer. This suit has not been brought to a conclusion. But about the time of filing his answers in the two cases, the plaintiff himself filed a bill disclosing the circumstances in which Montague had become interested in the entire fractional quarter; the surrender of his first deed, and the execution of the second; the ambiguous description of the property in that second deed, and the justice of his claim to an interest in the fourth part of the entire quarter under it. He insisted that he had a good title, either in law or in equity, to this fourth part. To this bill the heirs and representatives of Dunbar were parties, as well as the purchasers of the three-fourths part of that parcel of the quarter section.

The prayer of the bill was, that the heirs and purchasers of the estate of the heirs might be compelled to convey an undivided fourth of that quarter to him, and, if necessary, that the deed of Dunbar to Montague and the mesne conveyances might be corrected according to the right of the parties. But in case that the claimants had a good title, then that he might have a decree for the money paid by them to the representatives of Dunbar. He prayed that the partition suit be connected with his suit, and that they might be heard together.

The several defendants answered the bill, and upon a hearing in the Circuit Court it was dismissed. In the Supreme Court of Wisconsin, an appeal from the claim of the plaintiff to relief against one of the purchasers who had failed to plead the statute of limitations, and had notice, was recognised; also his claim to the money paid to the heirs of Dunbar for the undivided fourth of the land in dispute. The decree of the Circuit Court was affirmed as to those who had pleaded the *bona fides* of their purchase and the act of limitations.

The suit in the District Court of the United States proceeds upon the assumption that the plaintiff is not concluded by either of these decrees. That the partition made of lots one and six was illegal, because the formalities prescribed by the statute were not complied with. That the purchasers at the sale of the estate of the minor heirs of Dunbar acquired no title from that sale, because the heirs were not represented in the proceedings by a guardian, and were minors. But if they acquired any title, they took it subject to the rights and claims of the plaintiff, and those under whom he claims, whether such purchasers at the guardian's sale had notice or not. The plaintiff contended that, upon a fair construction of the lost deed to Montague, an interest equal to one-fourth of the fraction passed; but if that were not the case, that he was entitled to hold under the deed executed by Dunbar, in 1836, to Montague. That the destruction of this deed did not defeat the title of Montague under it, or revest the title in Dunbar. Appropriate prayers for instructions were made and refused in the District Court, and exceptions were duly taken. The jury were instructed that the plaintiff, Parker, was a party to

the partition suit in Milwaukee county, and that the decree in that suit was conclusive, and that the decree in the case of Parker *v.* Kane and others, in equity, bound this suit to the extent of that decree.

The jury returned a verdict for the defendant.

It was argued in this court by *Mr. Gittings* and *Mr. Machen* for the plaintiff in error, and *Mr. Brown* for the defendant.

The brief filed on behalf of the plaintiff in error was very voluminous. The argument upon one point only can be given.

6. The bill in equity prosecuted by the plaintiff against Tweedy, Kane, Montague, and others, furnishes no bar to this suit. That was a bill to obtain a reformation of the second deed from Dunbar to Montague, and of the deed from Montague to Fisk, in order that those deeds should so describe the land as to relieve the case from further controversy.

The plaintiff filed that bill in the Milwaukee Circuit Court, January 10th, 1851, against the heirs of Dunbar and their guardian, and the purchasers, Kane, Brown, and Tweedy, and against Montague, to have certain mistakes in the deeds corrected. The bill set forth the agreement in 1835 between Dunbar and Montague, that Montague should furnish money to purchase the quarter section, and that they should own the land together as tenants in common. That Montague did advance the money, and Dunbar did purchase the land. It set forth the deed of 1836, conveying one-half of the land, the sale by Montague of one-fourth to Dunbar, the agreement to deliver up the deed of 1836, and to take a deed of one-fourth of the tract described in it; that Dunbar executed what was understood and intended to be a deed of one-fourth of all said land; that, in drawing this deed, there was a mistake in not inserting and conveying an undivided fourth of said southwest quarter, of said northeast quarter, and, *if an undivided one-fourth of said southwest quarter of said northeast quarter did not pass by that deed to Montague*, he had by virtue of said prior deed the legal title thereto, and, by virtue of such subsequent agree-

ment, the equitable title thereto, when said last deed was delivered and recorded. The bill then set out the conveyance by Montague to Chapin, in 1838, of one-sixteenth, by a warranty deed, and by a description which embraced the whole quarter section, and a conveyance by Chapin to the plaintiff of that one-sixteenth, May 18, 1841.

It then set forth, that Montague, October 27, 1842, conveyed to Fisk three-sixteenths of lots one and six, (giving the same description as is given in Dunbar's last deed to Montague;) that Fisk purchased, and Montague intended to convey, and it was understood between them that the deed did convey, three-sixteenths of the whole quarter; *and that if it did not, there was a mistake in the deed.*

It then set out a conveyance through the heirs of Fisk to plaintiff, of all their right and interest, and thereupon averred that the plaintiff had the title, either legal or equitable, to one undivided fourth part of the west half of the southwest quarter of said northeast quarter, under and by virtue of the conveyances aforesaid, and of the agreements therein set forth.

The bill then set forth the death of Dunbar in 1846; that the guardian of his infant heirs had sold to C. J. Kane an undivided fourth of said west half, being the precise fourth which the plaintiff claimed; and that Kane bid it off, and conveyed to Tweedy, Brown, and Beeman. It alleged notice to them, &c., and *prayed* that Montague and the heirs and purchasers under Dunbar might be compelled to convey one-fourth part of the southwest quarter to the plaintiff, and if necessary, that the deeds, Dunbar to Montague, and Montague to Fisk, might be corrected so as to conform to the understanding, intention, and agreement, between the parties; and he prayed for all general and equitable relief in the premises.

But a small part of the answers is material to the present question. Montague admitted the statements of the bill, and set forth, that since the commencement of the suit, he had executed a quit-claim deed to the plaintiff.

Tweedy made a statement of facts, from which it appeared that he had notice. Kane denied notice, and, alleging that the mistake, if any, in the deed Dunbar to Montague, was

made more than ten years before the suit, claimed the benefit of the statute of limitations. Waldo (made a defendant on the death of Becman) did the same.

Upon a hearing, the Circuit Court entered a decree, which it was not competent for the court to make, because the matter in question was only, whether the plaintiff was entitled to have the deed of 1837 corrected. Even supposing that the deed does, as the plaintiff contends, in fact, convey one full quarter of the section, it does not convey it in the terms which should have been used. The description of the premises should have been precisely like that in the first deed, except the substitution of one-fourth part for one-half, and then there would have been no further controversy. The plaintiff, in his bill, sedulously excluded any admission that he had not a legal title. He alleged that he was remediless at law respecting the subject matter of the bill, to wit: respecting the mistake. The plaintiff never proposed to try his legal title in a bill in equity, and no attempt was made to sustain the bill on that title.

There was no claim set up under the deed of 1836 as an instrument of conveyance; but it was referred to, to show the equity. The decree filed in the Circuit Court of Milwaukee is a legal curiosity, the credit for which is perhaps due to the defendant's counsel. The plaintiff brought his bill to have a mistake in a deed from Dunbar to Montague corrected. The decree assumes, in the first place, to find that certain of the defendants are *bona fide* purchasers without notice of the plaintiff's equities, and therefore it is ordered, adjudged, and decreed, that a deed from Dunbar to Montague, the description of which, by the way, does not agree with any deed in the case, is held and declared to be inoperative and ineffectual to affect the rights of said defendants, as such purchasers; then that those defendants, as such purchasers, *have acquired a good and perfect title as against the complainant;* and not only so, but against all others *claiming or to claim* by, through, or under said deed, to *the land in dispute;* and then the decree undertakes to settle and establish the proportions in which the defendants own the land as between themselves.

Why it did not proceed to order that the plaintiff, and all others claiming or to claim anything against the defendants, should deliver up their deeds to be concelled, and be forever estopped to prosecute any other suit, does not distinctly appear. That might, it is submitted, have been ordered with equal propriety. In the conclusion, it does the only thing it was proper for the court to do, if the suit was not maintained; that is, it dismisses the plaintiff's bill.

In determining the effect of the suit, the court and decree will look to the whole record, and not merely to what the counsel have caused to be filed as a decree.

Bainbrigge *v.* Baddeley, 2 Phill. Ch., 710.

Guert *v.* Warren, 9 Ex. Ch., (W. H. and Good.,) 379; Hob., 53.

The insertion in a decree of matter which ought not to be there, cannot affect the right of a party entitled.

Holland *v.* Cruft, 3 Gray, 187.

See Mondel *v.* Steel, 8 M. and W., 858, 872.

In fact, the Supreme Court of Wisconsin understood the bill to be for a reformation of the deed only. In the opinion, it is said, "the cause, or matter of complaint, to relieve him from which the complainant filed his bill in this cause, *originated* in a mistake committed in the descriptive part of a deed executed on the 18th day of December, 1837," &c.; and then it is said that the cause for such a bill had occurred and was complete upon the delivery of the defective deed.

The decree of the Supreme Court affirmed the decree of the court below as to Kane, Waldo, and Brown, and reversed it as to all the rest, by which the court doubtless meant to affirm the decree so far only as it determined the matters in issue. Brown had disclaimed, and his disclaimer was not controverted. Kane and Waldo had insisted upon the statute of limitations of ten years, applicable to remedies for mistakes; and the decree of the court below and the court above gave them the benefit of it. A decree was entered against Tweedy, because he had not pleaded the statute.

The plaintiff submits therefore that the plaintiff's equitable title to have relief, on account of the mistake in the second

deed, Dunbar to Montague, and the deed, Montague to Fisk, were the only matters in issue in that suit; and that he failed to sustain his suit against Kane and Waldo, only upon the ground, that *that* remedy was barred by the statute. This furnishes no bar to any other remedy which he seeks, and no decree which the court could enter would bar the present suit.

Bainbrigge *v.* Baddeley, 2 Ph. Ch., 705.
Mason's Ex'rs. *v.* Alston, 5 Seld., 28.
Callander *v.* Dittrich, 4 Scott N. R., 682.
Kelsey *v.* Murphey, 26 Penn., 78.
Buttrick *v.* Holden, 8 Cush., 233.
Pleasants *v.* Clements, 2 Leigh, 474.
Hotchkiss *v.* Nichols, 3 Day, 138.
McNamara *v.* Arthur, 2 Ball and Beat., 353.
Lessee of Wright *v.* Deklyne, Pet. C. C., 198, 202.

Upon this point, the argument of *Mr. Brown* was as follows:

Point Third. A bill for the partition of the southwest forty acres was also filed, in which Kane and Parker were parties.

For the purpose of enabling the court properly to adjudicate upon the interests of the parties, and of establishing his rights to the ten acres in question in this ejectment suit, Parker filed his bill in chancery, in the nature of a cross-bill, setting forth, substantially, the same facts upon which he here seeks to recover.

To this bill, Kane and others filed answers; and a decree was entered, confirming the title of Kane, under the deed of the guardian, and also disaffirming every right of Parker under the alleged deed from Dunbar.

From this decree, the plaintiff in this suit (Parker) appealed to the Supreme Court of Wisconsin; and by them the decree of the court below was affirmed as to Kane, and the whole matter was thereby disposed of.

Parker *v.* Kane et al., 4 Wisconsin, 1.

The whole matter thereby became *res adjudicata*, and no court can collaterally set aside those decrees.

Gould *v.* Stanton, 16 Conn. Rep., 12.
Wendell *v.* Lewis, 6 Paige Ch. Rep.

Woodruff *v.* Cook, 2 Edw. Ch. Rep., 259.
Bank of the U. S. *v.* Beverly, 1 Howard Rep., 134.
Hopkins *v.* Lee, 6 Wheaton, 109.
Washington Bridge Co. *v.* Stewart, 3 How. Rep., 413.
Kerr *v.* Watts, 6 Wheaton, 550.
Outrom *v.* Morehead, 3 East. Rep., 346.
Eastman *v.* Laws, 5 Bing. N. C., 450.
Manchester Mills, Douglas, 222.

And this court has, in cases where adjudications have been made by inferior tribunals, recognised the necessity of leaving titles undisturbed.

Grignon, Lessee, *v.* Astor, 2 Howard, 319.
See, also, United States *v.* Booth, 21 Howard, 506.
Haskell *v.* Rowe, 1 McCord Ch., p. 22.
Kennedy *v.* Meredith, 1 Monroe, 409.
Campbell *v.* Price, 3 Munford, 227.
White *v.* Atkinson, 2 Call., 376.
Dodd *v.* Astor, 3 Barbour Ch. Rep., 395.
Schurman *v.* Weatherton, 1 East., 541.
Downer *v.* Cross, 2 Wisconsin, 371.
Cole *v.* Clark, 3 Wisconsin, 329.

Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiff sued in ejectment to recover certain parcels of land included in the northeast fractional quarter of section twenty-one, in township seven north, of range twenty-two east, in the district of lands subject to sale at Green Bay, and are situated in the city of Milwaukee.

The fractional quarter is subdivided into three lots. Lot number one is north of a line running east and west, that bisects the quarter section; lot number six corresponds to the southeast quarter of the quarter section; and the third lot is a tract of forty acres, and is known as the southwest quarter of the northeast quarter of the section, township, and range, above mentioned.

A patent issued to William E. Dunbar for this fractional quarter, in 1837, from the United States, in which the land is described as "the lot number one, and south half of the north-

east quarter of section twenty-one, in township number seven north, of range twenty-two east, of the district of lands," &c. In the same year, Dunbar and wife conveyed to Richard Montague "one equal undivided fourth part of the following described parcel or tract of land, viz: Lots one (1) and six, (6,) being that part of the northeast quarter lying east of the Milwaukee river, in section number twenty-one, in township number seven (7) north, of range twenty-two east," &c.

The plaintiff, upon the trial of the cause in the District Court, connected himself with this deed (which was duly recorded) by legal conveyances. Besides the title under this deed, he exhibited a title from Dunbar and wife to an undivided fourth of the whole fraction; all of which lies east of Milwaukee river. That the plaintiff had at one time a title to an undivided half of lots one and six, was not disputed; but his claim to an undivided fourth of the southwest quarter of the fraction, under the deed of Dunbar to Montague, was a matter of controversy.

The defendant connected himself with the patent of Dunbar, by showing a sale by the administrator of his estate, under the authority of the Court of Probate of Milwaukee, of an undivided one-half of the entire fractional quarter patented to him, and a sale and conveyance by the guardian of the heirs of Dunbar of an undivided fourth part of the southwest quarter of the fraction, under a decree of the Circuit Court of Milwaukee, sitting in chancery, and a purchase by persons under whom he claims.

The defendant, to repel the claim of the plaintiff to any interest in the land possessed by him in lots numbers one and six, produced the record of proceedings and decrees in the Circuit Court of Milwaukee county, in chancery, for the partition of those lots among the plaintiff and his co-tenants, with the latter of whom the defendant is a privy in estate. This record shows that a petition was made by the co-tenants of the plaintiff for a partition of these lots, according to their rights and interests. The plaintiff was made a party, appeared and answered, and there was a decretal order for a partition. Commissioners were appointed to divide the lots, who made

a report to the court that appointed them. That the plaintiff made objections to the proceedings, was overruled, and afterwards appealed to the Supreme Court. That the Supreme Court revised the proceedings of the Circuit Court, and affirmed its decree in the most important particulars, and gave some directions, which, being fulfilled to the satisfaction of the Circuit Court, a final order of confirmation, and to vest the title in the parties to their several allotments, was made.

The plaintiff objects to these proceedings:

1. That there was no authority to make a several partition between the complainants. 2. There was no authority to make a partition, subjecting the land set off as his share to an easement. 3. There was no authority to make a partition by a plat, without the establishment of permanent monuments. 4. There was no reference to a proper person to inquire into the situation of the premises, after the decree settling the rights of the parties. 5. The commissioners had no power to set apart and designate any portion of the land for sale, as they undertook to do. 6. The court did not ascertain and distinctly declare whether any part or what part should be sold; but its language was hypothetical and uncertain. All the subsequent proceedings must fall, for want of the foundation of such a decree. 7. It does not appear that all the commissioners met together, in the performance of their several duties, as required by the statute.

The statutes of Wisconsin provide for the partition of estates held in common, by a bill in equity, filed in the Circuit Court of the county in which the land is, and for a sale of the premises when a partition would be prejudicial to the owners. The court upon the hearing may determine and declare the rights, titles, and interests, of the parties to the proceedings, and order a partition. It may appoint commissioners to execute the decree, who are required to make an ample report of their proceedings to the court, in which it can be confirmed or set aside. When a partition is completed, the court may enter a decree; and thereupon the partition is declared to be "firm and effectual forever," and "to bind and conclude" all the parties named therein.

The decrees are subject to the revising power of the Supreme Court. In reference to the objections made by the plaintiff, it is sufficient to say that some of them were made in the courts of Wisconsin without effect, and all might have been urged there at a proper stage in the proceedings. Kane *v.* Parker, 4 Wis., 123.

That it sufficiently appears that the subject was within the jurisdiction of those courts, and the proper parties were before them; and this court, conformably to their established doctrine, acknowledge the validity and binding operation of these orders and decrees, and determine that this court cannot inquire whether errors or irregularities exist in them in this collateral action. Thompson *v.* Tolmie, 2 Pet., 157; Grignon *v.* Astor, 2 How., 319; Beauregard *v.* New Orleans, 18 How., 497.

At the time that the partition of lots numbers one and six was sought for, a petition was filed in the same court by the same parties for a partition of the southwest quarter of the fractional quarter section described in Dunbar's patent. The plaintiff had an acknowledged interest in that parcel, independently of his claim under Montague, and was made a party to that suit.

In his answer to the petition he refers to this claim under Montague, and the mesne conveyances that connect him with the deed of Dunbar to Montague. He stated, that, it being uncertain whether that deed of Dunbar would be sustained as sufficient by the court to convey a legal title to a fourth part of that parcel, he designed to file a bill in equity, for the purpose of having his title ascertained, and to have his conveyances reformed, if need be, so that his claim under that deed could be established and confirmed. In the same month he filed in the same court a bill in equity against the heirs of Dunbar and their guardian, and the purchasers under the decrees, obtained by the administrator and guardian, for the sale of the parcels in the fractional quarter described in Dunbar's patent.

He charges in this bill that Montague was equally interested with Dunbar, at the date of his entry in the land office, in the entire fraction, and furnished the money for the purpose of

making it; that Dunbar gave to Montague a deed for one-half, according to the description in the certificate of purchase from the register of the land office. That by a subsequent contract his interest was reduced to one-fourth. That his first deed not being recorded, he surrendered it to Dunbar, who destroyed it. That the deed for the fourth part was made to fulfil the agreement for title to a fourth of the whole fraction; and that Dunbar represented this deed to be sufficient, and during his life acknowledged that it was sufficient, and that Montague was a joint and equal owner with him.

He avers that these facts constitute him the owner of one-fourth of the entire fraction, either at law or in equity. He refers to the sales of a larger interest than they really owned, by the heirs of Dunbar, through their guardian, and to the pendency of the suits of partition. He prays that the court will require the defendants in the bill to release their title to the interest embraced in his claim, and that his conveyances may be reformed, if need be, to express his legal and equitable rights; but if the court should decide that the guardian of the children of Dunbar had conveyed a good and valid title as against him, he prayed for a personal decree for the proceeds of his sale. He also prayed that this suit might be heard with the partition suit of the claimants under Dunbar's administrator and the guardian of his children, and for all general and equitable relief.

The purchasers asserted in their answers the superiority of their legal and equitable title, and pleaded that they were *bona fide* purchasers, and all, except one, also pleaded the statute of limitations. The guardian answered, that he had made the sale in good faith, under a valid decree, and under the belief that his wards were entitled to the estate.

The Circuit Court, upon the pleadings and proofs, dismissed the bill of the plaintiff, and declared in the decree that the defendants had a valid title as *bona fide* purchasers, not affected by the registered deed from Dunbar to Montague.

From this decree the plaintiff appealed to the Supreme Court. That court affirmed the decree of the Circuit Court as to all the purchasers, except one. They say the plaintiff is

not entitled to relief under the first deed of Dunbar to Montague, which had been destroyed; for, admitting that the destruction of the deed did not disturb the title, nevertheless, in view of the statute of frauds, and the rule of evidence that statute established, a grantee in a deed, who had voluntarily, and without fraud or mistake, destroyed his deed, could not establish his title. One of the purchasers, who had notice of the plaintiff's claim, and had failed to plead the statute of limitations, was decreed to release his title to the plaintiff, and the guardian was required to account to him for the price he had received. Parker *v.* Kane, 4 Wis., 1. The defendant is a privy in estate with the successful litigants in this cause, and relies upon the decree as a bar.

We have seen that the jurisdiction of the Circuit Court of Milwaukee, under the statute of Wisconsin, in matters of partition, extends to the ascertainment and determination of the rights of the parties in matters of partition, and that its decree is final and effectual for their adjustment. That court is also clothed with power, at the suit of a person having a legal title and possession, to call any claimant before it, to quiet a disputed title. Rev. Stat. Wis., 573, sec. 20; 417, sec. 34.

The bill seems to have been framed on the distinct and declared purpose of obtaining from the courts of Wisconsin an authoritative declaration of the legal as well as equitable rights of these parties under their conflicting titles, with a view to the partition of the entire fractional quarter section, suits for which were then pending; and the prayer of the bill, that if the conveyance of the guardian "passed a good and valid title against the plaintiff," that then he might be indemnified by a decree for the proceeds of the sale in the hands of the guardian, submitted the legal as well as the equitable relations of the parties, under their respective titles, to the judgment of the court.

The reversal of the decree of the Circuit Court by the Supreme Court, and their decision that the guardian should account for the proceeds of the sale in his hands, is a direct response to this prayer, and implies that the recorded deed of Dunbar to Montague did not convey a legal title to this frac-

tion. We question whether the voluntary dismissal of the bill, as to Martineau, the guardian, subsequently to its return in the Circuit Court, will qualify this decree, or limit its effect as *res judicata* of the legal right. 30 Miss. R., 66; 2 Free Ch. R., 158; 9 Simon R., 411; Eng. Orders in Ch., 1845, n. 117.

In Great Britain, a Chancellor might have considered this as a case in which to take the opinion of a court of law, or to stay proceedings in the partition and cross-suits until an action of law had been tried, to determine the legal title. Rochester *v.* Lee, 1 McN. and G., 467; Clapp *v.* Bronagham, 9 Cow., 530. But such a proceeding could not be expected in a State where the powers of the courts of law and equity are exercised by the same persons. The parties to this ejectment and the suit in chancery court of Wisconsin are the same, or are privies in estate. The same parcel of land is the subject of controversy, and the object of the suit, if not identical, is closely related.

The object of the bill in chancery, as we have seen, was to obtain from the court a decision upon the legal and equitable titles of the plaintiff, with the immediate view to a partition. If the decision had been made in his favor, it is true that a change of possession would not have taken place, as an immediate consequence, but it would have conclusively established the right of the plaintiff, either in an action of ejectment or upon a writ of right.

The object of the suit of the plaintiff in chancery was to obtain a recognition of the sufficiency of his deeds, as entitling him to the land, or to supply their defects, or to afford him indemnity, by subjecting the price that his adversaries had paid for the land to a tortious vendor having the legal title.

The object of the ejectment suit is to recover the land by means of the title disclosed in the deeds. A portion of the judges find in the two suits *eandem causam petendi*, and that the decrees of the Circuit and Supreme Courts of Wisconsin embraced the decision of the same questions, and are conclusive of this controversy. Bank of U. S. *v.* Beverly, 1 How., 135. But if the plaintiff is not concluded by the proceedings of the

courts of Wisconsin, the question arises, whether his legal title will support his claim to the interest in the southwest quarter of the fraction.

The first deed from Dunbar to Montague was destroyed before the second was made, and it never was placed upon record. The decree of the courts of Wisconsin shows that the purchasers of the guardian were *bona fide* purchasers without notice. That deed is therefore inoperative, under the statutes of Wisconsin in relation to the registry of deeds. Territorial Statutes of Wisconsin, 179, sec. 10; Rev. Stat. of Wis., 329, 350, secs. 24, 34, 35.

We agree with the Supreme Court of Wisconsin, that the recorded deed from Dunbar to Montague did not convey any part of the fractional quarter, except that contained in lots numbers one and six. Lot number one is a subdivision of the fractional quarter section, and is designated in the plat of survey, as well as in the patent. Lot number six is referred to in the pleadings and proofs as a known and recognised parcel, corresponding with an official subdivision; and, upon referring to the official surveys in the General Land Office, we find that it is, as we had supposed it from the evidence in the record to be, noted there. The deed of Dunbar designates these subdivisions as the corpus of his conveyance; and, as a further description, adds, "being that part of the northeast quarter lying east of the Milwaukee river."

These lots lie east of the Milwaukee river, but there is within the fractional quarter a tract equally distinct, and marked as lots numbers one and six, and this fact has occasioned this controversy. The description of the property conveyed as lots numbers one and six of the fractional quarter is a complete identification of the land, having reference to the official surveys of the United States, according to which their sales are made. The more general and less definite description cannot control this; but whatever is inconsistent with it will be rejected, unless there is something in the deed, or the local situation of the property, or of the possession enjoyed, to modify the application of this rule. It cannot be controlled by the declarations of the parties, or by proof of the negotia-

tions or agreements on which the deed was executed. Hall *v.* Combes, Cro. Eliz., 368; Jackson *v.* Moore, 6 Cow., 706; Drew *v.* Drew, 8 Foster, 489; 4 Cruise Dig., 292; 35 N. H. R., 121; 5 Metcalf, 15.

Upon the whole case, we are of opinion there is no error in the record injurious to the plaintiff, and that the judgment of the District Court must be affirmed.

Mr. Justice CLIFFORD dissented.

J. J. B. WHITE (DEFENDANT) AND GILBERT S. HAWKINS AND PETER J. COCKBURN, COMPOSING THE FIRM OF OAKEY, HAWKINS, & CO., AND MRS. W. C. W. FAUST, WIDOW, AND MRS. REBECCA J. WHITE, AIDED AND ASSISTED BY HER HUSBAND, J. J. B. WHITE, (INTERVENORS,) PLAINTIFFS IN ERROR, *v.* WRIGHT, WILLIAMS, & CO.

Where the question decided by the Supreme Court of Louisiana was, that the introduction of a judgment obtained in Mississippi for the same cause of action which was then before the court of Louisiana was not such an alteration of the substance of the demand as was forbidden by the code of practice, this is not a question which can be revised by this court under the twenty-fifth section of the judiciary act; it being merely a question of pleading and evidence in support of a new allegation, arising according to the practice in Louisiana so as to reach the merits of the case.

THIS case was brought up from the Supreme Court of Louisiana by a writ of error issued under the twenty-fifth section of the judiciary act.

It originated in the Fourth District Court of New Orleans, upon the petition of Hamilton W. Wright, who stated that he was the sole assignee of the rights and interests of the late commercial firm of Wright, Williams, & Co. The petition then stated that J. J. B. White, who resided out of the State of Louisiana, was indebted to the petitioner, as such assignee, in the sum of $9,509.32 with interest, and prayed for an attachment upon his property. The writ was issued, and levied upon one hundred and fifty-four bales of cotton on

board the steamboat Sallie Robinson. The consignees, Oakey, Hawkins, & Co., intervened, and claimed the cotton as the property of O'Donnell; and afterwards Rebecca J. White, the wife of the defendant, and Mrs. S. C. W. Faust, intervened, and claimed the cotton attached as their joint, undivided, separate property.

The writ of attachment was issued on the 17th November, 1856.

On the 29th May, 1857, the case thus being at issue, the plaintiff filed an amended and supplemental petition, in which he states that since the institution of this suit, upon the 29th of December, 1856, at a Circuit Court in and for the fifth judicial district of the State of Mississippi, in and for the county of Yazoo, a judgment was rendered in favor of petitioner, against the defendant, White, for the same subject matter stated in the original petition filed in this cause, as appears by the annexed transcript of the proceedings in this case filed for reference, and as part of said supplemental and amended petition, and prayed for judgment as in said original petition.

On June 11th, 1857, the defendant through his curator filed an exception to the amended petition, on the ground that the original cause of action, if any ever existed, had been merged in the judgment rendered in the State of Mississippi; that this court, by the proceedings of plaintiffs, had been divested of jurisdiction in the matters in controversy, and should be dismissed at plaintiffs' costs. He further plead *res judicata.*

On the 19th of November, 1857, the intervenors filed similar pleas.

The Fourth District Court decided as follows, viz:

Article 419, C. P., declares: "After issue joined, the plaintiff may, with the leave of the court, amend his original petition, provided the amendment does not alter the substance of his demand by making it different from the one originally brought."

The original debt sued on has been merged in the judgment rendered in the State of Mississippi; and, as the judgment is entitled to the same force and effect as if rendered in Louis-

iana, no action can be maintained on the original cause of action, viz: the open account.

2 N. S., 604.

The allegations in the supplemental petition alter the substance of the demand within the meaning of article 419, C. P.

See Dennistoun *v.* Payne, 7 Ann., 334.

Oakey *v.* Murphy, 1 Ann., 372; 3 Ann., 375, 388.

The amendment cannot be allowed; and, as the original cause of action has been destroyed by the plaintiffs' own showing, it follows that the exceptions must be sustained, and plaintiffs' petition be dismissed with costs, which is accordingly hereby ordered.

Upon the construction of article 419, Code of Practice, (together with other points which have no connection with this report,) the case went up to the Supreme Court, which reversed the judgment of the court below, and gave judgment for the plaintiff.

The opinion of the Supreme Court upon the point whether the allegation of the judgment in Mississippi altered the substance of the demand, within the meaning of article 419, was as follows:

3. The exception filed by the attorney appointed to represent the defendant should have been overruled. The plaintiff had the right, under the law of Louisiana, to sue the defendant in the courts of this State, and also in the courts of Mississippi, at the same time, and for the same cause of action. This right necessarily carries with it the accessory right to prosecute the suits in the courts of the two different States to final judgments on the merits. This right is remedial, and is intended to secure to the creditor all possible means for the collection of his debt in different jurisdictions. If the exception filed on behalf of defendant were sufficient in law to dismiss the plaintiffs' action, the right to institute separate actions in different States for the same debt would be nugatory; for, so soon as a judgment should be obtained in one State, it could be made the means of dismissing the suit in the other, and thereby deprive the creditor of the fruits of his diligence in the undecided suit.

Conceding that the account sued on was *merged* in the Mississippi judgment, the debt was not thereby extinguished, but established to be due and owing from the defendant to the plaintiff. This judgment in Mississippi is only evidence of the existence of the debt, for the recovery of which this suit was instituted, the affidavit was made, the attachment bond was given, and the writ of attachment issued, and there is no legal reason why this judgment should not be substituted, by way of amendment, as the cause of action, in place of the account, for the purpose of maintaining the attachment.

The fact that the judgment is for a greater amount than claimed and sworn to by the plaintiff is immaterial, for the reason that the attachment is only valid as against the property for the amount sworn to, whatever may be the amount claimed in the petition.

The supplemental petition did not change the substance of the demand. The prayer of the original petition is, that the attachment be maintained, and that the defendant be condemned to pay the sum of $9,509.32 and interest, with privilege upon the property attached, and the prayer of the supplemental petition is the same.

The defendant and intervenors sued out a writ of error under the twenty-fifth section of the judiciary act, and brought the case up to this court.

Mr. Benjamin moved to dismiss the writ of error, because this case is not one in which this court has jurisdiction to revise the decision of the Supreme Court of Louisiana under the twenty-fifth section.

Mr. Justice McLEAN delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Louisiana.

The defendant in error, by his counsel, J. P. Benjamin, Esq., moves the court that the writ of error issued in this cause be dismissed, for the reason that this case is not one in which the court has jurisdiction to revise the decision of the Supreme Court of Louisiana.

On looking into the record, there appears to be no ground on which this writ of error can be maintained. There is no complaint that the obligation of a contract has been impaired, nor that any right has been claimed and refused under any treaty or act of Congress. The cause must therefore be dismissed, for want of jurisdiction.

WILLIAM B. LAWLER, APPELLANT, *v.* HORACE B. CLAFLIN, WILLIAM H. MELLEN, NATHANIEL F. MILLER, DAVID H. CONKLING, AND HENRY STONE.

Where proceedings were had in Minnesota for the sale of property mortgaged to secure a debt, and the judgment of the court below was, that the property should be sold, there appears to be no error in the judgment, and it must therefore be affirmed.

THIS was an appeal from the Supreme Court of the Territory of Minnesota.

The action was commenced in the District Court, second district, county of Ramsey, by Claflin and the other defendants in error, against Lawler and thirty-two other persons, who were claimants under Lawler.

The statutes of Minnesota abolished the distinction between the forms of action at law, and declared that there should be in the Territory but one form of action at law, to be called a civil action, for the enforcement and protection of private rights and the redress of private wrongs, except as otherwise expressly provided by statute. The only pleadings allowed on the part of the plaintiff were: 1, the complaint; 2, the reply or demurrer; and on the part of the defendant, the demurrer and answer. All equity and chancery jurisdiction, authorized by the original act of the Territory, shall be exercised, and all suits or proceedings to be instituted for that purpose are to be commenced, prosecuted, and conducted to a final decision and judgment, by the like process, pleadings, trial, and proceedings, as in civil actions, and shall be called civil actions.

Under this mode of practice, Claflin and the other defend-

ants in error, who were merchants of the city of New York, filed a complaint against Lawler, as mortgagor, to foreclose a mortgage given by him to them, upon property in St. Paul. The complaint claimed that the premises might be sold according to law.

It is not necessary to follow the proceedings under this new mode of practice. Suffice it to say that Lawler answered, and the plaintiffs replied. A jury trial was waived in open court by the attorneys for the plaintiffs and defendants, and the cause was tried before the judge. The defendants then moved to dismiss the action for certain reasons, but the motion was overruled. They then offered depositions which were objected to, but allowed to be read for certain purposes; after which, the plaintiffs offered some depositions which were objected to, but allowed to be read. Other evidence was offered by the plaintiffs, which was objected to, but received; upon which state of the case, the judge decreed that Lawler executed the note and mortgage, and was indebted to the plaintiffs in the amount claimed.

No bill of exception was taken during the progress of the trial, but the whole case went up to the Supreme Court of the Territory. That court made the following remarks in the course of its opinion:

"A jury trial was waived, and the cause was tried by the court.

"The court rendered a judgment of foreclosure in favor of the plaintiffs, and made the usual order directing a sale of the mortgaged premises.

"From the judgment, an appeal has been taken to this court.

"The paper books furnished to the court contain not only the judgment roll, including properly the decision of the court below, but also the evidence in the case. The cause has been argued as though the evidence was properly before this court; but this is a mistake.

"In this case, it is true that the evidence consisted wholly, or nearly so, of depositions; but there is no more propriety in sending up written than oral testimony, and we have no right to look beyond the record in the case.

"The record consists of the pleadings, the decision of the judge, and the judgment. The question, then, is, does the record show any error of law?

"No error has been assigned, and none appears in the record, unless it appears in the decision of the court below.

"The decision is something more than a general verdict. Perhaps any error disclosed by the decision, although such decision may contain more matter than is required by the statute, may be noticed. The true course, I apprehend, however, is for the party to take his exceptions to every ruling, in the same manner as in a jury trial, unless such ruling will form a legitimate part of the decision, or the error, if any exist, will appear in the pleadings."

It was stated in the outset of this report that the case was brought up to this court by appeal, and not by writ of error.

It was argued by *Mr. Stevens*, upon a brief filed by himself, and *Mr. Brisbane*, for the appellant, and by *Mr. Gillet* for the appellees.

The counsel for the appellant founded his argument upon the theory that the whole case was before this court, evidence and all; whilst *Mr. Gillet* contended that the decision of the court, where a jury trial was waived, was conclusive as to all questions of fact, and that the absence of a bill of exceptions precluded all inquiry into questions of law, where the case should have been brought up by writ of error, and not by appeal.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the Supreme Court of the Territory of Minnesota.

The suit was brought on a mortgage executed the first day of October, 1852, by Ann Curran, the duly-authorized attorney in fact of William B. Lawler, conditioned for the payment of the sum of four thousand dollars, being part of lot three, in block thirty, in the town of St. Paul, forming an oblong square, forty-two feet on Third street by eighty feet

on Roberts street. This mortgage was duly recorded on the day subsequent to that of its execution.

This mortgage, it was alleged, was executed to secure a sum of money then due to the plaintiffs, and which was likely to become due, in the further purchase of merchandise from the plaintiffs by the defendant. The plaintiffs accepted the mortgage, as security for purchases to be made, or any debts which the firm of Curran & Lawler might subsequently owe the firm.

The understanding and agreement between the parties was, that the mortgage was to be held by plaintiffs as a pledge or collateral security, and was not to be cancelled or delivered up until all purchases which Curran & Lawler might make, and which might become due at any time within the year—that is, before the first of October, 1853. So long as anything should remain due on such purchases, the indebtment was to be considered and deemed secured by the mortgage.

The payment of the note and mortgage, as alleged by Curran & Lawler in their answer, is denied; and it is stated that the amount of indebtment on the note and mortgage, at maturity, was upwards of five thousand dollars.

It is difficult to determine the character of the loose papers certified from the Supreme Court of Minnesota to this court. They have neither the form nor the substance of a record. The papers seem to be thrown together, as much by accident as design; and one can scarcely gather any special object in reading the transcripts. It would seem that neither certainty nor order can be extracted from these papers, and that some form should be adopted by which the pleadings should be stated, and the points controverted, whether of fact or of law. Many objections are made to questions propounded to witnesses, but no exceptions seem to have been taken.

A jury seems to have been waived, and the facts were submitted to the court. In such a case, the question of law arising on the facts would appear to have been decided by the court. Still, no exception is taken. In fact, there seems to be nothing for this court to try, except the validity of the mortgage and the fact of its discharge. And, even in this

matter, the evidence is in conflict, and it is difficult to decide the point disputed.

The mortgage was for four thousand dollars, and was to stand as a security for the balance due the plaintiffs; and in this way it was intended to give an additional credit to the company. From the manner in which the mortgage was treated, it appears to have been designed as a standing guaranty for the sum named.

And, in the language of the court, the said "action having come on to be heard at the May term of the District Court of Ramsey county, upon the complaint of the plaintiffs and the answer of the said William B. Lawler, before the presiding judge of said court, a jury trial therein having been waived by the respective parties, the same having been decided in favor of the plaintiffs, and that there is due on the notes and mortgage upon which the action is brought the sum of four thousand four hundred and ninety-five dollars and forty cents, with interest from the 4th October, 1853, amounting in all to $5,084.07; and, on motion, it was ordered, adjudged, and decreed, that the mortgaged premises, or so much thereof as may be necessary, be sold by the sheriff for the payment of the mortgage; and it is further ordered, adjudged, and decreed, that the defendants, and all persons claiming under them, be forever barred," &c.

On the appeal of Lawler and others from the District Court of Ramsey county to the Supreme Court of the Territory, "the matters at issue in this cause having been fully considered, it appears to this court that, in the proceedings, decree, and judgment thereon, in the District Court of Ramsey county, to this court appealed from, there is no error. It is therefore ordered that said decree and judgment be in all things affirmed, with costs," &c.

From this last decree there is an appeal now pending before this court.

In looking into the facts of this case, it does not appear that the merits are changed by the views taken by the District Court of Ramsey county, or by the decision of the Supreme Court of the Territory.

The evidence is against the discharge of the mortgage. After the amount claimed under the mortgage, there is still a balance due the plaintiffs on general account.

Upon the whole, the decree of the Supreme Court of the Territory is affirmed; and the cause is remitted to the Supreme Court of the State of Minnesota, to be carried into effect as the law authorizes.

CHARLES EMERSON, PLAINTIFF IN ERROR, *v.* HORATIO N. SLATER.

In the case of Slater *v.* Emerson, 19 Howard, 224, this court held that where there was a contract to finish a railroad by a given day, the parties to which were the contractor with the railroad company of the one part, and a stockholder in the company of the other part, time was of the essence of the contract; and there could be no recovery on the written agreement without showing performance within the time limited; but added, that a subsequent performance and acceptance by the defendant would authorize a recovery in a *quantum meruit.*

This court now holds that the promise of the stockholder contained in the written agreement was an original undertaking, on a good and valid consideration moving between the parties to the instrument, and not a special promise for the debt, default, or misdoings, of another. Consequently, it is not within the operation of the statute of frauds.

The cases upon this point examined.

Being an original contract, parol evidence was admissible to show that the parties had, subsequently to the date of the contract, and before a breach of it, made a new oral agreement, on a new and valuable consideration, enlarging the time of performance, and varying its terms.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Massachusetts.

It was the same case which was before this court at a previous term, and is reported in 19 Howard, 224.

The substance of that case and the new view of the present one are fully stated in the opinion of the court, to which the reader is referred.

It was argued by *Mr. Hutchins* and *Mr. Cushing* for the plaintiff in error, and *Mr. Bates* for the defendant.

The points of the argument of the counsel for the plaintiff in error, which are material to be stated in the present report, were the following:

I. At common law, a contract reduced to writing may, by parol agreement of the parties subsequently made, be varied, waived, or discharged, whether the same is a simple contract, or under seal.

Browne on Statute of Frauds, sec. 409, (*b*) sec. 423.
1 Greenl. on Evidence, secs. 302, 304.
Snow *v.* Inhabitants of Ware, 13 Met., 42.
Marshall *v.* Baker, 1 Appleton, 402.
Ballard *v.* Walker, 3 Johns. Cases, 60.
Goss *v.* Lord Nugent, 5 Barn. and Adol., 65.
1 Phillips Ev., (Cowen and Hill's Ed.,) p. 563, w. 987.
Sherwin et al. *v.* Rut. and Bur. R. R., 24 Vt., 347.
Vicary *v.* Moore, 2 Watts, 451.
Besker et al. *v.* Troy and Rut. R. R., 27 Vt., 766.
Neil *v.* Chever, 1 Bailey, (S. C.,) 537.
Munroe *v.* Perkins, 9 Pick., 298.
White *v.* Parkin, 12 East., 578.
Fleming *v.* Gilbert, 3 Johns. Rep., 528.
Keating *v.* Price, 1 Johns. Cases, 22.
Low *v.* Treadwell, 3 Fairf., 441.

II. And there is no distinction in this respect between a contract in writing at common law, and a contract required to be in writing by the statute of frauds.

Browne on Statute of Frauds, sec. 423.
1 Greenl. on Ev., secs. 302, 304.
Cummings *v.* Arnold, 3 Met. 486.
Stearns *v.* Hall, 9 Cushing, 31.
Caff *v.* Penn, 1 M. and S., 26.
Goss *v.* Lord Nugent, 5 Barn. and Adol., 58.

VI. There is a fact in proof in this case, which did not appear in the case when before this court before—and that is, that when Slater made the agreement upon which suit is brought, securities were placed in his hands by the principal debtor to indemnify him for his liability. His promise is not, therefore, within the statute of frauds.

VII. A parol promise to pay the debt of another, in consideration of property placed by the debtor in the promissor's hands, is not within the statute of frauds. It is an original promise, and binding upon the promissor; and in this respect it is immaterial whether the liability of the original debtor continues or is discharged.

1 Browne on Statute of Frauds, sec. 187, p. 184.
Wait, appellant, *v.* Wait, 28 Vt., (2 Wash.,) 350.
Farley *v.* Cleveland, 4 Cowen, 432.
1 Smith's Leading Cases, 329.
Hindman *v.* Langford, 3 Strobhart's Rep., 207.
Cross *v.* Richardson, 30 Vt., 641.
Fisk *v.* Thomas, 5 Gray, 45.
Rand *v.* Mather, 11 Cushing, 1.
Olmstead *v.* Greenly, 18 Johns., 12.
Hilton *v.* Dinsmore, 21 Maine, (8 Shep.,) 410.
Cameron *v.* Clark, 11 Ala., 259.
Loring *v.* Lee, Spencer, (N. J.,) 337.
Goddard *v.* Mochbee, 5 Cranch C. C., 666.
Stanley *v.* Hendricks, 13 Iredell, (N. C.,) 86.
Lee *v.* Fontaine, 10 Ala., 755.
McKenzie *v.* Jackson, 4 Ala., 230.
Lippencott *v.* Ashfield, 4 Sandford, 611.
Westfall *v.* Parsons, 16 Barb., 645.
Todd *v.* Tobey, 29 Maine, 219.

VIII. The defendant having waived by parol the performance of the work at the day, thereby himself prevented performance, and he cannot avail himself of the non-performance.

Browne Stat. of Frauds, secs. 423, 424, 425, 436, p. 486.
3 Johnson N. Y., 531.
2 Selden N. Y., 203.

IX. When this case was before this court before, no question was made nor discussion had, whether the promise of the defendant was within the statute of frauds; the question was, simply, whether *time* was of the essence of the contract; and this court decided that it was.

Emerson *v.* Slater, 19 Howard, 224.

X. The evidence offered by the plaintiff in error, under the

common counts, that the defendant in error had securities in his hands to indemnify him for his promise, took the case from the statute of frauds. It made him an original promissor for the work done after November 14, 1854, (the date of the contract,) and he is therefore liable upon the common counts upon a *quantum meruit* as an original debtor.

The counsel for the defendant in error contended that the decision of this court in the previous case involved the following propositions:

1. That the original contract between Emerson and the corporation, to build the bridges for the corporation, remained in full force, unaffected by the contract between Emerson and Slater.

2. That, by force of his contract, Slater stood in the relation of a surety for the corporation, for the amount for which he had agreed to become liable.

3. That the time of performance (December 1) was of the essence of Slater's contract, and he was not liable thereon, as Emerson had failed to perform within the time fixed.

If, therefore, the contract of November 14, 1854, was a special promise for the debt, default, or misdoings, of another, it was within the statute of frauds, and the alleged waiver, extension, and substitution, must be in writing, and could not be proved by parol.

This court had decided that performance by the 1st day of December was "*an essential part of this contract.*" And, manifestly, a contract cannot be varied in one of its essential parts, without making a new contract.

And when such new contract has been made, it must be declared on. A declaration on the old contract cannot be sustained by showing that, though the old contract has not been performed in one of its essential parts, which is a condition precedent to recovery, yet that a new bargain had been made, by which that essential part had been stricken out of the contract, and something different substituted in its place.

And, accordingly, this plaintiff declares on such new contract in his last count. And, inasmuch as the contract declared on is that of a surety, it must be in writing, and *wholly* in wri-

ting. The statute of frauds is not complied with by producing a contract which is partly in writing, while one of its essential parts rests in parol.

(The counsel then examined a number of English and American cases, to show that this change in the contract fell within the statute of frauds.)

The plaintiff, at the trial in the Circuit Court, introduced three deeds of land, from the railroad corporation to the defendant, dated three days after the defendant entered into the contract of November 14, and said to have been made to indemnify the defendant from his liability under the said contract.

But we are not aware of any case or dictum showing that because a surety, *after he has become bound as such*, takes security from his principal to indemnify himself against loss by his contract of suretyship, he thereby ceases to be a surety and becomes a principal debtor. There are decisions, no doubt well founded, that an absolute parol promise to pay the debt of another, in consideration of property put into the promissor's hands to enable him to pay the debt, makes the debt his own, and he is not a surety, within the statute of frauds.

But there is no evidence in this record to prove such a case. Slater's promise was not made in consideration of this property. There is no evidence of any agreement, even, to convey it to him at the time he entered into his contract. And it was not actually conveyed to him till three days afterwards. And it is not stated that when it was conveyed to him, it was to enable him to pay the debt, or that it was made *his property* in consideration of his promise to pay the debt. The contrary is stated. It was put into his hands "to *indemnify* the defendant from his liability in said contract, dated November 14, 1854, with the defendant." Until the defendant should be in some way indemnified, the land, in equity, belonged to the corporation. And as Slater's promise depended on the performance by Emerson before December 1st, if he should not so perform, Slater would not be indemnified, and would have no claim on the land.

It is submitted, no authority exists for the position, that a

conditional undertaking to pay the debt of another is taken out of the statute of frauds, because security is given by the principal to indemnify the surety, three days after the conditional contract of suretyship is made.

However true it is that assumpsit for a *quantum valebant* or *quantum meruit* will lie, where the terms of a special contract have not all been complied with, to recover the value of the labor and materials held and enjoyed by the defendant, yet nothing is better settled, than that no action can be maintained on the contract itself, without alleging, with exactness, performance in entire accordance with the terms of the contract, including that in relation to time of performance, and proving the allegation.

This proposition has been affirmed in nearly every State.

(The counsel then referred to decisions in this court, and the courts of almost every State in the Union.)

Emerson cannot recover, therefore, unless it be on the common counts; and not then, unless it be on the *quantum meruit* and *valebant*. Can he recover on these?

The agreement of November 14 shows that the money and notes given by Slater were to apply to the then indebtedness of the company to Emerson, and were not to apply to any work to be done heretofore—and this was one of the points argued at the former trial, contending that Slater was only a surety. That Emerson understood that he was doing the work for the company is evident from the fact that he charged the company with it, presented to them his bills, settled with its committee, and never presented any charges for work to Slater.

If, as this court has heretofore decided, Slater was a surety for the price of work done for the corporation, there can be no recovery had against him on counts for work, labor, and materials, furnished to himself. None were furnished to himself. The law will not imply a promise to pay another's debt. It requires an express promise in writing.

The evidence given on the trial has no tendency to show any promise by Slater, save by the written contract.

He knew Emerson was going on with his work, both before

and after December 1st. That Emerson was bound by his contract with the corporation to do so. And every act and word of Slater, and every omission to speak or act, is entirely consistent with the assumption, that if Emerson should finish the work before December 1st, he was to look to him for the notes; if he should not finish before December 1st, he was to look to the corporation for whom and under a contract with whom he was doing the work.

There is no case of recovering on a *quantum meruit* or *quantum valebant*, except for some work or materials done or furnished, and that too for the defendant.

But Emerson furnished no work or materials for Slater. They were all for the railroad company. They were for the benefit of and owned by the company, and Emerson was to be paid for them by the company. The contract between Emerson and Slater guards especially against their release. The company is the only party entitled to offset for any defect in the work, as they are the owners of the work, and as Slater made no stipulations as to its character, except that it be ready for laying the rails for one track. Besides, the completing the bridges for one track was but part of the work Emerson was doing under his contract. He went on and completed his contract with the company, and the whole work was done exactly as it would have been done if Slater's contract had never been made.

Suppose Emerson had died, become insolvent, or in some other way had become absolutely incapacitated from completing the work agreed on by December 1st, would Slater have been liable on a *quantum meruit?*

How long a time after December 1st would have been allowed to executors of Emerson to complete the work so as to bind Slater?

If Emerson and the railroad company had cancelled their contract, or had the company refused to allow Emerson to continue his work, would Slater have been liable on a *quantum meruit?*

Mosely *v.* Hunter, 9 Ired., 119.

If there was anything done distinctly for Slater, as it does

not appear what it was by the agreement, Emerson is bound to show what it was, in order to enable the jury to determine what was the amount of the *quantum meruit.*

He did nothing for Slater. His work was for the corporation, and every stockholder and creditor (of which Emerson is one) is liable if Slater is.

Mr. Justice CLIFFORD delivered the opinion of the court.

This case comes before the court upon a writ of error to the Circuit Court of the United States for the district of Massachusetts. It was an action of assumpsit, brought by the plaintiff in error against the present defendant, upon a written agreement, bearing date on the fourteenth day of November, 1854.

By the terms of the instrument, the plaintiff covenanted and agreed with the defendant, in consideration of the agreements of the latter therein contained, and of one dollar to him paid, that he, the plaintiff, would complete all the bridge work to be done by him for the Boston and New York Central Railroad Company, ready for laying down the rails for one track, by the first day of December next after the date of the contract. In consideration whereof, the defendant agreed that he would pay the plaintiff, within two days from the date of the agreement, the sum of forty-four hundred dollars in cash; and also give to the plaintiff, on the completion of the bridges, and when the rails for one track were laid from Dedham to the foot of Summer street, in Boston, his, the defendant's, five notes, for two thousand dollars each, dated when given, as provided, and made payable to the plaintiff or order, in six months from their date. Another stipulation of the agreement was, that the notes, when paid, were to be applied towards the indebtedness of the railroad company to the plaintiff, and that the agreement was in no way to affect any contract of the plaintiff with the railroad, or any action then pending between them.

When the declaration was filed, it contained three special counts, drawn upon the written agreement, together with the common counts, as in actions of *indebitatus assumpsit.*

Performance on the part of the plaintiff, and neglect and refusal on the part of the defendant to give the five notes specified in the agreement, after seasonable demand, constitute the cause of action set forth in the several special counts. They differ in nothing material to be noticed in this investigation, except that, in the first count, performance on the part of the plaintiff is alleged, according to the contract, on the first day of December, 1854, while in the second and third counts it is alleged at a period twenty days later.

An additional special count was afterwards filed by consent, which, in one respect, varies essentially from the other counts. After setting out the substance of the contract, it alleges that the defendant waived performance at the day stipulated in the agreement, and extended the time to the twentieth day of the same December, and that the plaintiff performed and completed the work within the extended time. Demand of the notes prior to the commencement of the suit, substantially as alleged, was admitted at the trial, as were also the execution of the agreement and the payment by the defendant of the forty-four hundred dollars.

As appears by the transcript, the cause has been twice tried upon the same pleadings. At the first trial, the verdict was for the plaintiff; but the defendant excepted to the rulings and instructions of the Circuit Court, and, after judgment, removed the cause into this court by writ of error.

Among the questions presented on the writ of error, the principal one was whether, by the true construction of the written agreement, time was of the essence of the contract. That question was directly presented by the fourth exception; and this court held, that the refusal of the circuit judge to instruct the jury, as prayed by the defendant, that the plaintiff could not recover on the special counts without showing that the work was completed by the day stipulated in the contract, was error. Accordingly, the judgment was reversed, and the cause remanded, with directions to issue a new venire.

In the opinion delivered on the occasion, this court said, in effect, that in cases where time is of the essence of the contract, there can be no recovery on the written agreement, with-

out showing performance within the time limited; but added, that a subsequent performance and acceptance by the defendant will authorize a recovery in a *quantum meruit.* Slater *v.* Emerson, 19 How., 239.

Failing to show performance at the day named in the agreement, the plaintiff, at the last trial, offered to prove by parol to the effect that, after the date of the agreement, and before as well as after the day specified for the completion of the work, the defendant, by his conduct, acts, and declarations, waived and dispensed with performance at the day named in the written agreement, and agreed to substitute therefor performance on the twentieth day of the same December, and to deem performance on the day last named as equivalent to performance on the day specified in the written agreement, and that the work was fully performed within the extended time.

Objection was made by the defendant to this testimony, upon the ground, that the written agreement declared on was a special promise for the debt, default, or misdoings of another; and that the alleged waiver, substitution, and extension, not being in writing, were within the statute of frauds; and the court sustained the objection, and excluded the testimony. To which ruling of the court the plaintiff excepted.

He then proposed to proceed upon the common counts, and offered evidence accordingly. After reading the agreement set up in the special counts, he introduced three deeds, each dated November 17, 1854, purporting to convey certain parcels of real estate therein described. They were each given by the railroad company to the defendant, to indemnify him for the liability he assumed in the before-mentioned written agreement with the plaintiff. Estimating the value of the real estate so conveyed by the considerations expressed in the respective deeds, it amounted in the aggregate to the sum of thirteen thousand five hundred dollars.

He also introduced a memorandum agreement between the defendant and the railroad company, whereby the former leased to the latter ten hundred and fifty tons of railroad iron, to be laid down by the company and used on their railroad. By the terms of the last-named agreement, the railroad iron

was estimated at the value of sixty-eight thousand four hundred dollars; and the company agreed to pay the defendant, for the use of the iron, five thousand dollars per month, the first payment to be made on the first day of March then next, and so upon the first day of each succeeding month, until the whole sum was paid, with interest on the same from a given day—the defendant agreeing, if there was no default of the payments, when the whole was paid, to sell and deliver the iron to the company for the estimated value, including the interest.

To secure these payments, together with the interest, the railroad company, by the same instrument, assigned and set over to the defendant the proceeds of the railroad, to an amount equal to the estimated value of the iron, with the interest, and authorized and required the superintendent of the road to retain in his own hands, out of the proceeds, a sum sufficient to pay the amount to the defendant, in the manner and at the times specified in the agreement.

Emerson's contract with the railroad company was also introduced, and makes a part of the record. It bears date on the seventeenth day of December, 1853, and provides, on the one part, that the plaintiff shall build and complete, sufficient for the passage of an engine over the same by the first day of May then next, all the bridging, as then laid out and determined upon by the engineer, from the wharf, near the foot of Summer street, in Boston, to Dorchester shore, and to complete the same as soon thereafter as might be reasonably practicable. On the other part, the agreement prescribes the compensation to be paid by the railroad company to the plaintiff, for building and completing the respective works therein designated and described, stipulating that eighty-five per cent. upon the estimated value of the materials furnished, and seventy-five per cent. upon the estimated value of the labor performed, should be paid monthly, as the work was done, and that the balance should be paid by the company upon the completion and acceptance of the whole work.

Parties to the suit are by law competent witnesses in the courts of Massachusetts; and under that law the plaintiff was examined in this case.

He also called and examined five other witnesses. From this parol testimony, it appears that securities were put into the hands of the defendant, deemed by him and the company adequate, at the time, to indemnify him against his contract with the plaintiff. Those securities, two of the witnesses say, consisted of real estate, and the bonds of the company for seventeen thousand dollars, secured by a mortgage upon the road. In respect to the real estate, it is to be observed that the deeds of conveyance bear date three days after the date of the contract; but the presumption from the circumstances is a reasonable one, that they were given in pursuance of the arrangement made at the time the contract was executed. It also appeared that the company failed in July, 1854, and that it was actually insolvent at the date of these transactions.

Prior to the date of the agreement of the 14th of November, 1854, the plaintiff had stopped work under his contract with the company, and refused to continue it. As soon as the contract with the defendant was made, he resumed the work on the bridges, and finished them about the middle of December, 1854; but the rails were not all laid by the company until the twenty-first day of the same month.

At the date of the contract between these parties, the defendant was a large stockholder in the corporation, and holder of the bonds of the company, which were secured by a mortgage of the road to trustees. During the progress of the work under the contract between these parties, and before the day therein named for the completion of the work, the officers of the company, or some of them, repeatedly stated to the plaintiff, in the presence of the defendant, and without objection on his part, that all the company wanted was, that the plaintiff should keep out of the way of the track-layers.

Three of the directors, including the defendant, on the twenty-fourth day of November, 1854, called on the plaintiff while he was at work on one of the bridges, and inquired of him if he could complete it by the fourth day of the then next month, stating to him the reason why it was desirable that he should do so—and by working nights and Sundays he completed it, according to their request.

Several witnesses state—and among the number the one who laid the rails for the company—that the track-layers were not delayed by the plaintiff; and the plaintiff testified that the defendant never objected because the bridges were not completed by the day specified in the written agreement. On being recalled, he further testified that he paid, for work done and materials furnished after that day, the sum of eleven thousand one hundred and fifty-seven dollars and eighty-four cents, and that he had not received a dollar for it from any source.

Thereupon the presiding justice ruled and instructed the jury that, upon this testimony, the plaintiff was not entitled to recover on the common counts, and directed the jury to return their verdict for the defendant. Accordingly, the jury found that the defendant never promised; and the plaintiff excepted to the rulings and instructions of the court.

Several questions were discussed at the bar, which, in the view we have taken of the case, it will not be necessary to decide.

Both of the exceptions to the rulings and instructions of the court necessarily involve the construction of the contract between these parties; but the question presented is widely different from the one considered and decided by this court on the former record. On that occasion, the single question of any importance was, whether, by the true construction of the contract, it was agreed and understood between the parties to the instrument that the completion of the work at the time therein prescribed was a condition on which the obligation of the defendant to give the notes was to depend.

Contrary to the ruling of the circuit judge, this court held that the covenants of the respective parties were dependent, that time was of the essence of the contract, and remanded the cause for a new trial.

That rule of construction, beyond doubt, is the law of the contract, and no attempt has been made to evade or question it on either side in this controversy. But the question now presented is of a very different character.

It is insisted by the plaintiff that the promise of the defend-

ant was an original undertaking, on a good and valid consideration, moving between the parties to the instrument. On the part of the defendant, it is insisted that his undertaking was a special promise for the debt, default, or misdoings, of another, and so within the statute of frauds.

If the theory of the plaintiff be correct, then it would seem to follow that the rulings and instructions of the Circuit Court were erroneous. Verbal agreements between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to vary its terms, or to affect its construction. All such verbal agreements are considered as merged in the written contract. But oral agreements subsequently made, on a new and valuable consideration, and before the breach of the contract, in cases falling within the general rules of the common law, and not within the statute of frauds, stand upon a different footing. Such subsequent oral agreements, not falling within the exception mentioned, may have the effect to enlarge the time of performance specified in the contract, or may vary any other of its terms, or may waive and discharge it altogether. On this point, the authorities are numerous and decisive, of which the following are examples: Goss *v.* Nugent, 5 Barn. and Ad., 65; Nelson *v.* Boynton, 3 Met., 402. Speaking of the exceptions to the general rule, that parol evidence is not admissible to contradict or vary the terms of a written instrument, Mr. Greenleaf says: "Neither is the rule infringed by the admission of oral evidence to prove a new and distinct agreement upon a new consideration, whether it be a substitute for the old one, or in addition to and beyond it; and if subsequent, and involving the same subject matter, it is immaterial whether the new agreement be entirely oral, or whether it refers to and partially or totally adopts the provisions of the former contract in writing, provided the old agreement be rescinded and abandoned." 1 Green. Ev., 303. But the rule, so far as it is applicable to this case, is better stated by Lord Denman, in Goss *v.* Nugent, 5 Barn. and Ad., 665, wherein he says: "After the agreement has been reduced into writing, it is competent to the parties, in cases falling within

the general rules of the common law, at any time before the breach of it by a new contract, not in writing, either altogether to waive, dissolve, or annul, the former agreement, or in any manner to add to or subtract from or vary or qualify the terms of it, and thus to make a new contract." That rule was afterwards qualified by the same learned judge in a particular not essential to the present inquiry; and with that qualification it appears to be the rule constantly applied by the English courts, in cases not within the statute of frauds, to the present time. Harvey *v.* Grabham, 5 Ad. and El., 61; 1 Phil. Ev., (Cow. & Hill's ed.,) p. 563, n. 987; Munroe *v.* Perkins, 9 Pick., 298; Snow *v.* Inhabitants of Ware, 13 Met., 42; Vicary *v.* Moore, 2 Watts, 451; Cummings *v.* Arnold, 3 Met., 489; Fleming *v.* Gilbert, 3 Johns. R., 528.

On the other hand, assuming the theory of the defendant to be correct, that, by the true construction of the contract, his undertaking was a special promise for the debt, default, or misdoings, of the railroad company, then perhaps the better opinion is, according to the weight of authority, that a written contract within the statute of frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing. Marshall *v.* Lynn, 6 Mee. and Wels., 109; Goss *v.* Nugent, 5 Barn. and Ad., 58; Harvey *v.* Grabham, 5 Ad. and El., 61; Stowell *v.* Robinson, 3 Bing. N. C., 927; Stead *v.* Dowber, 10 Ad. and El., 57; Emmet *v.* Dewhurst, 8 Eng. L. and Eq., 88; Hasbrouk *v.* Tappan, 15 Johnson's R., 200; Blood *v.* Goodrich, 9 Wen., 68; Stevens *v.* Cooper, 1 Johnson's Ch. R., 429; Clark *v.* Russel, 3 Dall., 415. Decided cases, however, are referred to, from the Massachusetts reports, which evidently wear a different aspect, and it is contended by the counsel for the plaintiff that the principle adopted in those cases constitutes the rule of decision in this case; but it is unnecessary to determine that point at the present time, as we are of the opinion that the promise of the defendant contained in the written agreement was an original undertaking, on a good and valid consideration moving between the parties to the instrument. Nelson *v.* Boynton, 3 Met., 396; Stearns *v.* Hall, 9 Cush., 31.

Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal debtor, are, in general, within the statute of frauds. Other cases arise which also fall within the statute, where the collateral agreement is subsequent to the execution of the debt, and was not the inducement to it, on the ground that the subsisting liability was the foundation of the promise on the part of the defendant, without any other direct and separate consideration moving between the parties. But whenever the main purpose and object of the promissor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability. Nelson *v.* Boynton, 3 Met., 400; Leonard *v.* Vredenburg, 8 Johns. R., 39; Farley *v.* Cleveland, 4 Cow., 432; Alger *v.* Scoville, 1 Gray, 391; Williams *v.* Leper, 3 Bur., 1886; Castling *v.* Aubert, 2 East., 325; 2 Parsons on Con., 306. Nothing is better settled than the rule, that if there is a benefit to the defendant, and a loss to the plaintiff, consequential upon and directly resulting from the defendant's promise in behalf of the plaintiff, there is a sufficient consideration moving from the plaintiff to enable the latter to maintain an action upon the promise to recover compensation. 2 Addison on Con., 1002, and cases cited. Other authorities state the proposition much stronger, authorizing the conclusion that benefit to the party by whom the promise is made, or to a third person at his instance, or damage sustained at the instance of the party promising, by the party in whose favor the promise is made, is sufficient to constitute a good and valid consideration on which to maintain an action. Violet *v.* Patton, 5 Cr., p. 150; Chitt. on Con., p. 28; Townsley *v.* Sumrall, 2 Pet., p. 182.

Apply these principles to the terms of the written agreement, in view of the attending circumstances and the subject matter, and it is quite clear that the promise of the defendant

was an original undertaking on a good and valid consideration moving from the plaintiff at the time the instrument was executed. On its face it purports to be a contract between the parties, for their own benefit; one agreeing to do certain work, and furnish certain materials, and the other agreeing to pay therefor a stipulated compensation. Their promises are mutual, and in one respect dependent. In consideration that the plaintiff engaged to do the work and furnish the materials by a given day, the defendant, on his part, agreed, among other things, when the work was completed, to give the plaintiff the five notes therein described. Reference was made to the contract of the plaintiff with the railroad company in the first instance, as descriptive of the work to be done, and of the materials to be furnished; and in the second instance, doubtless for the reason that, as a part of the transaction, the company had placed, or agreed to place, securities in the hands of the defendant, to indemnify him for the liability he thereby assumed to the plaintiff. Part of those securities were delivered over to the defendant at the time, and the residue as soon thereafter as the conveyances could conveniently be made. But when we consider the attending circumstances, the presumption is much stronger that the arrangement was one mainly, if not entirely, for the individual benefit of the defendant.

Prior to that date, the railroad company had failed, and was utterly insolvent, owning nothing, it seems, except the securities transferred to the defendant for his indemnity in this transaction, and the franchise of the road. Unlike what was exhibited in the former record, it now appears that the defendant had large interests of his own, separate from his relation to the company as a stockholder, which were to be promoted by the arrangement. He had leased to the company railroad iron for the use of the road, amounting in value to the sum of sixty-eight thousand dollars, and, as a security for payment, held an assignment of the proceeds of the road to that amount, with interest, which was to be paid in monthly instalments of five thousand. Now, unless the bridges were completed and the road put in a condition for use, there would be no proceeds;

and as he had already taken into his possession all the available means of the company to secure himself for this new liability, should the road not be completed, the company could not pay for the iron.

In this view of the subject, it is manifest that the arrangement was one mainly to promote the individual interest of the defendant. Damage also resulted to the plaintiff, as is obvious from the whole transaction. Under his contract with the company, they had stipulated to pay him monthly eighty-five per cent. upon the estimated value of the materials furnished, and seventy-five per cent. upon the estimated value of the labor performed as the work was done. Failing to receive those monthly payments from the company, the plaintiff, as he had a right to do, stopped the works, and refused to proceed, in consequence of the failure of the company to make the monthly payments. To remedy this difficulty, and insure the completion of the bridges so as to render the road available for use, this arrangement was made by the defendant. It was not an arrangement to pay a subsisting indebtedness, but only for work to be done and materials to be furnished; monthly payments were discontinued, and the plaintiff was induced, with an advance of forty-four hundred dollars, to resume and complete the work at his own expense. Without detailing more of the evidence, as exhibited in the statement of the case, it will be sufficient to say that, in view of all the attending circumstances, we think it is clear that the promise of the defendant was an original undertaking upon a good and valid consideration moving between the parties to the written agreement.

For these reasons, we think the plaintiff had a right to proceed upon the common counts, and that it was error in the presiding justice to direct a verdict for the defendant. It is also contended by the plaintiff that the effect of the indemnity given by the railroad company to the defendant was to take the contract out of the statute of frauds; but we do not find it necessary to determine that question at the present time.

The judgment of the Circuit Court is therefore reversed, with costs, and the cause remanded with directions to issue a new venire.

JOHN OVERTON, ROBERT C. BRINKLEY, ROBERTSON TOPP, AND JAMES JENKINS, PLAINTIFFS IN ERROR, *v.* ELIJAH CHEEK AND GEORGE W. CHEEK.

Where a writ of error was allowed in open court, in the Circuit Court, but this writ had no seal, and was not returned to this court with the transcript of the record, and two terms afterwards a paper was filed in the clerk's office, in form of a writ of error, but without a seal, and having no authenticated transcript annexed, the cause must be dismissed on motion.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of West Tennessee.

Mr. Davidge moved to dismiss the writ for the following reasons, which motion was opposed by *Mr. Gillet.*

In this cause, a transcript of the record was filed in the office of the clerk of this court on the eighteenth day of February, 1858, and the cause was thereupon docketed. No writ of error was returned with the transcript; nor has any writ of error, in a legal sense, ever been returned. But on the twenty-seventh day of December, 1859, a paper was filed in the clerk's office, in form of a writ of error, but without the seal of the Circuit Court, whose proceedings are to be re-examined, and without an authenticated transcript of the record annexed to and returned with it, as required by the judiciary act.

By reference to the transcript, it will appear that the judgment of the Circuit Court was rendered on the sixteenth day of April, 1857. At the ensuing term of this court, the transcript was filed. The paper filed in the clerk's office purports to have been issued by the clerk of the Circuit Court on the seventeenth day of April, 1857, and it is returnable to this court on the first Monday of December, 1857. It does not appear ever to have been filed in the Circuit Court. There is no citation.

It is submitted—

1. That in order to give jurisdiction to this court, the writ of error must be under the seal of the Circuit Court, whose

clerk is authorized to issue it. Act of Congress of May eighth, 1792, sec. 9; (1 Statutes at Large, 278.)

2. That the writ of error must be returned at the ensuing term. If a term intervene, the objection is fatal.

Hamilton *v.* Moore, 3 Dallas, 371.

Steamer Virginia *v.* West et al., 19 Howard, 182.

Villalobos *v.* United States, 6 Howard, 81.

United States *v.* Carey, ib., 106.

3. That there must be annexed to, and returned with, the writ, an authenticated transcript of the record. Without the writ, the transcript is filed without authority of law; and a writ of error without the record of the court to be reviewed, or reasons for not returning it, is not returned. Here the writ of error comes back as it went out. There is no return, and hence no jurisdiction.

4. The writ does not appear to have been filed in the Circuit Court.

Brooks *v.* Norris, 11 Howard, 204.

5. There was no citation, and no legal evidence of the waiver of the citation. The transcript filed does show that the citation was waived; but that transcript is not legally before this court, not having been returned in obedience to process.

6. That the transcript was not returned in conformity with law and the rules of this court.

Mr. Justice McLEAN delivered the opinion of the court.

This purports to be a writ of error to the Circuit Court of the United States for the district of West Tennessee.

By reference to the transcript, it appears that the judgment of the Circuit Court was rendered the sixteenth of April, 1857. At the ensuing term of the Supreme Court, the transcript was filed.

It appears that a writ of error in the Circuit Court was allowed, in open court, and signed by the clerk the seventeenth day of April, 1857, which was returnable to the Supreme Court on the first Monday of December, 1857. But this writ had no seal, nor was it returned with the transcript to the

Supreme Court. But on the twenty-seventh of December, 1859, a paper was filed in the clerk's office, in form of a writ of error, but without a seal, and having no authenticated transcript annexed.

From this it appears that no writ of error has been certified with the transcript, and that the paper purporting to be a writ of error, which was filed in December last, being without seal, was void. Two terms of this court have intervened, not including the present term, since the transcript was certified, without a writ of error.

The cause must therefore be dismissed for these irregularities, without noticing others apparent on the record.

STEPHEN O. NELSON, ELLISON BANKSMITH, HENRY C. WALKER, AND THOMAS A. NELSON, PARTNERS UNDER THE FIRM OF S. O. NELSON & CO., APPELLANTS, *v.* LUCIUS C. LELAND, JOHN H. COOKE, DUNCAN C. WILLIAMS, AND MCRAE, COFFMAN, & CO., CLAIMANTS OF THE STEAMER BRIGADIER GENERAL R. H. STOKES.

In a collision which took place between a steamboat and a flat-boat on the Yazoo river, more than two hundred miles from its mouth where it falls into the Mississippi river, both vessels were in fault—the flat-boat, because it had not one or more steady and fixed lights on one or more conspicuous parts of the boat, and because of its erroneous position in the river; and the steamboat, because the master, seeing a light ahead, did not stop his boat, and reverse her wheels, until the locality of the light was clearly ascertained.

The collision took place within the admiralty jurisdiction of the courts of the United States.

Upon a motion to dismiss an appeal, upon the ground of a want of jurisdiction originally in the District Court, the question of jurisdiction in that court is a proper one for appeal to this court, and for argument when the case is regularly reached. This court have jurisdiction on such an appeal. The motion to dismiss, upon that ground, must therefore be overruled.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Louisiana, sitting in admiralty.

It was a case of collision between the steamboat Brigadier General R. H. Stokes and a flat-boat called "Clear the Track," which occurred upon the Yazoo river, 200 miles above its mouth where it empties into the Mississippi, twelve miles above Vicksburg, and wholly within the State of Mississippi. Its waters are fresh, and there are no tides in it. The libel was filed by Nelson & Co., the consignees of the flat-boat, and of 366 bales of cotton shipped on board of it.

The District Court gave judgment in favor of the libellants for the sum reported by the commissioners, viz: $7,616.44. The Circuit Court was of opinion that the exception taken to the jurisdiction of the court was well founded, annulled the decree of the District Court, and dismissed the libel with costs. The libellants appealed to this court.

At December term, 1857, *Mr. Gillet*, of counsel for the appellees, moved the court to dismiss this appeal, "upon the ground of a want of jurisdiction originally in the District Court." Upon which motion, Mr. Chief Justice Taney delivered the opinion of the court, that the question of jurisdiction in the lower court is a proper one for appeal to this court, and for argument when the case is regularly reached, and that this court have jurisdiction on such appeal. The motion to dismiss the appeal on that ground was therefore overruled.

At that term, *Mr. Gillet* and *Mr. Cushing* filed an elaborate brief against the jurisdiction of the courts of the United States in this case; but at that term the court decided the case of Jackson *v.* Steamboat Magnolia, which is reported in 20 Howard, 292. The points and authorities referred to in the brief were examined and ruled in that case, and therefore it is not necessary to state them in the present report.

The case was argued upon the facts as they appeared in evidence by *Mr. Pike* for the appellants, and *Mr. Gillet* for the appellees. Each party accused the other of negligence and want of skill in several particulars, which points would be of little interest to the general reader, and are therefore passed over.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal in admiralty from the Circuit Court of the United States of the eastern district of Louisiana.

The libellants allege that they were the consignees of a certain flat-boat called "Clear the Track," and of three hundred and sixty-six bales of cotton, which were shipped to them by various persons by said flat-boat; that said boat left Sardinia, on Yakana river, in the State of Mississippi, on the 19th February, 1853, bound for New Orleans; that on the 2d March ensuing, on said voyage, descending the Yazoo river, about eight miles below the head of Honey Island, and within the admiralty jurisdiction, about four o'clock on the morning of said day, the flat-boat, being a stanch, tight, and well-built vessel, completely rigged and well provided with tackle, apparel, and furniture, and having on board a full complement of men to navigate the boat, being about the middle of the said Yazoo river, leaving sufficient space on either side for a steamboat or other large vessel to pass, and having a light upon the flat-boat, the captain and crew of the boat being up, the steamboat Brigadier General R. H. Stokes, ascending the said river, struck the flat-boat "Clear the Track" in the bows, which caused her to fill with water, and become a complete wreck; that the steamboat rung her bell, recognising the light of the flat-boat, but continuing to run up the middle of the river.

In their answers, the respondents say that the collision set forth in the libel occurred on the Yazoo river, about fifty miles above the foot of said island, and more than two hundred miles above the mouth of the Yazoo, where it falls into the Mississippi river; and that the entire length of the Yazoo river is within the State of Mississippi; and they allege that the District Court has not jurisdiction of the matters and things, or the claim alleged in the libel against the respondent. And the respondent denies that the collision was caused or did happen by any fault, negligence, or want of skill, in the officers or crew of the steamboat; and they say it was caused by the unskilful management of the flat-boat; and the proper place for the flat-boat, it is said, was at the shore at night; and that

there was not sufficient space for the steamboat to pass between the flat-boat and the shore.

D. B. Miller says: I have seen the flat-boat; she seemed to have a sufficient number of hands on board, and to be well managed. From the size of the boat, witness thinks she was suitable for the navigation of the Yazoo and Mississippi rivers, and from her size she would carry three hundred and fifty bales of cotton and more.

Jackson Harris is of the same opinion. James D. Bell examined the boat well, and considered her strong and well built. Saw her loaded with three hundred and forty bales of cotton, and says she would have carried fifty more bales safely. Capt. Williams was captain of the flat-boat "Clear the Track" when the collision occurred. Besides himself, he had five hands and one passenger, who also worked. Witness began his trip at Sardinia, on the Yakana river. The flat-boat had three hundred and seventy-one bales of cotton on board. Nothing of importance occurred until the morning of the second of March, 1853, when a steamer was heard coming up the river, which afterwards proved to be the Brigadier General R. H. Stokes. Witness had laid down about twelve o'clock that night, but was shortly afterwards awaked by Johnson, one of his hands, who informed him a steamboat was approaching, and he desired witness to be on deck. Witness saw the steamer approaching, at a distance of about half a mile. A light on deck was immediately prepared. At this time, the steamboat was about four or five hundred yards out of sight round the point. The witness ordered his men, four of whom were on deck at the time, to throw the boat out from the point, so as to give the steamer room to pass. Continued efforts were made for this purpose, until the collision occurred.

When the boats came together, all hands were at the oars, except Mr. Johnson, who held the light. The steamboat could be seen across the point. It was some fifteen minutes, the steamboat being in full view, before the boats came into collision. The flat-boat was struck on the first stanchion from the corner of the bow nearest the point of the nosing, about three feet from the jackstaff of the steamer. The collision was

very severe—so great as to knock every one down on the flat-boat. Witness was knocked down senseless by the crane-neck of the oar, but he saw all the others fall before he fell. When witness recovered from the effect of the blow, he perceived the steamer had passed out of his view. Every effort was made to stop the hole made in the flat-boat by the steamer, and, by working the pump, to keep the boat from sinking. The boat floated down some twenty-five miles before they could land her. In less than an hour after the collision, the boat sank six feet deeper in the water, and became unmanageable; and a landing was made, with great difficulty, at some three or four o'clock in the afternoon.

The steamer Stacey came down the river the next day, and she took on two hundred bales of the cotton, including the thirty-five on shore. Before the arrival of the Stacey, witness had engaged the steamboat McLean to go up and take up the cotton that could be saved.

Witness has been engaged in flat-boating on the Yazoo river for the last eighteen years. He does not consider the place where the collision happened as unsafe to run a flat-boat at night, and that it is not usual to tie up flat-boats in that part of the river.

The witness says the flat-boat had a torch made of split pine boards, as usual on such occasions. The Stacey met the flat-boat in a very narrow part of the river, much narrower than where the flat-boat met the Stokes. The Stacey was much nearer the flat-boat when she rang her bell than the Stokes, but she backed out of the way. The Stacey is double the size of the Stokes, it being the largest boat that runs up the Yazoo.

Mr. Johnson is corroborated by others in his statement. Thomas Barnes says the steamer did not change her course after seeing the flat-boat. The steamer was not hurt. Her jackstaff was knocked off, which was replaced. Did not hear Captain Williams offer any assistance to the flat-boat. At the time the steamer struck the flat-boat, she was nearly in full headway.

Witness thinks there was time enough for the steamer to

get out of the way of the flat-boat. The master of the boat entered a regular protest against the steamer. A number of witnesses referred to facts which have no material bearing in the case.

On the part of the respondent, it was proved by William F. Mouldin, the pilot on the Yazoo since 1845, and was so acting on the Stokes when the collision occurred, eight miles from the head of Honey Island: The bell was rung to stop at Hall's Landing. Directly after ringing the large bell to land, saw a light, as he supposed, at the landing. The river was narrow and the current swift. After running a short distance, and rounding the point, saw the flat-boat about three hundred yards above the steamer. He immediately rang the bell to stop the engines, and then to back her, which was done. When she had made about six revolutions, the collision took place. The steamboat was nearly at a stand. The flat-boat was floating nearly broadside down the river. There was no possible means by which a collision could be avoided. The steamboat could not pass on either side of the flat-boat. This, however, is controverted by other witnesses, who say that there was space on each side of the flat-boat for the steamer to pass up the river.

That the light on the flat-boat was seen some two or three hundred yards by the steamer approaching the flat-boat, is admitted; but it is urged that a steady light should have appeared on the flat-boat; that a waving lighted torch often misleads an ascending boat, on the supposition that it is on shore, and designates a landing-place. Several of the witnesses say, that on observing the approach of the flat-boat, the wheel of the steamer was reversed, and some five or six revolutions had been performed when the collision occurred. Some of the witnesses think that the force of the steamer was checked, so that its movement up the river could scarcely be perceived when the steamer struck the flat-boat.

It has happened in this case, as in all other cases of collision, that the witnesses on board of their respective boats, from the circumstances which surrounded them, and the favorable impressions naturally felt in regard to the efforts made by their

respective crews to save the property and lives under their charge, differ widely in their opinions. The steamboat received but little or no injury by the collision; but the flat-boat, in its structure and cargo, received material injury. The evidence fully proves this, not only in regard to the flat-boat and cargo, but also as to the expense and loss to which the owner was subjected.

It is unnecessary to go into detail to show the facts proved. It is enough to know the character of the transaction, and the responsibilities incurred by the respective parties.

The general rule is, where two vessels meet each other, one propelled by steam and the other by the winds, the steamer must give way, and avoid a collision. To this no one can object; but, like other general rules, it may be subject to exceptions.

The Yazoo extends, from its junction with the Mississippi river, some two hundred miles and upwards into the State of Mississippi, and in some parts its navigation requires care and experience. Its channel widens and deepens as the volume of water increases; but it is a narrow river, and its course is crooked—but the Stacey and other boats, of a large class for inland boats, navigate it with success.

Several of the steamboat witnesses think that a flat-boat, laden with three hundred and seventy bales of cotton, ought not to run on a dark night, but should be tied up, where the channel is narrow, and have fixed lights, which distinguish it from a place of landing. Other witnesses differ from the above, and say that an inland navigation so long and important as this, ought to be left free to the enterprise of its inhabitants. This is more congenial to the spirit of our people than a regulation which would retard commerce, without any adequate beneficial results. No measure of this character could well be adopted, without an accurate survey of the river, in which the points of danger should be designated. Until this shall be done, it would seem most judicious not to go beyond a regulation for boats, passing each other in ascending and descending this river, having lights, and giving notice of their approach. There are regulations which apply to our internal

navigation, embracing our rivers and other waters. Under these, every master of a boat should act with a presumed knowledge of his duty, and be held responsible accordingly.

We think, in several particulars, the captain of the flat-boat was in fault. He should have had one or more steady and fixed lights on one or more conspicuous parts of his boat. He should have been careful, by having the upper and lower end sweeps or oars so worked as to have occupied near the shore of the river, giving a sufficient passage to the ascending steamboat. Especially he should have so guided his boat as to have kept it on a straight line of the water, and not on a diagonal course. It is easily perceived that, from the position of the flat-boat, it was difficult, if not impracticable, to ascend the river by the steamer without striking the flat-boat, in the position it occupied.

But we think there was also fault in the steamer. In rounding the point, it is admitted, the steamer was at least three hundred yards below the flat-boat. Seeing the light ahead, the master, in the use of ordinary caution, should have stopped his boat at once, and reversed her wheels, until the locality of the light was clearly ascertained. It is no excuse, that he mistook the light for a place of landing. The commander cannot lessen his responsibility by alleging his mistake. He is bound to make no mistake, for it is his duty to stop his boat where he doubts, until he ascertains the facts. Had this been done, the collision could not have occurred. He could have backed his boat, until he avoided the flat-boat. In not having done this, the steamer was in fault, and the damages must be divided between the two boats, and also the costs.

Some doubts have been suggested whether, in the exercise of the admiralty jurisdiction, some limit may not be interposed. Under the English system, the ebb and flow of the tide, with few if any exceptions, established the fact of navigability; and this was the course of decision in this country, until recently.

The vast extent of our fertile country, its increasing commerce, its inland seas, bays, and rivers, open to us a commer-

cial prosperity in the future which no nation ever enjoyed. Our contracted views of the English admiralty, which was limited by the ebb and flow of the tide, were discarded, and the more liberal principles of the civil law, equally embraced by the Constitution, were adopted.

This law is commercial in its character, and applies to all navigable waters, except to a commerce exclusively within a State. Many of our leading rivers are sometimes unnavigable; but this cannot affect their navigability at other times. A commerce carried on between two or more States is subject to the laws and regulations of Congress, and to the admiralty jurisdiction.

Upon the whole, the decree of the Circuit Court is reversed; and the cause is remanded, under the above order of this Court.

Mr. Justice CAMPBELL dissented, and Mr. Justice CATRON concurred for the reason stated by him.

Mr. Justice CAMPBELL dissenting:

The decree in the Circuit Court, dismissing the libel in this cause, was rendered before the judgment in this court in the case of Jackson *v.* Magnolia, 20 How., 292, was given. There is no material difference in the cases. The reasons for the judgment of the Circuit Court in this case are contained in the opinion filed by me in that case. I do not consider it necessary or proper to repeat them here. I concur in the judgment of the court upon the merits of the cause.

Mr. Justice CATRON concurs with the opinion of the court, because the question of jurisdiction, involved in this cause, was ruled in the case of the Magnolia, referred to by Mr. Justice Campbell.

SPRINGFIELD TOWNSHIP, OF FRANKLIN COUNTY, PLAINTIFF IN ERROR, *v.* JOHN H. QUICK, AUDITOR, AND WILLIAM ROBESON, TREASURER, OF FRANKLIN COUNTY.

Congress reserved the sixteenth section of the public lands in all the new States for the support of schools, for the benefit of the inhabitants of the township.

So that the funds arising from this section are applied to the use of the inhabitants of the township, the State has a right to apply funds raised from other sources, according to its discretion, for the purposes of education throughout the State.

THIS case was brought up from the Supreme Court of the State of Indiana by a writ of error, issued under the twenty-fifth section of the judiciary act.

It originated in the county of Franklin, before the judge of the fourth judicial circuit of the State of Indiana, and was called a civil action. Springfield township filed a complaint against Quick, the auditor, and Robeson, the treasurer, of Franklin county, alleging that they had in their hands a certain sum of money, which they were about to distribute erroneously, and praying for an injunction to prohibit them from making the distribution in the mode which they proposed.

On the 21st of May, 1855, an injunction was issued by the clerk of the court, according to the prayer of the bill. In August, 1855, the defendants demurred to the bill, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The court overruled the demurrer, and ordered the defendants to answer; which being declined, the injunction was made perpetual. The defendants appealed to the Supreme Court, which reversed the judgment, and Springfield township brought the case up to this court.

The reservation by Congress of the sixteenth section of the public lands in each township in all the new States, and its appropriation to school purposes for the benefit of the inhabitants of the township, is so well known to all readers of American history, that a brief reference to the legislation of Indiana will be sufficient to explain the point involved in the present case.

Under the authority of an act of Congress, Springfield township sold the sixteenth section, in 1836, for the sum of $7,423.36; which was invested, and the interest applied to the support of schools within the township. It was conceded, in the argument of this case, that the township was still entitled to the use of this money, and to receive it; but the claim was

for an additional amount, from a fund which accrued under the State laws of Indiana.

In 1851, Indiana adopted a new Constitution, the eighth article of which established a school fund, derived from several sources, which were directed to be consolidated into one fund. The first of these sources was the Congressional township fund, and the lands belonging thereto. Then followed an enumeration of ten different sources from which revenue was derived, all of which were united into one common fund. This was directed, by an act of the Legislature, to be apportioned amongst the several counties of the State, according to the enumeration of scholars therein, without taking into consideration the Congressional township fund in such distribution.

But the Constitution also contained the following section, being section seven, in the eighth article, viz:

"All trust funds held by the State shall remain inviolate, and be faithfully and exclusively applied to the purposes for which the trust was created."

It is evident that, under this act of the Legislature, Springfield township might have received less than the interest of the sum for which section sixteen had been sold, the proceeds of which had been invested. Therefore a suit was brought against the auditor, treasurer, and board of commissioners, of Franklin county, to test the constitutionality of the law; and at November term, 1854, the Supreme Court of the State decided that the act of the Legislature was a violation of the seventh section of the eighth article of the Constitution just quoted, and was consequently null and void. The case is reported in 6 Indiana Reports, page 84.

In March, 1855, the Legislature passed another act, providing for the distribution of the fund, but inserting the following proviso at the end of the one hundred and first section:

"Provided, however, that in no case shall the Congressional township fund, &c., be diminished by such distribution, and diverted to any other township."

Springfield township filed the complaint now in question, alleging that they were entitled to $435.17, being the interest

of the sum for which section sixteen had been sold, and also to $437.76, being its distributive share, making in the aggregate $872.93, to be distributed in said Springfield township; or, in other words, that the State had no right to charge them, in estimating their distributive share, with what they had received under the Congressional township fund.

The history of this suit has been given in the early part of this statement, by which it will be seen that the Supreme Court of Indiana decided against the claim of Springfield township. The case is reported in 7 Indiana Reports, page 636.

It was submitted on printed argument by *Mr. Barbour* for the plaintiff in error, and *Mr. Jones* for the defendant.

Mr. Barbour enumerated the acts of Congress which bore upon the case, and also the Constitution and laws of Indiana. The point which he made resulted from this examination, and was stated in the following manner:

The eighth article of that Constitution contains the following provisions on the subject of education:

"SEC. 1. Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government, it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide by law for a general uniform system of common schools, wherein tuition shall be without charge, and equally open to all.

"SEC. 2. The common school fund shall consist of the Congressional township fund, and the lands *belonging thereto*, the surplus revenue fund, and the other funds named."

The third, fourth, and fifth sections provide for the funding, investment, and distribution thereof.

Sec. 6 makes the several counties liable for the preservation of the fund, and payment of the interest thereon.

"SEC. 7. All trust funds, held by the State, shall remain inviolate, and be faithfully applied to the purposes for which the trust was created."

Sec. 8 provides for the election of a State superintendent of public instruction.

Pursuant to the provisions of this article of the Constitution, the first Indiana Legislature convened after its adoption, by an act approved June 14, 1852, and found in the Revised Code of 1852, (vol. 1, page 439,) undertook to consolidate the school funds of 1852, and to distribute generally over the State the proceeds of the sixteenth section in each township, reserved by Congress to the inhabitants of the respective townships in which the sections are situate, for the use of schools therein.

This distribution was controverted by the present plaintiffs in the State courts, and their power and right to the exclusive control of this sixteenth section and its proceeds fully established by the Supreme Court of the State of Indiana, in the case of the State of Indiana and others *v.* Springfield Township, reported in 6 Indiana Reports, page 84, &c., and which is especially referred to the attention of this court, as containing a true statement and history of the legislation of Indiana on this subject, and a full vindication of the right of the plaintiffs in this case to the relief sought.

Shortly after this judgment was pronounced by the Supreme Court of the State of Indiana, which was at the November term, 1854, the Legislature of Indiana, to avoid its force and effect, and indirectly to accomplish that which the court determined could not be done, passed an act, approved March 5, 1855, entitled "An act to provide for a general system of common schools, the officers thereof, and their respective duties, and matters properly connected therewith, and to establish township libraries, and for the regulation thereof."

See Acts of Indiana for 1855, page 161.

The following is the ninety-seventh section of that act:

"The State superintendent shall annually, by the fourth Monday in April in each year, make out a statement showing the number of scholars in each county of the State, the amount of the income of the common school fund in each county for distribution, and the amount of taxes collected for school purposes, and shall apportion the same to the several counties of the State, according to the enumeration of scholars therein,

without taking into consideration the Congressional township funds in such distribution."

After having in this manner furnished the basis for the distribution of the income of the common school fund and amount of the school tax for the current year amongst *the several counties*, the act prescribes, in its 101st section, the method of distributing, *in each county*, the sum so apportioned to it. It is as follows:

"The treasurer of the several counties shall annually, on the third Monday of May, make distribution of the income of the common school fund to which his county is entitled (upon the warrant of the county auditor) to the several townships and incorporated cities and towns of the county, which payment shall be made to the treasurer of each township; and in making the said distribution, the auditor shall ascertain the amount of the Congressional township fund belonging to each city, town, and township, and shall so apportion the income of the common school fund as to equalize the amount of available funds in each city, town, and township, as near as may be, according to the number of scholars therein: *Provided, however*, That in no case shall the Congressional township fund be diminished by such distribution, and diverted to any other township."

To controvert the right of distribution under these sections, the plaintiffs in error filed their complaints in the court below. Issue was joined, and the cases went to the Supreme Court of the State of Indiana, where the judgment was finally against the plaintiffs in error, and to reverse which, these writs of error are prosecuted under the act of Congress.

The plaintiffs in error insist that the eighth article of the Constitution of 1851 of the State of Indiana, and the legislation of said statute of March 4, 1855, above referred to, are both in violation of the ordinance and acts of Congress, vesting these said sixteenth sections in the inhabitants of the respective townships in which they are situated, and consequently void.

It cannot be disguised that this legislation of 1855 was a palpable evasion of the judgment pronounced by the Supreme

Court of Indiana, in 6 Indiana Reports, page 84. And this high court will certainly not tolerate this petty subterfuge, but will hold as they did in Trustees for Vincennes University *v.* the State of Indiana, (14 Howard's Supreme Court Reports, page 268,) that the rights of parties cannot thus be trifled with, but will be held sacred from all improper legislation.

The judgment of the Supreme Court of Indiana in the case at bar, (7 Indiana Reports, page 636,) pronounced by Judge Gookins, we think is a very lame attempt to justify the eighth article of the Constitution of 1851 and the act of 1855, and cannot be sustained by reason or authority. With all due respect for the opinion of that court, it is a mere *ad captandum* argument, and, as will be seen, was the opinion of a divided court.

What rights are sacred which can be spirited away in this manner, or what respect can such legislation or judicial construction command, when it is conceded that the same effect is produced indirectly, which, it is solemnly pronounced, cannot be done directly.

The plaintiffs in error appeal to this honorable court to protect their rights and interests, vested under these acts of Congress, against this unjust State legislation, and against this void provision of the State Constitution.

The rights of the plaintiffs in error appear to them so plain and self-evident, that it is difficult to frame an argument to support them, and they are submitted to the court on their own intrinsic merits.

Mr. Jones made the two following points:

1. Is the act in question constitutional?

2. Does it violate the act of Congress making the grant of the sixteenth section of lands in the several Congressional townships of the State of Indiana, "to the inhabitants thereof, for the use of schools?"

In arriving at the merits of this case, it may not be improper to view it with reference to a general question, as to whether it is in contravention of any provision of the Constitution of the United States. The appellees insist it is not, as that in-

strument is but a charter of privileges and powers ceded and delegated by the people of the Union to the General Government, as restrictions and concessions of inherent sovereignty, necessary to be made in order to create, give efficiency to, and perpetuate, a parent government. And that the right exercised by the State of Indiana, as claimed by her in the law in question, is not a ceded nor a delegated right, and that its exercise is not, by reasonable construction, within any prohibitive feature of the Federal Constitution. On the contrary, this right is conceived to be within the reasonable limits of the rights specially reserved to the States or to the people—the true source of all political power—by the tenth amendment to that instrument, that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

Does it contravene any provision of the Constitution of the State of Indiana? It is insisted that it does not, as the Constitution of the State is but an organic rule, originating in and restrictive of the unlimited powers of a sovereignty. Not defining what alone the Legislature may do, in its capacity as the law-making power of the State, but positively prohibiting certain acts of legislation; denying that branch of the State Government the privilege of interfering with certain defined rights, reserved by the people, and pointing out the mode in which legislation shall be conducted. It does not withhold from the State the right to prescribe, through the agency of her Legislature, a rule for the taxation of her people and their property, within her limits, for educational purposes. Nor does it prohibit any distribution the Legislature may see proper to direct of such taxes so collected, whether that distribution be *per capita*, or with reference to existing educational advantages one locality may have over another; and whether donations from the General Government, or other sources, shall be taken into consideration in the mode of distribution, is conceived to be an untrammelled power of the Legislature of the State, the exercise of which is unforbidden by any provision of either the State or the Federal Constitution.

The very features of the law complained of are component

parts of the State Constitution; and, if not repugnant to other subsequent provisions of that instrument, their validity is coequal with the Constitution itself. These provisions are contained in the eighth article of the Constitution of the State.

Vide R. S. of Ind., 1852, vol. 1, page 62.

The sections of the law held to be exceptionable by the appellant are clearly within the directory provisions of the eighth article of the Constitution of Indiana; and section one hundred and one, so far from diverting or diminishing the Congressional township fund, expressly provides, "that in no case shall the income of the Congressional township fund belonging to any township, or part of such township, be diminished by such distribution, and diverted to any other township."

Laws of the State of Indiana, 1855, page 176.

It is insisted by the appellant that the act is contraventive of that provision of the State Constitution which requires all laws of the State to be of uniform operation throughout the State, which position the appellees deem to have been properly held untenable by the Supreme Court of the State in this same case. That court says: "It does not conflict with the twenty-third section of the fourth article, (of the Constitution of the State of Indiana,) which requires all laws to be of uniform operation throughout the State, for the act is not only uniform in itself, but it produces uniformity in the subjects upon which it operates."

It is submitted, whether the same rule of construction which applies to a statute does not apply to a Constitution. That where the proviso of an act (or Constitution) is directly repugnant to the purview of it, the proviso will not stand as speaking the last intention of the maker. Or, in other words, is not the subsequent constitutional provision of the eighth article of the Constitution of the State of Indiana an exception to the prohibition of the fourth article of that instrument?

Nor can it be brought within the prohibitions enumerated in the twenty-second section of the fourth article of the State Constitution, as the only mention there made of the subject

is a restriction of the State, forbidding the passage of local or special laws "providing for supporting common schools, and for the preservation of the school fund"—the law itself being made to operate generally and uniformly throughout the entire State.

It is an unquestioned duty of the State to preserve, in good faith, the trust funds held by her for the benefit of her citizens. In the same article of her Constitution containing the educational provisions, which the act in question was framed to carry into effective practice, she solemnly acknowledges that obligation by providing that "All trust funds held by the State shall remain inviolate, and be faithfully and exclusively applied to the purposes for which the trust was created." And the appellees insist that it is not inconsistent with her good faith in that respect for her, in the untrammelled exercise of State sovereignty, in making provisions for the education of her people, to take into consideration these donations made for educational purposes, and to so distribute all other funds as to equalize the educational facilities of the whole State.

The entire subject matter upon which the act in question proposes to operate is within the limits of the State of Indiana. She does not propose, by this legislative enactment, to assume control of any foreign matter whatever. And it has been held, "That a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, when that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty, of a State to advance the safety, happiness, and prosperity, of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends, when the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated. That all those powers which relate to merely municipal legislation, or which may more properly be called internal police, are not surrendered or restrained; and consequently, in relation to

them, the authority of a State is complete, unqualified, and exclusive."

Mayor, Aldermen, and Commonalty of City of New York *v.* George Miln, 11 Peters, 102.

Inasmuch as the act does not propose to divert the Congressional township fund, but expressly provides against its diversion and diminution, and for its faithful preservation and application to the specified use for which it was granted, it most certainly does not violate the act of Congress granting the lands to the several townships of the State. Such construction can only be given to the act in question, by imputing to the State Legislature an ignorance or duplicity inconsistent with common intelligence and common honesty.

It being unquestionably the duty of all Christian legislators to exercise, in sound discretion, those attributes of sovereignty called into requisition in providing means for the cultivation of the intelligence and morality of the people, it is insisted that the widest scope of power is vested in the Legislature of the State of Indiana, to provide means for the education of the masses within her limits. If it be not competent for her Legislature to take into consideration advantages already enjoyed by favored sections of the State, and a sufficient tax were levied to insure a competent school fund in all parts of the State, on a basis of uniform taxation, the consequence would be, that in wealthy localities, with but few proper subjects to receive the intended benefit, an unnecessary tax would have to be levied and collected, and an unemployed surplus hoarded up, to become a bone of contention, and an inducement to legislative folly and extravagance, as all past history has ever proven plethoric treasuries to have been, as well as a monument of a want of that proper appreciation of sovereignty which would deny discretionary power, in a sovereign State, to equalize and render uniform the operation of her laws, and the benefits to her people arising therefrom, by exercising inherent powers consistent with the public welfare, and not prohibited by any higher law.

It being a well-settled principle that the power of a State to levy taxes, to create a revenue for any specified object, is an

incident of sovereignty, and only restricted by constitutional inhibitions; and there being no such constitutional prohibition—the sense of honor, justice, and equity, of a State alone defining the limits within which that power shall be exercised—what feature of the law in question can be said to exceed the authority of the State? In the Constitution of the State of Indiana, there is no feature, the appellees insist, prohibiting the levying and collecting of taxes such as contemplated by the school law in question. And that a necessary incident to the power to create a revenue is the power to disburse it; to apply it to the wants of the community in which it was raised. The Constitution of the State being silent as to the mode of distributing the common school fund, that burden was necessarily cast upon the Legislature. In the exercise of this necessary, incidental power, that body directs that all the funds raised, to constitute a common school revenue, be so distributed, taking into consideration the Congressional township fund, as to insure an equality of educational facilities throughout the State. The law implicitly complying with the directory provisions of the State Constitution as to the benefits to be conferred, if there be serious error, or an invasion of right in it, it remains to be demonstrated by some hypothesis not yet tangibly exposed to inspection.

The very law which, in good faith, and with no attempt at secrecy, takes into consideration the Congressional township fund, in providing a mode for the distribution of the school funds of the State, also takes from the county seats, throughout the State, their hitherto exclusive school fund, known as the seminary fund, and intermingles it with the funds from other sources, of which the educational fund of the State is composed. This consolidation is not complained of as an unwarranted assumption of power, nor is it pretended that it is not clearly within the legitimate scope of legislative authority. The same power that can rightly divert a revenue enjoyed by peculiar localities, and disburse it throughout an entire State, most certainly possesses a sufficient authority, over her own internal affairs, to take into consideration other

funds, in her efforts at placing all upon a uniform basis as it respects the means of educating her people.

The idea of attaching to the Congressional township fund a degree of sacredness that renders its very contemplation by the State an unpardonable offence, is a creature of imagination, unsupported by any authority whatever. Indiana honorably acknowledges her trust, and provides strict rules for its most sacred observance. She feels the obligation resting upon her, and throws all needful restrictions, checks, and guards, around that fund, for its preservation and appropriation to the use for which it has been granted by the Federal Government, and intrusted to her as the trustee of her people. And at the same time, it is insisted, she justly appreciates her sovereignty in so distributing other funds as to advance, by her own contributions, such localities and recipients of her favors as have not the same educational facilities enjoyed by those who possess considerable Congressional township funds, in order that the educational advantages enjoyed by her people shall be equalized and uniform throughout her entire limits. And these powers, it is insisted, are rightfully exercised by her in the law in question, and it is conceived that the Supreme Court of the State did not err in sustaining the validity of the law.

Mr. Justice CATRON delivered the opinion of the court.

The twenty-fifth section of the judiciary act declares, that where is drawn in question the construction of any statute of the United States, and the decision is against the right set up or claimed by either party under the act of Congress, such decision may be re-examined, and reversed or affirmed, in the Supreme Court, on writ of error.

Here it is claimed, for the inhabitants of the township, that the fund arising from the proceeds of the sixteenth section shall not be estimated in distributing the general school fund of the State derived from taxes paid into the State treasury. The acts of the Legislature equalize the amount that shall be appropriated for the education of each scholar throughout the State, taking into the estimate the moneys derived from

the proceeds of the sixteenth section, with the proviso, that the whole of the proceeds shall be expended in the township. If it be *more*, then an equal portion to each scholar elsewhere furnished by the State fund—still, the township has the benefit of such excess, but receives nothing from the treasury; and if it be *less*, then the deficiency is made up, so as to equalize according to the general provision.

And the question here is, whether the State laws violate the acts of Congress providing that the proceeds of the sixteenth section shall be for the use of schools *in the township*. And our opinion is, that expending the proceeds of the sixteenth section for the exclusive use of schools "in the township" where the section exists, is a compliance with the legislation of Congress on the subject; nor is the State bound to provide any additional fund for a township receiving the bounty of Congress, no matter to what extent other parts of the State are supplied from the treasury.

The law is a perfectly just one; but if it were otherwise, and the school fund was distributed partially, nevertheless those receiving the bounty from Congress have no right to call on this court to interfere with the power exercised by the State Legislature in laying and collecting taxes, and in appropriating them for educational purposes, at its discretion.

We hold, that a true construction was given to the acts of Congress referred to, and order that the judgment be affirmed.

CHARLES KOCK, PLAINTIFF IN ERROR, *v.* LOUIS EMMERLING.

Where an agent was employed to sell an estate in Louisiana, and the owner refused, without sufficient reasons, to fulfil an agreement which the agent had made, a right to demand compensation accrued to the agent, the amount of which is to be settled by established usage.

THIS case was brought up by writ of error from the Circuit Court of the United States for the eastern district of Louisiana.

The facts are stated in the opinion of the court.

It was submitted on printed argument by *Mr. Pike* for the

plaintiff in error, and argued by *Mr. Benjamin* for the defendant.

Mr. Pike contended, that neither by the common law nor by the law of Louisiana was the broker entitled to any commission.

On the subject of the common law, he cited the cases of Broad *v.* Thomas, 7 Bing., 99, and Read *v.* Rann, 10 Barn. and Cress., 438.

On the subject of the law of Louisiana, he cited many authorities from the civil law, and the case of De Santos *v.* Taney, decided in November, 1857. With respect to this latter case, he said:

In De Santos *v.* Taney, in November, 1857, the very question in this case came before the same court. In that case, a real estate broker, employed to find a purchaser for a house, had done so. The price and terms were agreed to and settled, and accepted by the defendant in writing. The bill of sale was drawn and ready, when a dispute arose as to who should pay certain taxes, and the matter was broken off. The court affirmed the decision in Blanc *v.* the Improvement and Banking Co., and Didion & Duralde; and said that, in all the cases relied on by the broker, the contract was consummated, though, through bad faith towards the broker on the part of his principal, it had been suspended, and apparently abandoned.

The court said, "Negotiations for sales through brokers, interrupted and broken off at every stage of progress to completion, are of daily occurrence. But all the authorities confirm the doctrine of Judge Martin, as we understand it, *that no brokerage is due until the sale is complete and executed; that is to say, until the consideration of the sale has passed to the vendor.*"

Thus it is settled, by the legitimate interpreter of the law of Louisiana, as the law of that State under its code, that, as is the law in England, the broker, if paid at all, is paid by way of commissions—*i. e.*, by a per centage upon the money actually received on a completed sale; and that if there be no sale, he is entitled to nothing.

And this is a reasonable doctrine. The compensation in case of success is very large; and, in fixing it so high, all the uncertainties and difficulties to be anticipated in completing a sale, whether arising from the whims and caprices of the parties, or from any other cause, may well be regarded as taken into consideration. The broker's implied contract is, in effect, an *aleatory* one. For the chance of a large reward, he risks his labor and trouble. He takes the chances of success, and must be supposed to have considered the caprice, even, of each party, as an element of the calculation. And a plain reason for this is, that it would be, in almost every case, impossible to prove that *mere* caprice broke off the negotiation. As he has no legal right to force a party to conclude a sale or purchase, that he may have his fee, so he has no right to insist on knowing the reason which caused the refusal to proceed, any more than if he were a marriage broker. In this case, as in that of a marriage not effected, he must, to recover, establish a proposition he *cannot* establish, to wit: that the parties refusing to proceed did so for an insufficient reason.

It is not shown in this case that he incurred any expenses or made any outlay. The suit is for his commissions, and the judgment allowing him such commissions is surely erroneous.

Mr. Benjamin said:

This case is a very simple one. Emmerling, a real estate broker, was employed by Kock to find a purchaser for his plantation at the price of $250,000. A purchaser was found by the broker, with whom the bargain was made by Kock at the price fixed by himself. After making a verbal agreement for the sale, Kock changed his mind, and refused to sell. The question is, whether he can lawfully refuse to pay his broker the commission earned, on the ground that the sale was not actually effected, when it was his own act that prevented the accomplishment of the sale.

The judge below decided rightly that the commissions were due.

C. C., 2035.

Righter *v.* Aleman, 4 Rob., 45.

Wells *v.* Smith, 3 La. Rep., 501.
Levistones *v.* Landreaux, 6 Annual, 26.
Lestrade *v.* Perrera, 6 Annual, 398.
McGavock *v.* Woodlief, 20 How., 221.

Mr. Justice McLEAN delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the eastern district of Louisiana.

An action was brought by Emmerling, an alien, against Kock, a citizen of Louisiana, for the sum of five thousand dollars, on the purchase and sale of real estate.

Emmerling, it seems, being a broker, and engaged in the purchase and sale of real property, was employed by Kock to sell a certain plantation on the Bayou Lafourche, known as the Letory place, and by his written instructions, the 2d April, 1857, was authorized to sell this plantation above named at two hundred and fifty thousand dollars, payable one-fifth cash, and the remainder in four equal instalments, bearing eight per cent. interest.

The petitioner, it is alleged, after visiting the plantation at various times, and with different persons, finally, on the 19th of April, 1857, made an agreement with Jacob Denny, a resident of Louisiana, to purchase the plantation at the price fixed, provided the said Kock would so change the terms of payment as to receive forty thousand dollars in cash, and the remainder in six annual instalments, bearing seven per cent. interest.

Kock consented to the terms, and the 29th April he and Denny met at New Orleans to complete the contract. Kock insisted that for the first year's credit a good acceptance for thirty thousand dollars should be given, and agreeing, if this were done, the five thousand dollars remaining on the first term should be equally divided among the other five terms, so that the first year's payment should be thirty thousand dollars, and the other five credit terms should be thirty-six thousand dollars each. And he agreed to take as satisfactory the acceptance of Messrs. Fellows & Co., or Messrs. Lavoe & McColl, commission merchants, of New Orleans. Messrs. Fellows

& Co. agreed to accept for the thirty thousand dollars, and Denny offered to advance the forty thousand dollars, and in every other respect to carry out and complete the proposed contract. But Kock refused to comply with his agreement, capriciously, as it would seem, as he assigned no reason for his refusal, except that he was going to Europe on a visit with his family, and had no time to execute the title papers. Denny proposed to provide for the payments, and receive the title on his return, but he refused to sell the plantation.

The petitioner alleged that the contract was fully executed on his part, and on the part of Denny; and he claims a recompense for the service in which he was engaged, at the rate of two per cent. on two hundred and fifty thousand dollars, making the sum of five thousand dollars, said per centage being the usual established rate of broker's commission on the sales of plantations.

The defendant denies the allegations of the bill in the Circuit Court.

A judgment was entered in the Circuit Court for the sum claimed by the petitioner; from which judgment the defendant has appealed to this court.

In his statement of facts, the district judge says: "It is established by the proof that the price of the plantation was two hundred and fifty thousand dollars, and the rate of commissions of brokers on sales of plantations was two per cent." This is the ordinary mode of bringing before this court a writ of error on a statement of facts in Louisiana by the district judge. McGavock *v.* Woodlief, 20 How., 225.

There would seem to be no doubt on the merits of this case. The terms of the contract as to the sale were specific and unmistakable, and everything was done that could be done by the purchaser to carry out the contract; but the vendor, without any reason, refused to complete it.

The broad ground is assumed, that no contract of this character can be specifically enforced, unless it has been fully executed.

In the case of McGavock, above cited, the court say: "The terms of the sale, as given by the vendor to the plaintiff, the

broker, were simple and specific, &c., and Long, the purchaser, agreed to these terms, as averred in the petition, and not questioned in the case; and if he had offered, and was in a condition to consummate the agreement according to its terms, no doubt the commission would have been earned, and the recovery below right." But a change was proposed by Long, which prevented the arrangement.

Civil Code, 2035, declares, "The condition is considered as fulfilled, when the fulfilment of it has been prevented by the party bound to perform it." In addition to this, the following authorities have been cited: Righter *v.* Alamon, 4 Rob., 45; Wells *v.* Smith, 3 La. Rep., 501; Levistones *v.* Landreaux, 6 Annual, 26; Lestrade *v.* Perrera, 6 Annual, 398.

It is not perceived why a contract to sell property, real or personal, on commission, should not be governed by the same rules as other sales. If a usage has been established in Louisiana, as seems to be the case, for the sales of plantations, such usage, being reasonable, should govern in the absence of a special agreement.

Nothing is more common in our large cities than to charge brokerage for procuring the loan of money. This varies as the money market rises or falls. One per cent., and sometimes two, is charged for this service. The same rule applies as to the sale of property. Where the contract is fair, it is not perceived why such compensation should not be paid, as agreed by the parties, or by an established usage.

Where the vendor is satisfied with the terms, made by himself, through the broker, to the purchaser, and no solid objection can be stated, in any form, to the contract, it would seem to be clear that the commission of the agent was due, and ought to be paid. It would be a novel principle if the vendor might capriciously defeat his own contract with his agent by refusing to pay him when he had done all that he was bound to do. The agent might well undertake to procure the purchaser; but this being done, his labor and expense could not avail him, as he could not coerce a willingness to pay the commission which the vendor had agreed to pay. Such a state of things could only arise from an express under-

standing that the vendor was to pay nothing, unless he should choose to make the sale.

The judgment of the Circuit Court is affirmed.

Mr. Justice CATRON and Mr. Justice GRIER dissented.

ELISHA MORRILL, PLAINTIFF IN ERROR, *v.* JOHN CONE AND CARLOS J. CONE.

Although under a power of attorney, authorizing a conveyance of lands, the legal title does not pass when the attorney executes a deed, unless the sale was made in accordance with the requirements of the power, yet in this case, where the deed executed by the attorney was apparently within the scope of his power, and admitted the payment of the consideration, it was *prima facie* evidence of the conveyance of the legal title.

The evidence offered to show that the power of attorney had not been complied with, was not sufficient in an action of ejectment to recover the lands after a long period of time had elapsed, and the lands had been repeatedly sold.

THIS case was brought up by writ of error from the Circuit Court of the United States for the northern district of Illinois.

It was an ejectment brought by Morrill, a citizen of New Hampshire, to recover from John Cone and Carlos J. Cone the southwest quarter of section thirty-six, township eleven north, range one west, in the county of Warren, and State of Illinois.

Upon the trial, the plaintiff exhibited his title as follows, viz:

1. A patent for the land in question from the United States to Benjamin Abbott, dated April 9th, 1818.

2. A deed for said land from said Abbott to the plaintiff, dated January 9th, 1855.

3. The plaintiff also put in evidence, by way of precaution, a deed to himself from one Nathaniel Abbott, dated October 26th, 1838.

The defendants, in order to show that the title had passed out of the Abbotts to grantees, under whom they made defence, at a time prior to the inception of the plaintiff's title, read to the jury—

1. A deed for said land from Benjamin Abbott to Nathaniel Abbott, dated May 9th, 1818.

2. A power of attorney from Nathaniel Abbott, John D. Abbott, and Joseph Low, to Abraham Beck, dated July 14th, 1820, authorizing him to sell and convey "all those certain lots, pieces, or parcels of land named and described in the annexed list or schedule, situate, lying, and being in the tract appropriated by acts of Congress for military bounties, in the State of Illinois, and which were severally granted to the persons whose names are annexed to each lot or parcel of land," with this proviso written immediately after the attesting clause, "provided, however, that the condition is understood to be such, that our said attorney is to take sufficient security on real estate for all the above lands which may be sold on a credit."

The annexed schedule contained sixty-four quarter sections, and among them the land in suit. Acknowledged February 12th, 1821, and recorded July 30th, 1821.

As the decision of the case turned upon the execution of this power, and the admissibility of the evidence offered to prove its defective execution, it is proper to state the circumstances under which it was given; and, in doing so, to use the testimony of the witness who was produced, because the second branch of the opinion of this court is, that even if the evidence was admissible, it would not have destroyed the title of the defendants.

In 1820, Beck was acting as agent for the Abbotts and Joseph Low, (under whom the plaintiff, Morrill, claimed,) and who resided in New Hampshire.

On the 31st of May, 1820, Beck wrote that he had found a purchaser for eighty lots, (including the land in question,) at fifty-seven dollars per lot, making four thousand five hundred and sixty dollars, payable in nine, eighteen, and twenty-four months.

On the 12th of July, 1820, Low, who appeared to manage the business, wrote to Beck that he would accept the offer and send a power of attorney by the next mail.

On the 14th of July, 1820, the power was executed and

transmitted to Beck. The concluding part of the instrument was as follows, viz:

"Have made, constitued, and appointed, and by these presents do make, constitute, and appoint, Abraham Beck, of the town of St. Louis, and State of Missouri, our true and lawful attorney, for us and in our names to sell and convey the whole of the said described lands, and make, execute, and deliver good and sufficient warranty deeds for each and every of the aforesaid lands, and to grant and convey the same absolutely in fee simple for such price or sum of money, and to such person or persons as he may think fit and convenient, with such clauses, over-acts, and agreements, as our said attorney shall think fit and expedient, hereby ratifying and confirming all such deeds and conveyances, bargains and sales, which shall at any time be made by our said attorney, touching or concerning the premises.

"In witness whereof, we have hereunto set our hands and seals, this fourteenth day of July, 1820; provided, however, that the condition is understood to be such that our said attorney is to take sufficient security on real estate for all the above lands which may be sold on a credit.

"JOSEPH LOW, [SEAL.]
"NATH'L ABBOTT, [SEAL.]
"JOHN D. ABBOTT, [SEAL.]"

On the 12th of September, 1820, Beck executed a deed to O'Hara, in the names of his employers, "for and in consideration of the sum of three thousand five hundred and thirty-four dollars to them in hand paid, the receipt whereof is hereby acknowledged."

On the same day, viz: September 12, 1820, O'Hara gave six promissory notes to Beck, payable at different times, and executed the following instrument:

"Whereas I have this day purchased of Abraham Beck, as attorney of Joseph Low and others, ninety-two quarter sections of Illinois military bounty lands, for which I have agreed to pay him at the rate of fifty-seven dollars each, amounting to five thousand two hundred and forty-four dollars, which is payable, one-third at nine months, one-third at eighteen months,

and one-third at twenty-four months, for which I have given my notes payable as above; and whereas I have given my notes payable as above; and whereas some defects exist in the power of attorney by which he has conveyed fifty-seven quarter sections, part of the above, I do covenant and agree with the said Abraham Beck, that, whenever he gets a power of attorney to convey said lots, and confirm his proceedings, and deliver the same to me, that I will execute and deliver to the said Abraham Beck, as attorney for the said persons mentioned, a mortgage upon good and sufficient real estate, sufficient to secure the payment of the above notes.

"St. Louis, *September* 12, 1820.

"Recorded December 6, 1821.

"WILLIAM H. O'HARA."

In September, 1820, O'Hara mortgaged the land to Cabanné, which was acknowledged on the 30th of October, and recorded on the 21st of February, 1821.

On the 23d of November, 1820, Beck wrote to Mr. Low as follows:

"I understood the intention of Mr. O'Hara, who is the purchaser, to be to give a mortgage on the lands. But it appears I misunderstood him. He offered to take the lands at the price and on the terms mentioned, and to give notes at nine, twelve, and twenty-four months, secured by mortgage. I understood, and so I wrote to you, that the mortgage could be on the lands; but he meant to give a mortgage on sufficient other property. This is a difference of no consequence, and I would have concluded the arrangement; but your power of attorney was a limited one, and under which a conveyance could not be good.

"I therefore made the best arrangement I could, which was to make a conveyance of the property, and give a personal guaranty that a proper power of attorney would be forwarded; upon which Mr. O'Hara gave his notes as agreed, and arranged the balance, and gave me a covenant to execute a mortgage upon sufficient real estate whenever a power of attorney, duly executed, should arrive. I therefore consider the thing completed.

"As to Mr. O'Hara's standing and responsibility, I refer you to Mr. Enoch Long, or to Major Long, both of whom well know him. I have drawn a power of attorney, and have shown [it] to Mr. O'Hara, who approves it. I enclose it to you to be executed."

The power thus enclosed, omitted the proviso relative to the security on real estate, retaining the date of July 12, 1820.

On the 12th of February, 1821, this power was again executed and transmitted to Mr. Beck; but before its execution, Low added the proviso, making it read as before.

On the 30th of July, 1821, the power was recorded.

In October, 1822, the mortgage which O'Hara had given to Cabanné was foreclosed, and the land sold. The defendants claimed under a deed from the commissioner appointed to make the sale and several mesne conveyances, the last of which was to the defendant, John Cone, in 1850.

The bill of exceptions recited the evidence to establish all these facts, together with the deposition of Low, and concluded as follows:

"This being all the evidence in the case, and the court being of opinion that the title of the defendant, John Cone, to the premises in controversy, deduced as aforesaid, was a good and valid title, superior and paramount to the title of the plaintiff, so instructed the jury, who found their verdict accordingly."

Upon which exception, the plaintiff brought the case up to this court.

It was submitted on printed argument by *Mr. Williams* for the plaintiff in error, and *Mr. Browning* for the defendant.

The arguments of the counsel upon both sides were so much involved with the questions of fact, that it would be difficult to report any discussions of abstract principles of law. They are therefore omitted.

Mr. Justice CAMPBELL delivered the opinion of the court.

This suit was brought for the recovery of a parcel of land ly-

ing in the tract appropriated for military bounties in Illinois, and granted by the United States in 1818 to Benjamin Abbott, a private in their army in the war of 1812, as bounty. The title of the plaintiff consisted of a certified copy of the patent to Abbott, and a quit-claim deed of Abbott to him, dated in 1855. He also produced a deed from Nathaniel Abbott to him, dated in 1838. The defendants exhibited the original patent to Abbott; his deed to Nathaniel Abbott, dated in 1818, for the same land; a deed from Nathaniel Abbott, John Low, and John D. Abbott, dated 12th September, 1820, to William O'Hara, and executed by Abraham Beck as attorney, and connected themselves with this deed by a number of mesne conveyances, the last of which was to the defendants, and was executed in April, 1850. They entered upon the land under this deed, and paid taxes until the commencement of this suit. These conveyances were recorded in the proper office. The questions presented by the bill of exceptions sealed for the plaintiff on the trial arise on the conveyance to William O'Hara, by Nathaniel Abbott, John Low, and John D. Abbott.

This deed purports to have been made upon a pecuniary consideration, the amount and receipt of which is acknowledged. The letter of attorney to Beck is dated the 14th July, 1820, and was recorded the 30th July, 1821. It authorizes the attorney to sell and convey some sixty-four parcels of land, including the one in dispute, in the military tract described in a schedule annexed, for such price and to such persons as he might think fit, and to make, execute, and deliver good and sufficient warranty deeds to them. To the ordinary testimonium clause a proviso was added, "that the conditon is understood to be such, that our said attorney is to take sufficient security on real estate for all the lands which may be sold on a credit." The donors of this power of attorney reside in New Hampshire; the attorney in Missouri.

The plaintiff read a deposition of John Low, one of the donors of the power, from which we collect that Beck, the attorney, was verbally authorized to find a purchaser for the lands described in the schedule, and other parcels in the military tract in Illinois, and agreed with O'Hara upon the price

and term of credit. That this agreement was communicated by letter to the witness, who sanctioned it, and sent a power of attorney to Beck to complete the sale and to execute the titles, but to reserve a mortgage on the lands sold to secure the payment of the purchase money.

O'Hara objected to giving a mortgage upon the lands purchased by him, but offered to give security upon other real property. Thereupon the attorney prepared a deed for all the lands embraced in the contract to O'Hara, and took his notes for the purchase money, and gave to him his guaranty that his constituents would confirm the sale, and received from him a covenant that whenever Beck should receive a power of attorney to convey said lands and confirm his proceedings, and deliver the same to him, O'Hara, he would deliver to Beck for his constituents a sufficient mortgage upon real property to secure the price. The power of attorney produced by the defendants was prepared by Beck without the condition, and sent to Low, to be executed by him and the others, to enable him to fulfil the agreement. This was done by them after adding the condition, on the 12th February, 1821. The witness says that there was no schedule attached to it. He answers from information and belief that Beck did not collect from O'Hara any money, or receive from him any further security. The district judge, upon this testimony, instructed the jury that the defendants had the superior title, and their verdict was accordingly rendered for them.

The authority conferred upon the mandatary by the letter of attorney is special and limited, and his acts under it are valid only as they come within its scope and operation. He was bound to conform to the conditions it contains, and in its execution to adopt the modes it indicates.

He was authorized to sell the lands for cash, or on a credit with security on real property, to execute a deed describing the consideration, acknowledging its payment, and to receive the money or securities the purchaser might render. Peck *v.* Harriott, 6 S. and R., 149; 9 Leigh R., 387. But he was not authorized to exchange the lands for other property, or to accept the notes of the vendee as cash, or to accept personal se-

curity, or any form of security except that specified in the condition. *Non est in facultate mandatarii addere vel demere ordini sibi dato.* These propositions are not disputed as applicable to cases arising between parties to the original contract, in which the limitations on the authority and the circumstances of departure from it in the execution are understood. But it is contended that bona fide purchasers are entitled to repose credit in the recitals and declarations of the attorney as expressed in his deed, that disclose the mode in which the authority has been exercised, and will be protected against their falsity. That the principal is estopped to deny their truth. This argument rests for its support upon the hypothesis that the delinquency of the mandatary is a breach of an equitable trust, a trust cognizable in a court of chancery only, a court that will not administer relief against a bona fide purchaser having the legal title. It assumes that the deed made by the attorney invests the grantee with the legal title, notwithstanding the non-compliance with the condition. If this were true, the inference would follow. Danbury *v.* Lockburn, 1 Meri., 626. But the assumption is not tenable. The attorney was not invested with the legal estate. He was the minister, the servant, of his constituent, and his authority to convey the legal estate did not arise except upon a valid sale in accordance with the requirements of the power.

Doe *v.* Martin, 4 T. R., 39; Minot *v.* Prescott, 14 Mass. R., 495. The deed executed by the attorney is apparently within the scope of his power, and the admission of payment of the consideration is competent testimony of the fact. American Fur Co. *v.* United States, 2 Peters R., 358. But it is competent to his principal to show that the transaction was in appearance only, and not in fact within the authority bestowed.

And the question arises, was there any testimony to be submitted to the jury to repel the presumption that there was a bona fide execution of the trust reposed in the attorney? One of the donors of the power, but who does not appear to be interested in the land otherwise than by the recital in that instrument, admits his knowledge of the terms of the sale made to O'Hara; that this power was remitted to Beck to validate

the contract, as far as it had been executed, and to enable him to complete it according to the engagement that had been entered into.

The power of attorney and the deed had been on the public records for thirty-four years before this suit was commenced, and for five years these defendants had been in the actual possession of the property. It had been repeatedly sold during this long period. To the inquiry made of the witness, whether the purchase money had been paid to the grantors, or whether the security on real property had been taken, he answers: "This affiant is informed and believes that most of the lands were sold to William O'Hara without security, or the payment of anything in hand upon the promissory notes of the said O'Hara, which, as this affiant is informed and believes, were in the hands of Beck at the time of his death, and copies of which, * * as he is informed and believes, * * * are annexed." It is the opinion of the court that this testimony was not admissible; and although it was read to the jury, it did not contain anything to warrant a conclusion unfavorable to the title of the defendants.

Judgment affirmed.

JOSEPH S. CUCULLU, PLAINTIFF IN ERROR, *v.* LOUIS EMMERLING.

Where, according to the practice in Louisiana, the facts of the case are stated by the court below in the nature of a special verdict, an objection that the contract sued upon could not be proved by one witness only, comes too late when made for the first time in this court.

According to that practice, the judge below finds facts, and not evidence of those facts.

THIS case was brought up by writ of error from the Circuit Court of the United States for the eastern district of Louisiana.

In 1857, Emmerling, a resident of New Orleans, an alien subject of the Grand Duke of Hesse Darmstadt, filed his petition in the Circuit Court, alleging that Cucullu had employed him as a broker to sell an estate. The cause was submitted to the court below, which found the following facts, viz:

The plaintiff, Louis Emmerling, a resident of the city of New Orleans, and an alien subject of the Grand Duke of Hesse Darmstadt, brings this suit against the defendant, a citizen of Louisiana, to recover the sum of twenty-seven hundred dollars, which he alleges is due him as the amount of his commissions on a sale effected by him as a broker.

The court finds that the defendant, Cucullu, offered his plantation and slaves for sale, for the sum of one hundred and thirty-five thousand dollars, on the following terms, viz: the purchaser to pay in cash the sum of thirty-five thousand dollars, and assume the payment of a note of twenty thousand dollars, payable on the 1st and 4th of February, 1858, and for the residue of the price the purchaser to pay $13,333.33⅓ on the 10th and 13th of December, 1858; $13,333.33⅓ on the 10th and 13th of December, 1859; $13,333.33⅓ on the 10th and 13th of December, 1860; $13,333.33⅓ on the 10th and 13th of December, 1861; $13,333.33⅓ on the 10th and 13th of December, 1862; $13,333.33⅓ on the 10th and 13th of December, 1863—the six last-mentioned sums to bear interest at the rate of five per cent. per annum until maturity, and interest at the rate of eight per cent. after maturity until paid.

The court finds that the plaintiff, Emmerling, in his capacity as broker, offered to find a purchaser for the plantation and slaves; and that he opened a negotiation with A. W. Walker, who finally purchased the same on the terms above mentioned; that the written contract of sale attached to the petition is in the handwriting of the plaintiff, and signed by the defendant and Walker.

The court further finds, that while there was no direct or positive proof that the defendant, Cucullu, promised to pay the plaintiff his commissions for negotiating the sale, yet that he did recognise the services of the said plaintiff, and his own liability to pay for those services, in a conversation which he had with the said plaintiff in the presence of A. W. Walker, the purchaser of the property.

The court further finds that it was through the intervention of the plaintiff, as broker, that the sale of the property was effected. The facts upon which the foregoing conclusions of

the court are founded were mainly furnished in the testimony of said A. W. Walker. The witness, Guyol, the notary public before whom the title to the property was passed, also proved that the defendant, Cucullu, inquired of him the amount of the commissions charged by the broker, and that he (Guyol) answered, that the amount was two per cent. on the price of the property. The usual rate at which broker's commissions for like services are charged is two per cent., as appears from the testimony of several brokers who were examined on the trial. It is therefore ordered and adjudged, that the plaintiff recover from the defendant the sum of twenty-seven hundred dollars, the amount of his commissions as broker; and it is further ordered that the defendant pay the costs of this suit.

THEODORE H. McCALEB, *U. S. Judge.*

After an unsuccessful motion for a new trial, the defendant sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Taylor* for the plaintiff in error, and *Mr. Benjamin* for the defendant.

Mr. Taylor made the following points:

1. There was no direct or positive proof that the plaintiff in the court below—Louis Emmerling—was employed by Cucullu to negotiate a sale of his plantation, or that he had promised to pay him commissions for negotiating the sale. The conclusion that he did so is drawn, it is stated, from Cucullu's "recognition" of the services of the plaintiff, and of his own liability to pay for those services, in a conversation which he had with the plaintiff in the presence of A. W. Walker, the purchaser of the property; and the facts upon which this conclusion is based were testified to by a single witness, viz: Mr. A. W. Walker himself.

2. The agreement or contract under which Emmerling pretends to claim the payment by Cucullu of $2,700, as his commissions, cannot be proved in the State of Louisiana by one witness; and the judgment of the court below must be re-

versed for want of sufficient evidence to sustain it, as disclosed by the statement of facts in the case.

Cormier *v.* Le Blanc, 8 N. S., 458; 3 L. R., 214.
Gasquit *v.* Kokeenot, 5 L. R., 268.
Lallande *v.* McMaster, 16 L. R., 532.
Gillespie *v.* Day, 19 L. R., 263.
Brent *v.* Slack, 10 R. R., 371.

Mr. Benjamin said:

Louis Emmerling recovered a judgment in the Circuit Court against J. S. Cucullu for twenty-seven hundred dollars, for brokerage on the sale of a plantation. The statement of facts shows that the commissions were earned by Emmerling, and the writ of error seems to have been prosecuted solely to vex and delay the defendant in error, who prays the court to allow him damages under the twenty-third rule.

Mr. Justice GRIER delivered the opinion of the court.

The declaration charges that the plaintiff below was employed by Cucullu, as a broker, to sell a plantation; that he effected a sale on terms satisfactory to Cucullu; that the sale was consummated, by delivery of the property and receipt of the purchase money; and that for these services the plaintiff was entitled to a brokerage of two per cent., which Cucullu refused to pay.

The facts of the case are stated by the court below in the nature of a special verdict, finding the allegations of the declaration to be supported by the evidence.

It has been objected here, that such a contract cannot be proved by one witness, according to the law of Louisiana. That objection should have been made to the court below, if it is worth anything. But the case stated, made by the judge to whom the cause was submitted, finds facts, and not evidence of facts; consequently, this court cannot inquire, unless upon some bill of exceptions properly taken, whether the evidence was sufficient to justify the finding of the court. It would be granting a new trial, because the verdict is not sup-

ported by the evidence, without any bill of exceptions to the admission of testimony or to the charge of the court.

The judgment of the court below is therefore affirmed.

J. W. HODGE, JOHN W. HUNTER, HAYWOOD HUNTER, THOMAS COLEMAN, AND YOUNG COLEMAN, PLAINTIFFS IN ERROR, *v.* JOHN A. WILLIAMS.

A writ of error cannot be amended in this court.

Therefore, where the party who was really the plaintiff in error, and sought to reverse the judgment, was made the defendant, and the party in whose favor the judgment in the court below was rendered was made plaintiff in error in the writ, it cannot be amended in this court, but must be dismissed.

THIS case was brought up by writ of error from the District Court of the United States for the eastern district of Texas.

Mr. Hughes, of counsel for John A. Williams, suggested that the judgment of the said District Court was in fact against his client; and that, after said judgment, the said Williams filed his assignment of errors, and applied for a writ of error; and that by a clerical mistake the said Williams was made defendant in error, and J. W. Hodge, John W. Hunter, Haywood Hunter, Thomas Coleman, and Young Coleman, plaintiffs in error.

Mr. Hughes then moved the court to amend the said writ of error, or that the said writ of error, by reason of said clerical mistake, be dismissed for want of jurisdiction.

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

It appears, from the record in this case, that an action was brought in the Circuit Court of the United States for the eastern district of Texas, by John A. Williams, against Hodge and the other defendants named in the proceedings, and at the trial, the judgment was against the plaintiff.

The writ of error removing the case to this court is in the name of the defendants who succeeded in the court below,

and do not desire to disturb the judgment; and the plaintiff in that court, who alleges error in the judgment, and seeks to reverse it, is made the defendant in the writ of error.

It is evident that the writ was intended to be sued out by the plaintiff in the court below, and that the names of the defendants, as plaintiffs in the writ, were used without their authority; for the errors are assigned by the plaintiff, and the bond states that a writ of error has been sued out by him, and the citation issued by the judge is directed to the defendants, and served on their counsel. And it is obvious that the writ in the name of the defendants was an oversight of the clerk by whom it was issued.

But the amendment proposed cannot be made here. An amendment presupposes jurisdiction of the case. And this court have no appellate power over the judgment of the court below, unless the judgment is brought here according to the act of Congress—that is, by writ of error; and that writ, from its nature and character, must be sued out by the party who alleges error in the judgment of the inferior court. This writ is not mere matter of form, but matter of substance, prescribed by law, and essential to the jurisdiction of this court. And if it were amended here, by making the plaintiffs in error defendants, and the defendant in error the plaintiff, it would be a new writ made here, and not the one issued by the officer appointed by law.

Upon this principle, the court have uniformly refused to amend writs of error; and this must now be regarded as the settled practice of the court. It has repeatedly refused to amend, where the partnership name of a firm was used instead of the proper names of the parties; and in like manner it has refused to amend where the name of one or more of the parties were given, and the rest designated as *others* joined with them, without setting out the names of those intended to be included as *others*.

But the precise point now before us was decided in the case of Hines *v.* Papin, at December term, 1857. The same error was committed in that case which had been committed in this; and the error was equally apparent, as in the present instance,

from the recital in the bond and the citation and service. The case was, indeed, even stronger for the amendment than this, for counsel appeared in this court for each of the parties, and offered to amend by consent. Yet the court refused to amend, upon the ground that consent of parties would not give jurisdiction, where it was not given by law and legal process. But here there is no appearance for the parties who are named as plaintiffs in the writ of error; and if we order the amendment, we should make them defendants in a suit in which they are not bound to appear in that character. It is the duty of the party who desires to bring a case before this court, to see that proper and legal process is sued out for that purpose; and if he fails to do so, he has no right to treat the defect as a mere clerical error, for which he is not to be held responsible.

The opinion in the case of Hines *v.* Papin, above referred to, was delivered orally, and not reduced to writing, and consequently, does not appear in the printed reports. The court have therefore deemed it advisable to state now the practice and doctrine of the court in this respect, in order that suitors may be aware of the necessity of paying proper attention to the process they issue, and not subject themselves to costs and delay by errors which a clerk, in the hurry and pressure of other business, will unavoidably sometimes commit.

The writ of error must therefore, upon the motion before the court, be dismissed, as it cannot be amended.

THE UNITED STATES, APPELLANTS, *v.* JAMES D. GALBRAITH, JOHN SINE, DAVID T. BAYLEY, AND RICHARD H. STANTON.

Where the clear weight of the proof is against the possession or occupation by the grantee of land in California, the date of the grant was altered without any explanation of the alteration, and the genuineness of the signature of the Governor to a certificate of approval of the Departmental Assembly doubted, this court will reverse the decree of the court below confirming the claim, and remit it for further evidence and examination.

This was an appeal from the District Court of the United States for the northern district of California.

The history and nature of the case are stated in the opinion of the court.

It was argued by *Mr. Stanton* and *Mr. Gillet* for the United States, and *Mr. Hepburn* and *Mr. Brent* for the defendants in error.

The points and arguments which referred to many branches of the case, such as possession, &c., need not be stated. The following are the views which were taken of the alteration of the date of the grant.

Mr. Gillet's second point was this:

Where a party alters a written instrument with the intention of changing its character and effect, he destroys it, so that it can have no legal effect.

In the present case, the date of the original grant is shown to have been changed from the 12th of June to the 12th of February, 1846. The grants made as late as June of that year were the subject of question before the board and court. Those at an earlier date were not the subjects of so much suspicion. The grant itself states it was delivered to Padilla at the time when made. It is not shown to have been in other hands before it was filed in the cause. Either he or the claimants must have had it in their possession all the time. When produced, it had been altered. Padilla, or some one holding under him, must have made the alteration, and the alteration was material. This destroys its effect. The object of the alteration is apparent. Its materiality in Padilla's estimation cannot be questioned. He wished to make his grant date so far back as to be free from suspicion or question.

But, whether material or not, if the alteration was made by Padilla, or any one claiming under the grant, it is void. If altered by a stranger, if material, it vitiates the instrument.

It cannot be doubted that the alteration was made by Padilla, or some one claiming under the grant, as it went into his possession and remained with him and his grantees until filed before the land commissioners

The effect of alterations of deeds has been settled in the following cases:

In Henman *v.* Dickinson, (5 Bing., 183,) it was held, "Where a party sues on an instrument which on the face of it appears to have been altered, it is for him to show that the alteration has not been improperly made."

This the claimants did not attempt to show in the case at bar.

In Lewis *v.* Payn, (8 Cowen, 71,) it was held that "the alteration of a deed by one claiming a benefit under it, avoids it so far as respects any remedy upon it, and *semb*, this is so, whether the alteration be material, or a part wholly immaterial."

"The doctrine in Cro., Car., and Nels., Ab., seems to be sound, that where an estate cannot have existence but by deed, and the deed creating it is fraudulently destroyed by the party possessing the estate, the deed is void as to any remedy in favor of the fraudulent party, and the estate which he derived under it is gone."

In Jackson *v.* Molin, (15 Johns. R., 293, p. 297,) it was held, "If the obligee himself alters the deed, although it be in words *not material*, the deed is void."

In Prevost *v.* Gratz, (1 Pet. C. C. R., 364,) it was held, "An erasure in a deed, not shown to have been made before execution, is sufficient to avoid it upon a plea of *non est factum*. The presumption in such a case is, that the alteration was made after the execution of the deed."

In Jackson *v.* Osborn, (2 Wen., 555, p. 559,) it was held, that where there was an erasure or interlineation in a deed, the presumption was that it was made after execution, and it devolved upon the party claiming under it to explain, by evidence, if he insisted that it was made before execution.

The elementary writers all concur in the principles of the above cases.

It follows, that the grant in this case is void, and cannot lay the foundation of a recovery.

The counsel for the appellees replied to this argument as follows:

It is also objected that the date of the grant has been altered from June 12, 1846, to February 12, 1846.

The motive of this is not easy to understand. The Californians are a simple, ignorant people. The Supreme Court of the State told them their titles would not support an action, either for the possession or the property; the squatters, who knew Spanish, kindly interpreted the judgment of the court; it merely took the land from the Californians, and gave it to them, the squatters.

Is it strange, in such perplexity, that these simpletons should misbehave and play the fool? Sometimes they have not presented their titles at all; sometimes, with two titles, they have only presented one; and repeatedly ranches have been finally confirmed to them, on which, in their despair, they themselves had taken up pre-emptions and made oath that the land was public, and uncovered by any private claim. This alteration has no doubt occurred in some such way; but whatever the mode, it is immaterial in law.

The rule on the subject of alterations is this: where an estate which may exist without deed (as a fee simple in land) is conveyed by deed, then the alteration, even although material and fraudulent, destroys the deed, but not the estate. There are many cases to this effect, but a very strong one is the case of Lewis *v.* Payn, 8 Cowan, 71.

Payn, the defendant, distrained for rent; Lewis, the plaintiff, replevied; the defendant avowed the taking, and justified under a lease, in which he, Payn, who had written the lease, had afterwards fraudulently inserted an additional covenant to his own advantage. A counterpart to this lease was also executed and put in evidence. On this case, the court, Savage, Ch. J., held: "That where an estate cannot have existence but by deed, and the deed creating the estate is fraudulently destroyed by the party possessing the estate, the deed is void as to any remedy in favor of the fraudulent party, and the estate which he derived under it is gone. But where an estate which may exist without deed (for instance, a fee simple in lands) is conveyed by deed, then the fraudulent alteration or cancelling of the deed destroys the deed, but not the estate. If the deed

be a quit-claim, the party loses nothing; if it contain covenants, he loses all right to an action on these; but the title is not divested. A rent charge can be created in no other manner than by deed, and the fraudulent alteration destroys both the deed and the estate.

"In this case, however, there are two leases, one for each party, both alike, and both are properly originals, as they are each executed by both parties; so that there was sufficient evidence to have authorized a recovery by the defendant without the production of the deed in his possession, unless his estate is gone in consequence of the alteration made by him in the copy of the lease, which was in his possession. Had there been but one lease, and had that been altered by Payn, as the copy in his possession was, all the estate which he takes by it would be forfeited and gone. The alteration avoids that deed, so far as he derives a benefit under it. But the estate is not destroyed, as there is still a valid deed in the possession of Lewis, which secures to him the possession of the estate granted." 75, 76.

Here two original grants were executed at the same time; one was delivered to the grantee, and one was retained by the Government. Both of these were put in evidence; and though one be void, the other is sufficient to show that the estate passed.

To like effect, see Jackson *v.* Gould, 7 Wend., 364. There the plaintiff offered, first, *a record of a deed*, under which he claimed in ejectment, and afterwards the deed itself, which appeared to have several erasures of the word *junior*. The court, citing with approbation the case of Lewis *v.* Payn, say: "The *destruction* of the deed would not have divested the estate, neither did the *erasure* of part of the lessor's name. The deed was good when executed, and conveyed to the grantee the title."

See also Hatch *v.* Hatch, 9 Mass., top pages 293, 297, 298, where a deed altered by the consent of the defendant, who claimed under it, was read in evidence, and made the basis of a successful defence in ejectment. Also, Doe *v.* Hirst, 3 Starkie's Rep., 60.

Hennick *v.* Malin, 22 Wend., 391, decides that no subsequent alteration of a deed by the grantee, in a material or immaterial point, will avoid the deed, where the controversy relates to a title to land, and the title once vested under the deed in the grantee. In other words, the title once vested will not revert by the alteration, cancellation, or destruction, of the muniment of title, whatever may be the law of defence against the recovery on a personal contract.

See, also, 3 Preston's Abstracts, 103.

2 H. Black's, 263.

Bul. N. P., 267.

Applying this principle to the facts of this case, it will be seen that the alteration of the month of the grant, from June to February, 1846, *must* have been made in the original grant after it was recorded by the Mexican authorities, because there is no such alteration in the copy certified from the surveyor general's office.

The original grant, then, has this manifest alteration. If done for a fraudulent purpose, it is clearly immaterial in point of law, and the fraud could easily be detected, by reference to the record of the grant, and the date of the petition and antecedent documents.

There is no evidence to show by whom or when the date *was* altered.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from the District Court of the United States for the northern district of California.

The appellees, who derived their title from Juan N. Padilla, the original grantee, presented their claim before the board of land commissioners in 1852, for five square leagues of land known by the name of *Bolsa de Tomales*, situate in the county of Sonoma, California. The board, after hearing the proofs, decreed in favor of the claim, which, on appeal to the district judge, was affirmed.

The documentary evidence of the title includes a petition to the Governor for the tract, dated at Monterey, May 14th, 1846, accompanied with a certificate of Manuel Castro, prefect, that

the land was vacant and grantable, dated same place, 10th same month; a marginal reference for information by the Governor, Pio Pico, dated Los Angeles, 20th May, 1846; a note of concession, dated same place, 12th June, 1846; and a formal title, dated same time and place, both signed by the Governor, and J. M. Moreno, Secretary *ad interim*.

Proof was given of the signatures of the Governor and Secretary, and that these papers were found among the Mexican archives, which had been transferred to the custody of the surveyor general of the United States for California.

The original grant of the formal title to the grantee was given in evidence by the claimants, dated Los Angeles, 12th February, 1846; also, a certificate of the Governor and Secretary, of the approval on the 12th June by the Departmental Assembly, dated 14th June, 1846.

Some attempt was made to prove possession and occupation by Padilla before and since the date of the grant, which were denied by the Government. The clear weight of the proof in the case is against any possession or occupation. The two witnesses in support of it, aside from Padilla, clearly confounded the possession of the ranch of Padilla, called the *Roblar de la Miseria*, with that of the *Bolsa de Tomales*, both of which are in the same section of country. Padilla states that he had possession of the land in 1844; built on it in that year; that he cultivated the land, and had cattle on it from that time until he sold it to Molena and Berreyesa, in the latter part of the year 1848, or beginning of the year 1849. In this he is expressly contradicted by some half a dozen witnesses, some of whom cannot be mistaken as to the facts. It appears, from the evidence, that Padilla, at the breaking out of the disturbances in the early part of 1846, adhered to the Mexican Government, and was charged with having been concerned in killing some Americans in the fore part of that year; was pursued by an American force, and fled from that part of the country, and did not return until after the war. (See also the testimony of Padilla in the case of the claim of Josefa de Haro and others, No. 101, before the board of commissioners; and see his grant of *Roblar de la Miseria*, 25th November, 1845.)

It is admitted that the original grant of the title in form, which was in the hands of the claimants, has been altered so as to bear date the 12th February, instead of the 12th June, 1846. No explanation was given of the alteration, though it was apparent on the face of the paper.

The genuineness of the signature of the Governor, Pio Pico, to the certificate of the approval of the Departmental Assembly, was doubted by the board of commissioners.

The board say, after alluding to the alteration of the date of the grant, "there are many things connected with the claim which, under the conclusion at which the commission has arrived, were not altogether satisfactory. The time when the grant was made, only a few days before the Americans took possession of the country, the evident and palpable attempt to alter the date so as to make it appear several months anterior to the time when it was issued, and the manifest want of similarity in the signatures of Pio Pico to the papers of approval, with the usual mode of signing his name, are circumstances which greatly detract from the good faith of the claim. The evidence, however, they say, makes out a prima facie case, which, in the absence of any rebutting testimony, entitles the petitioners to a decree of confirmation."

The court is of opinion that, in consideration of the doubtful character of the claim, and entire want of any merits upon the testimony, the decree of the court below should be reversed, and the case remitted for further evidence and examination.

THE BANK OF PITTSBURGH, PLAINTIFF IN ERROR, *v.* JOHN S. NEAL AND REUBEN E. NEAL.

A commercial house sent to a correspondent eight bills of exchange, four purporting to be the first and the other four the second of exchange, and the whole eight accepted on their face by that commercial house, and each of the four made payable to the order of their correspondent, but in blank as to the names of the drawers, and the address of the drawees, and as to date and amount and time and place of payment.

The correspondent filled up and had discounted the four which were the first of exchange, which were not involved in the present suit.

Two of the four of the second of exchange were filled up, varying from the others, not only in dates and amounts, but also as to time and place of payment.

These bills were discounted by a bank without any knowledge whatever that either had been perfected and filled up by the prayee without authority, or of the circumstances under which they had been intrusted to his care, unless the words "second of exchange, first unpaid," can be held to have that import.

The effect of these words was a question of law, and not of fact for the jury.

The bills described above were not parts of sets of bills of exchange. They were perfected, filled up, and negotiated, by the correspondent of the defendants, to whom the blank acceptances had been intrusted as single bills of exchange; and for the acts of their correspondent, in that behalf, the defendants are responsible to a bona fide holder for value, without notice that the acts were performed without authority.

The case falls within the rule, that where one of two innocent parties must suffer, through the fraud or negligence of a third party, the loss shall fall upon him who gave the credit.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Indiana.

It was an action brought by the bank upon two bills of exchange, one dated on the 18th of August, 1857, at Pittsburgh, drawn by L. O. Reynolds & Son upon J. S. & R. E. Neal, at Madison, Indiana, requesting them to pay, four months after date of this second of exchange, (first unpaid,) to the order of L. O. Reynolds, at the Ohio Life Insurance and Trust Company, at Cincinnati, in the State of Ohio, two thousand one hundred and sixty-eight dollars. Reynolds endorsed this bill to L. Wilmarth & Co., who endorsed it to the bank. The bill was accepted by J. S. & R. E. Neal.

The other bill sued upon was similar in all its circumstances, except that it was dated on the 1st of August, 1857, payable four months after the date of this second of exchange, (first unpaid,) for thirteen hundred and fifty dollars. It was endorsed and accepted like the other.

In order to present a distinct view of the transactions which led to this suit and the nature of the defence, it seems necessary to state particularly all the bills mentioned in the proceedings, designating each bill by a letter, which is the reporter's mark, and used for easy reference.

In June, 1857, J. S. & R. E. Neal, residents of Madison,

Indiana, for the purpose of raising money, delivered to L. O. Reynolds, of Pittsburgh, the four following bills, viz:

Exchange for $——.

—— after —— of this first of exchange, (second unpaid,) pay to the order of L. O. Reynolds —— dollars, value received, without any relief from valuation or appraisement laws.

To ——.

Accepted: J. S. & R. E. NEAL.

(This bill we will call A.)

Exchange for $——.

—— after —— of this first of exchange, (second unpaid,) pay to the order of L. O. Reynolds —— dollars, value received, without any relief from valuation or appraisement laws.

To ——.

Accepted: J. S. & R. E. NEAL.

(This bill we will call B.)

Exchange for $——.

—— after —— of this second of exchange, (first unpaid,) pay to the order of L. O. Reynolds —— dollars, value received, without any relief from valuation or appraisement laws.

To ——.

Accepted: J. S. & R. E. NEAL.

(This bill we will call C.)

Exchange for $——.

—— after —— of this second of exchange, (first unpaid,) pay to the order of L. O. Reynolds —— dollars, value received, without any relief from valuation or appraisement laws.

To ——.

Accepted: J. S. & R. E. NEAL.

(This bill we will call D.)

With these bills, instructions were sent to Reynolds to have them filled up for sums not less than $1,500, nor more than $3,000 each, to have them discounted at Pittsburgh, and remit the proceeds to J. S. & R. E. Neal, at Madison, Indiana.

In July, 1857, four other bills like the preceding were sent to Reynolds. These last bills were sent to Reynolds at his

request, and intended for his use, as accommodation acceptances of the Neals.

These bills we will call E, F, G, H.

A was filled up by Reynolds as follows: Date, July 1st; amount, $1,965; time, four months; drawers, L. O. Reynolds & Son; drawees, J. S. & R. E. Neal. Thus filled up, it was negotiated by Reynolds to the Mechanics' Bank of Pittsburgh. Reynolds failed to remit the proceeds according to instructions. When the paper matured, the defendants, as acceptors, paid it.

B was filled up as follows: Date, July 10th; time, four months; amount, $2,035; drawers, L. O. Reynolds & Son; drawees, J. S. & R. E. Neal. Thus filled up, it was negotiated by Reynolds to the Merchants and Manufacturers' Bank of Pittsburgh. The proceeds of this bill were remitted by Reynolds to the defendants. Before the commencement of this suit, the Merchants and Manufacturers' Bank, as holder and owner of the bill, recovered judgment on it against the acceptor in the Jefferson Circuit Court of the State of Indiana. C and D were for the present retained by Reynolds in his own possession.

E, being similar to A, was filled up as follows: Date, July 30th; time, four months; amount, $2,450; drawers, L. O. Reynolds & Son; drawees, J. S. & R. E. Neal. Thus filled up, it was negotiated by Reynolds to the Merchants and Manufacturers' Bank of Pittsburgh, Reynolds retaining the proceeds. The holders of this bill brought suit against the defendants, as acceptors, in the Jefferson Circuit Court, Indiana, which action was still pending when the pleas in this case were filed.

F, being similar to B, was filled up by Reynolds as follows: Date, July 24th; time, four months; amount, $2,750; drawers, L. O. Reynolds & Son; drawees, J. S. & R. E. Neal. Thus filled up, it was negotiated by Reynolds to the Citizens' Bank of Pittsburgh, Reynolds retaining the proceeds. John Black & Co. became the holders, and after its maturity, and before the commencement of this suit, they recovered judgment against the acceptors of the bill for its full amount in the Jefferson Circuit Court of Indiana.

Thus the bills A, B, E, F, being the first of exchange, (second unpaid,) are accounted for. What became of G and H, the record did not show. Let us now account for C and D.

C was filled up as follows: Date, August 1st; time, four months; amount, $1,350; drawers and drawees, as above.

D was filled up as follows: Date, August 18th; time, four months; amount, $2,168; same drawers and drawees. These bills were both negotiated to the Bank of Pittsburgh, and were the ones sued on in this case. It will be observed that they were both second of exchange, (first unpaid,) and that the sums of money did not correspond in amount with any of those for which the first of exchange had been filled up, nor in date, time, or place of payment.

There were four counts in the declaration, and eight pleas, which were all demurred to except the plea of the general issue. It is not necessary to state these pleadings, because they were only intended to raise the questions of law which arise from the statement of facts given above. The court overruled the plaintiffs' demurrers, so that judgment went for the defendant; and upon this ruling upon the demurrers, the case was brought up by the plaintiff to this court.

It was argued by *Mr. Stanton*, upon a brief filed by himself and *Mr. Walker*, for the plaintiff in error, and by *Mr. Thompson*, upon a brief filed by himself and *Mr. Dunn*, for the defendants.

Mr. Stanton's points were the following:

1. That *the acceptance* of the bills held by the bank for value, binds the acceptors. Whether the bills held by the bank were seconds, or any other number, in any real or imaginary series of bills, *they were accepted*, and the acceptors bound themselves thereby to pay the holder the sum therein specified. If the acceptor meant to be bound only on one of the set, he should have *accepted* that one. The holder was not bound to make any inquiry or take any notice of the others.

16 Peters, 205.

Chitty on Bills, 155.

Holdsworth *v.* Hunter, 10 B. and C., 444.

Story on Bills, sec. 226.

Byles on Bills, 293, 294.

2. The words "second of exchange, first unpaid," were directions given by the drawer to the acceptors, to notify them of the series, and put the acceptors on their guard as to the extent of acceptance. But their own *acceptance* constitutes the contract of the acceptors, and by it they bound themselves to pay the holder of that identical paper the sum specified therein.

Wells *v.* Whitehead, 15 Wend., 527.

Downes *v.* Church, 13 Peters, 205.

"The bona fide holder of any one of the set, *if accepted*, might recover the amount of the acceptor."

Story on Bills, sec. 226.

Byles on Bills, 310.

Chitty on Bills, 155.

Holdsworth *v.* Hunter, 10 B. and C., 444.

3. There were no *firsts* of the bills held by the Bank of Pittsburgh. The agent to whom they were delivered in blank made a distinct bill of each blank; and each being accepted, the acceptors are chargeable to any bona fide holder in whose possession they might come.

The counsel for the defendant in error contended, in the first place, that this bill ought to be denominated a forgery, or at least a fraud, on defendants, falling short of the crime of forgery; and that the plaintiff could not claim the benefit of the rule which estopped the defendant from denying the bill for this reason: that the act of the party giving the credit must be such as is reasonably calculated to deceive—that the party claiming the protection of this principle must, himself, have acted with reasonable circumspection, and must have been subjected to the loss, notwithstanding the use of such reasonable circumspection.

The principle in question is, we think, accurately expressed in a recent case in the English Exchequer, Baker *v.* Sterne, 25 E. L. and E., 502. Pollock, C. B., citing and illustrating this same case of Young *v.* Grote, says: "I should myself prefer to

put it thus: that where a man issues a document of that sort, (a bill of exchange or check,) which may be so filled up, the authority is to be judged of, as far as the bulk of mankind is concerned, by that paper itself, and not by some other private instruction. It may, however, be ranged with a class of cases perfectly familiar, which we all know to be applicable to a great many other subjects as well as bills of exchange, namely: that where one man by his negligence has enabled another to practice a fraud on a third party, which the third party has no means of defeating whatever, the consequence of that must be visited upon the individual who enables the other to practice the fraud."

The same principle, designated as estoppel *eo nomine*, is defined as follows, by Lord Denman, in Pickard *v.* Sears, 6 Ad. and Ell., 469; S. C., 33; E. C. L., 115: "The rule of law is clear, that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." This language was not used with any special reference to commercial paper. It is merely quoted as comprising the elements of an estoppel *in pais*, as that doctrine has grown up, in modern jurisprudence, under the influence of equity.

In 2 Smith's Leading Cases, 4 Am. ed., Hare *v.* Wallace, 571, the editors, in speaking of the fact that an acceptor is estopped to deny the genuineness of the bill as originally drawn, say that this estoppel "is marked by much of the naked severity of circumstance and application which marked estoppels at common law." We cannot, however, see any peculiarity that distinguishes this, in principle, from other cases of estoppel *in pais*, or why it should be said to be marked with "naked severity." The drawee is reasonably presumed to know the handwriting of the drawer, who is his immediate correspondent. He should not pay the bill without being satisfied that it is genuine. If he does pay, and the draft proves a forgery, he is guilty of negligence, and for that reason the law will not grant him recovery.

He should not accept, without being satisfied that the drawer is competent to draw, and that his signature is genuine. By the act of accepting, he admits these things. Between a casual purchaser, in market, of the bill, and the drawer, there is no privity. They are probably strangers to each other, and in case of a foreign bill, residents of different States. Such purchaser, then, may reasonably act upon the faith of the admission implied in the acceptance; and as against him, the acceptor should not be allowed to say that the draft was forged. But this reason would cease in cases where the holder is privy to the fraud, or affected with notice of it, and in such case there is no estoppel.

Bank of Commerce *v.* Union Bank, 3 Coms.. 230.

Such estoppel, then, falls plainly within the ordinary principle of estoppels *in pais*, without resorting to any supposed peculiarity of the commercial law.

We submit, then, as a clear deduction from the authorities, that if the officers of the Bank of Pittsburgh, in purchasing this paper, failed to use ordinary and reasonable prudence, and if the paper, as intrusted by the defendants to Reynolds, was not in such condition or of such kind as to enable Reynolds to practice the fraud, notwithstanding the exercise of ordinary and reasonable prudence by the plaintiff, then the defendants are not concluded by their acceptance.

Let us then examine the facts of this case in the light of these principles.

(This part of the argument is necessarily omitted.)

It is urged, however, that the drawee should accept but one part of a bill drawn in a set, and that that part, when so accepted, becomes the bill; that any third person seeing it has a right to presume it to be the only accepted part, and is justified in purchasing it without inquiring after the other parts; that by accepting all the parts, the drawee becomes liable as upon so many different bills.

The following authorities are cited as tending to establish this position:

Chitty on Bills, 11 Am., from 9 London ed., 155, 156.

Byles on Bills, side pages 310, 311.

Story on Bills, sec. 226.
Holdsworth *v.* Hunter, supra.
Wells *v.* Whitehead, 15 Wend., 527.
Downes *v.* Church, 13 Pet., 205.

Each of the above text books contains a dictum seeming to favor the proposition, but neither of the three cases cited has any tendency to sustain it. If these dicta in the text books are to be understood as anything stronger than mere recommendation, we submit that they are unsustained by authority; that they are inconsistent with the theory of this species of commercial paper, and at variance with general commercial usage.

The counsel then examined these authorities, and concluded with the following summary:

Chitty deduces it as an inference from an untenable legal proposition; Story, rejecting the proposition, perpetuates the inference; Byles repeats it on the authority of Holdsworth *v.* Hunter, an authority that condemns it; and all of them put it as matter of recommendation and caution, rather than peremptory law.

The remaining part of the argument of the counsel for the defendant is omitted for want of room.

Mr. Justice CLIFFORD delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the district of Indiana. All of the questions presented in this case arise upon the pleadings and the facts therein disclosed. It was an action of assumpsit, brought by the plaintiff in error as the holder of two certain bills of exchange, against the defendants as the acceptors. An amendment to the declaration was filed after the suit was commenced. As now exhibited in the transcript, it contains four counts. Two of the counts were drawn up on the respective bills of exchange, and are in the usual form of declaring in suits, by the holder of a bill of exchange against the acceptor. Those contained in the amendment are special in form, setting forth the circumstances under which the respective bills of exchange were drawn, accepted, and negotiated, and averring that these

acts were subsequently ratified by the defendants. To the merits of the controversy the defendants pleaded the general issue, and filed seven special pleas in bar of the action. Demurrers were filed by the plaintiff to each of the special pleas, which were duly joined by the defendants, and after the hearing, the court overruled all of the demurrers. Those filed to the pleas responsive to the first and second counts were overruled upon the ground that the pleas were sufficient, and constituted a good bar to the action; but those filed to the fifth, sixth, seventh, and eighth pleas were overruled, upon the ground that the third and fourth counts, to which those pleas exclusively applied, were each insufficient in law to maintain the action. Whereupon, the plaintiff abiding his demurrers, the court directed that judgment be entered for the defendants, and the plaintiff sued out a writ of error, and removed the cause into this court. It being very properly admitted, by the counsel of the defendants, that the first and second counts of the declaration are in the usual form, it is not necessary to determine the question as to the sufficiency of the third and fourth, and we are the less inclined to do so, from the fact that the counsel on both sides expressed the wish, at the argument, that the decision of the cause might turn upon the question, whether the plaintiff, on the facts disclosed in the pleadings, was entitled to recover against the defendants. That question is the main one presented by the pleadings; and inasmuch as it might well have been tried under the general issue, we think it quite unnecessary to consider any of the incidental questions which do not touch the merits of the controversy. Special pleading in suits on bills of exchange and promissory notes ought not to be encouraged, except in cases where by law the defence would otherwise be excluded or rendered unavailing. Full and clear statements of the facts as disclosed in the pleadings, were presented to the court, at the argument, by the counsel on both sides. They are substantially as follows: In June, 1857, the defendants, residents of Madison, in the State of Indiana, being desirous of procuring a loan of money, made their certain acceptances in writing of two blank bills of exchange, in sets of two

parts to each bill, and transmitted the four blanks, thus accepted, to their correspondent, Lot O. Reynolds, then and still residing at Pittsburgh, in the State of Pennsylvania. Both sets of blanks were in the form of printed blanks usually kept by merchants for bills of exchange in double sets, except that each of the four was made payable to the order of the correspondent to whom they were sent, and was duly accepted on its face by the defendants, in the name of their firm. They were in blank as to the names of the drawers and the address of the drawees, and as to date, and amount, and time, and place of payment. When the defendants forwarded the acceptances, they instructed their correspondent to perfect them as bills of exchange, by procuring the signatures of the requisite parties, as accommodation drawers and endorsers, and to fill up each with the appropriate date, and with sums not less than fifteen hundred nor more than three thousand dollars, payable at the longest period practicable, and to sell and negotiate the bills as perfected, for money, and remit the proceeds to the defendants. Afterwards, in the month of July, of the same year, the defendants, at the request of the person to whom those acceptances were sent, made four other similar acceptances, and delivered them to him, to be sold and negotiated as bills of exchange, in double sets, for his own use, and with power to retain and use the proceeds thereof for his own benefit. They were in all respects the same, in point of form, as the four acceptances first named, and, like those, each of the four parts was made payable to the order of the person at whose request they were given, and was duly accepted by the defendants in the name of their firm. When they delivered the sets last named, they authorized the payee to perfect them as bills of exchange, in two parts, in reasonable amounts, and with reasonable dates. Eight acceptances were thus delivered by the defendants to the same person, corresponding in point of form to four bills of exchange, but with blanks for the names of the drawers and the address of the drawees, and for the respective amounts, dates, and times and places of payment. Four contained, in the printed form of the blanks, the words, "first of exchange, second unpaid;" and the other four contained in

the corresponding form the words, "second of exchange, first unpaid;" but in all other respects they were alike. All of the first class were perfected by the correspondent as bills of exchange of the first part, and were sold and negotiated by him at certain other banks in the city of Pittsburgh. He perfected them by procuring L. O. Reynolds & Son to become the drawers, addressed them to the defendants, endorsed them himself in blank, and procured another individual or firm to become the second endorser. They were filled up by him for sums varying from about two thousand to three thousand dollars, with dates corresponding to the times when they were negotiated, and were respectively made payable in four months from date. Contrary to his instructions, he retained the proceeds of the one first negotiated, which he had been directed to remit; and he also retained in his possession, but without inquiry or complaint on the part of the defendants, the other four acceptances, constituting the second class. On the first day of August, 1857, he perfected and filled up as a separate bill of exchange one of the last-named acceptances, and sold and negotiated it to the plaintiff for his own use and benefit. He also perfected and filled up, on the eighteenth day of the same month, another of the same class, in the same manner, and for the same purpose, and on the same day sold and negotiated it to the plaintiff. Both of these last-mentioned bills of exchange vary from those of the first class, not only in dates and amounts, but also as to time and place of payment, and are in all respects single bills of exchange. They were each received and discounted by the plaintiff, without any knowledge whatever that either had been perfected and filled up by the payee without authority, or of the circumstances under which they had been intrusted to his care, unless the words, "second of exchange, first unpaid," can be held to have that import.

In all other respects, the bills must be viewed precisely as they would be if they had been perfected and filled up by the defendants, and for two reasons, deducible from the decisions of this court:

First. Because, where a party to a negotiable instrument

intrusts it to the custody of another with blanks not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument; and as between such party and innocent third parties, the person to whom it was so intrusted must be deemed the agent of the party who committed such instrument to his custody—or, in other words, it is the act of the principal, and he is bound by it. Goodman *v.* Simonds, 20 How., 361; Violet *v.* Patton, 5 Cran., 142.

Secondly. Because a bona fide holder of a negotiable instrument, for a valuable consideration, without notice of the facts which impeach its validity between the antecedent parties, if he takes it under an endorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. Swift *v.* Tyson, 16 Peters, 15; Goodman *v.* Simonds, 20 Howard, 363.

Applying these principles, it is obvious that the only question that arises on this branch of the case is as to the effect of the words, "second of exchange, first unpaid," which appear on the face of the bills. That question, under the circumstances of this case, is a question of law, and not of fact for the jury. Three decisions of this court sustain that proposition; and in view of that fact, we think it unnecessary to do more than refer to those decisions, without further comment in its support. Andrews *v.* Pond and al., 13 Pet., 5; Fowler *v.* Brantly, 14 Pet., 318; Goodman *v.* Simonds, 20 How., 366.

Another principle, firmly established by this court, and closely allied to the question under consideration, will serve very much to elucidate the present inquiry. In Downes and al. *v.* Church, 13 Pet., p. 207, this court held, that either of the set of bills of exchange may be presented for acceptance, and if not accepted, that a right of action presently arises, upon due notice, against all the antecedent parties to the bill, without any others of the set being presented; for, say the

court, it is by no means necessary that all the parts should be presented for acceptance before a right of action accrues to the holder.

Now, if either of the set may be presented, and when not accepted a right of action immediately ensues, it is difficult to see any reason why, if upon presentation the bill is accepted, it is not competent for the endorsee to negotiate it in the market; and clearly, if the endorsee may properly negotiate the bill, a bona fide holder for value, without notice, may acquire a good title. In this connection, Mr. Chitty says, that "unless the drawee has accepted another part of a bill, he may safely pay any part that is presented to him, and that a payment of that part will annul the effect of the others; but if one of the parts has been accepted, the payment of another unaccepted part will not liberate the acceptor from liability to pay the holder of the accepted part, and such acceptor may therefore refuse to pay the bearer of the unaccepted part;" from which he deduces the rule, that a drawee of a bill drawn in sets should only accept one of the set. Chitty on Bills, (10 Am. ed., by Barb.,) 155.

Mr. Byles says: "The drawee should accept only one part, for if two accepted parts should come into the hands of different holders, and the acceptor should pay one, it is possible that he may be obliged to pay the other part also;" which could not be, unless it was competent for the holder of a second part to negotiate it in the market. Byles on Bills, p. 310.

Where the drawee accepted and endorsed one part to a creditor, as a security, and afterwards accepted and endorsed another part for value to a third person, but subsequently substituted another security for the part first accepted, it was held, in Holdsworth *v.* Hunter, 10 Barn. and Cress., 449, that, under these circumstances, the holder of the part secondly accepted was entitled to recover on the bill; and Lord Tenterden and Baron Parke held that the acceptor would have been liable on the part secondly accepted, even if the first part had been endorsed and circulated unconditionally.

Judge Story says, in his work on bills of exchange, that the

bona fide holder of any one of the set, if accepted, may recover the amount from the acceptor, who would not be bound to pay any other of the set which was held by another person, although he might be the first holder. Story on Bills, sec. 226.

No authority is cited, for the defendant, to impair the force of those already referred to; but it is not necessary to express any decided opinion upon the point at the present time. Suffice it to say, that in the absence of any authority to the contrary, we are strongly inclined to think that the correct rule is stated by Mr. Chitty, and that such is the general understanding among mercantile men.

But another answer may be given to the argument for the defendant, which is entirely conclusive against it; and that is, that the bills described in the first and second counts were not parts of sets of bills of exchange. They were perfected, filled up, and negotiated, by the correspondent of the defendants, to whom the blank acceptances had been intrusted as single bills of exchange; and for the acts of their correspondent, in that behalf, the defendants are responsible to a bona fide holder for value, without notice that the acts were performed without authority.

When the transaction is thus viewed, as it must be in contemplation of law, it is clearly brought within the operation of the same rule as it would be if the defendant himself had improvidently accepted two bills for the same debt. In such cases, it is held, that the acceptor is liable to pay both, in the hands of innocent holders for value. Davidson *v.* Robertson, 3 Dow. P. C., 228.

Lord Eldon said, in that case: "Here were two bills for the same account, and supposed to be for the same sums; they who were to pay them had a right to complain that there were two, and yet they were bound to pay both, in the hands of bona fide holders, if accepted by them or by others for them, having authority to accept."

To suppose, in this case, that the words "second of exchange, first unpaid," import knowledge to the plaintiff that the bills were drawn in sets, would be to give them an effect contrary to the averments of the defendants' pleas, as well as

contrary to the admitted fact that they were not so drawn; and for those reasons the theory cannot be sustained.

In view of all the facts as disclosed in the pleadings, we think the case clearly falls within the operation of the rule, generally applicable in cases of agency, that where one of two innocent parties must suffer, through the fraud or negligence of a third party, the loss shall fall upon him who gave the credit. Fitzherbert *v.* Mathen, 1 Term., 16, per Buller; Androscoggin Bank *v.* Kimball, 10 Cush., 373; Montague *v.* Perkins, 22 Eng. L. and Eq., 516.

Business men who place their signatures to blanks, suitable for negotiable bills of exchange or promissory notes, and intrust them to their correspondents, to raise money at their discretion, ought to understand the operation and effect of this rule, and not to expect that courts of justice will fail in such cases to give it due application.

According to the views of this court, the demurrers to the several pleas filed to the first and second counts of the declaration should have been sustained. Having come to that conclusion, it is unnecessary to examine the other propositions submitted on behalf of the defendants.

The judgment of the Circuit Court is therefore reversed, with costs, and the cause remanded, with directions to enter judgment for the plaintiff, as upon demurrer, on the first and second counts of the declaration.

THE INSURANCE COMPANY OF THE VALLEY OF VIRGINIA, PLAINTIFFS IN ERROR, *v.* MOSES C. MORDECAI.

Where there was insurance upon the freight of a vessel on a voyage from Charleston to Rio Janeiro, and from thence to a port of discharge in the United States, the insurance was upon the freight of each successive voyage, and is to be applied to the freight at risk at any time, whether on the outward or homeward voyage, to the amount of the valuation.

Therefore, where the vessel performed the outward voyage, and was condemned as unseaworthy, and the whole freight of the return voyage lost, the underwriters were not entitled to a deduction of the freight earned on the outward voyage.

Whether the underwriters were discharged in consequence of the condemnation of the vessel as unseaworthy, was a question not made on the trial or presented to the court for decision, and therefore cannot be entertained here; neither can the question whether the policy was an open or valued one, as no exception was taken to the ruling of the court below that it was a valued policy.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of South Carolina.

The insurance company had an agency established in Charleston, where their business appeared to be conducted by W. M. & J. C. Martin. The policy was not filled up or under the seal of the company, but the action was brought upon a written memorandum upon the policy, as follows:

Messrs. Mordecai & Co. are insured in the sum of four thousand dollars on the freight of the barque Susan, hence to Rio Janeiro and back, to any port of discharge in the United States.

$4,000 at 2 p. c., $80.

June 11, 1855.

The first above entry in the name of Mordecai & Co. should have been to M. C. Mordecai, and the amount insured was valued at the sum insured.

W. M. & J. C. MARTIN, *Agents.*

May 30, 1856.

The declaration went on to state that the barque Susan, while proceeding on her said voyage, and before her arrival at her port of destination or final delivery, was by the perils and damages of the sea, and by stormy and tempestuous weather, and the violence of the winds and waves, bulged, broken, damaged, and spoiled; that the said barque had to put back to Rio Janeiro, and was unable to proceed on her said voyage, &c., &c.

The defendants pleaded the general issue, and upon the trial the following bill of exceptions was taken, viz:

And on the trial of the issue aforesaid, the said M. C. Mordecai, by his counsel learned in the law, to maintain and prove the issue on his part, gave in evidence and proved that he was the owner of the barque Susan, and that he made an offer to

the agents of the defendants in Charleston for insurance of four thousand dollars on the freight of said barque from Charleston to Rio Janeiro, and from thence to a port of discharge in the United States, at a premium of two per centum, and that the offer was accepted, and the premium paid, and that the policy, according to the usage of the said company, was in blank. But a memorandum was signed by the agent, in the terms following, viz: "Mordecai & Co. are insured on freight of barque Susan, hence to Rio Janeiro, and from thence to a port of discharge in the United States.

Policy No. 209. $4,000, at 2 p. c. $80.

June 11, 1855. W. M. & J. C. MARTIN *Agt's.*"

That the vessel sailed from Charleston with a full cargo on the 11th day of June, 1855, when she was tight and strong, and arrived at the port of Rio Janeiro, where she discharged her outward lading, and took in a return cargo for the United States of thirty-eight hundred bags of coffee, at a freight of seventy-nine cents per bag, and on the 10th October, A. D. 1855, started on her return voyage, but by her want of strength and soundness was compelled to put back to Rio Janeiro, where she was condemned as unseaworthy and sold, and the whole freight of the return voyage was lost.

Whereupon the counsel for the defendant insisted that the policy was an open policy, and the insurers liable for only one thousand dollars; but the court ruled and so instructed the jury that the agreement proved was for a valued policy; and then the defendant insisted that the four thousand dollars having been insured on the round voyage, the insurers, from the evidence, were liable for only one-half of the sum insured, the other half being covered by the freight of the outward voyage, and prayed the court so to instruct the jury; which instruction his honor, the presiding judge, refused to give, but charged the jury that the loss of the freight on the return voyage was a total loss, and that upon the case as above stated the plaintiff was entitled to recover the whole amount underwritten by the defendants; to which last-mentioned instruction the defendant excepted; and the jury thereupon gave their verdict for the plaintiff as and for a total loss of the sum underwritten.

to wit, for the sum of four thousand dollars and interest. Whereupon, the counsel for the said company, because the matter aforesaid doth not appear by the record of the verdict aforesaid, did allege their exception to the opinion of the said judge, and did require that he should put his seal to this bill of exceptions, and thereupon the said judge, at the request of the counsel of the said Insurance Company of the Valley of Virginia, did put his seal, at Columbia, this second day of December, in the year of our Lord one thousand eight hundred and fifty-seven. A. G. MAGRATH, [SEAL.]

Whereupon, the jury found a verdict for the plantiff for four thousand dollars, with interest and costs.

The case was argued by *Mr. Robinson* for the plaintiffs in error, and *Mr. Phillips* for the defendant.

Mr. Robinson contended that the plaintiff was not entitled to recover anything, but that the clause in the policy attached, which exempted the assurers from responsibility in case the vessel should be declared unseaworthy, and that she was not seaworthy when she sailed from Rio Janeiro. Upon this point he cited a number of authorities.

If the plaintiff was entitled to anything, his judgment is for too much, and his verdict is for too much.

The contract of insurance is one of indemnity.

Charleston Ins. and Trust Co. *v.* Corner, 2 Gill, 427, 428.

Franklin F. Ins. Co. *v.* Hamill, 6 ib., 95.

Here the bill of exceptions does not show a case of a valued policy, as in Davy *v.* Hallett, 3 Caines's Rep., 19; and Patapsco Ins. Co. *v.* Biscoe, 7 Gill and J., 294; but an open policy, as in Maitland *v.* Ins. Co., 3 Richardson, 332. No doubt the policy was for the whole voyage round, as in Columbian Ins. Co. *v.* Catlett, 12 Wheat., 386, 387. But treating the policy as open, the recovery could only be in respect of 3,800 bags of coffee, at a freight of seventy-nine cents per bag, amounting at most to $3,002.09. And then it might be a question whether from this there should not be a deduction in respect of the

freight earned on the outward voyage from Charleston to Rio Janeiro.

Robertson *v.* Marjoribanks, 2 Stark., 573, 3 Eng. C. L., 480.

To avoid such deduction, the plaintiff has to insist that the freight insured is to be regarded as not on "one entire voyage" from Charleston to Rio Janeiro, and thence to a port of discharge in the United States, but upon "separate voyages" out and back, as in Rugg, &c. *v.* Augusta Ins. and Banking Co., 7 How., 610. This last position the appellants are not disposed to controvert; for treating the voyage from Rio Janeiro to a port of discharge in the United States as a "separate voyage," then, according to the opinion of Bosworth, J., in Van Valkenburgh *v.* Astor Mut. Ins. Co., 1 Bosworth, 66, the policy is, in effect, a distinct insurance for each separate voyage, and there is an implied warranty of the seaworthiness of the vessel, not only at the time of commencing the voyage from Charleston to Rio Janeiro, but also at the time of commencing the voyage from Rio Janeiro to a port of discharge in the United States.

Mr. Phillips called the attention of the court to the bill of exceptions, which showed that the court ruled, and so instructed the jury, that the agreement proved was for a valued policy, and that this ruling was not excepted to; nor was the question of the unseaworthiness of the vessel raised in the court below. The defendant having excepted only to the "last-mentioned instruction," as the bill states, there is but one question for review in this court, and that is the correctness of the "last instruction."

The second instruction, which was excepted to, raises only the question whether, on the assumption that the policy was a valued one, the amount insured was on the round voyage, or whether it was applicable to the risk of each voyage.

The defendant contended, and so asked the judge to instruct the jury, that the insurance was on the round voyage, and that they were therefore entitled to a deduction for the freight earned on the outward voyage. This was negatived in the

charge, and to this "*last-mentioned* instruction the defendant excepted." This excludes with an emphasis any intention to except to the first instruction, which declared the policy to be a valued one.

The only question, therefore, is, whether this was a correct exposition of the law.

In the case of Hugg *v.* Augusta Insurance Company, 7 How., 610, the insurance was "on freight of the barque Margaret Hugg, at and from Baltimore to Rio Janeiro, and back to Havana or Matanzas, or a port in the United States, &c., to the amount of $5,000," &c.

It was insisted by defendants that the voyage insured was one entire voyage, and that they were entitled to a deduction of the freight earned on the outward cargo from Baltimore to Rio.

But this court said: "We are of opinion that, upon a true construction of the policy, the insurance was upon every successive cargo that was taken on board in the course of the voyage out and home, and is to be applied to the freight at risk at any time, whether on the outward or homeward passage."

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the district of South Carolina.

The suit was brought in the court below on a policy of insurance, for $4,000, on the freight of the barque Susan, on a voyage from Charleston to Rio Janeiro, and from thence to a port of discharge in the United States.

The vessel sailed with a full cargo on the 11th June, 1855, when she was stanch and strong, and arrived at the port of Rio Janeiro, where she discharged her outward lading, and took in a return cargo, and on the 10th October, 1855, started on her return voyage, but was compelled, for want of strength and soundness, to put back to the port of departure, where she was condemned as unseaworthy, and sold, and the whole freight of the return voyage lost.

The counsel, upon this state of facts, which is all that ap-

pears in the bill of exceptions, insisted that the policy was an open one, and the insurers liable for only one thousand dollars; but the court instructed the jury that the agreement proved was for a valued policy.

The counsel then insisted, that the four thousand dollars having been insured on the round voyage, the insurers, from the evidence, were liable only for one-half the sum insured—the other half being covered by the freight of the outward voyage; but the court charged, that the loss of the freight on the return voyage was a total loss, and that, upon the case as it appeared, the plaintiff was entitled to the whole amount underwritten. To this last instruction, the counsel for defendants excepted.

The counsel for the plaintiff in error, on the argument, referred to the clause in the policy by which "it is also agreed, that if the above-named vessel, upon a regular survey, shall be declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage on account of her being unsound or rotten, then the assurers shall not be responsible on this policy;" and insisted that the condemnation of the vessel as unseaworthy, after returning back to the port of Rio Janeiro, brought the case within it.

But the answer to this position is, that no such question was made on the trial, or presented to the court for decision, and therefore cannot be entertained here; neither does the evidence in the case enable the counsel to raise any such question, as it does not appear that the condemnation proceeded from the causes specified in this clause of the policy. 7 Wh., 610; 10 ib., 418. It is enough, however, to say, that the question, for aught that appears in the bill of exceptions, was not raised on the trial.

As it respects the question whether the policy was an open or valued one, no exception was taken to the ruling that it was a valued one. The point was not pressed, probably; as we see, from a memorandum of the agents of the company in the case, that it was intended by the agreement to be a valued policy.

The remaining question, and indeed the only one presented

in the bill of exceptions, is, whether the voyage insured is one entire voyage from Charleston to Rio Janeiro, and back to the port of discharge in the United States, and consequently the underwriters entitled to a deduction of the freight earned on the outward voyage?

The court is of opinion, upon the true construction of the policy, the insurance was upon the freight of each successive voyage, and is to be applied to the freight at risk at any time, whether on the outward or homeward voyage, to the amount of the valuation.

The case, in this respect, is not distinguishable from Hugg *v.* the Augusta Insurance and Banking Company, (7 How., 595.) See, also, 3 Caines, 16; 7 Gill. and John., 293; 2 Phillips on Insurance, 31, 34.

Judgment of the court below affirmed.

WILLIAM BREWSTER, APPELLANT, *v.* WILLIAM WAKEFIELD.

Whilst Minnesota was a Territory, the following statute was passed:

Sec. 1. Any rate of interest agreed upon by the parties in contract, specifying the same in writing, shall be legal and valid.

Sec. 2. When no rate of interest is agreed upon or specified in a note or other contract, seven per cent. per annum shall be the legal rate.

Where a party gave two promissory notes, in one of which he promised to pay, twelve months after the date thereof, a sum of money, with interest thereon at the rate of twenty per cent. per annum from the date thereof, and in another promised to pay another sum, six months after date, with interest at the rate of two per cent. per month, the mode of computing interest under the statute was to calculate the interest stipulated for up to the time when the notes became due, and after that time at the rate of seven per cent. per annum.

Although the laws of the Territory abolished the distinction between cases at law and cases in equity, and required all cases to be removed from an inferior to a higher court by writ of error, and not by appeal, yet such laws cannot regulate the process of this court; and the present case, being in the nature of a bill in equity, is properly brought up by appeal.

The parties who acquired liens on the mortgaged property subsequent to the mortgage in question were not necessarily parties to this appeal; and if they had appeared to the suit in the court below, one defendant, whose interest is separate from that of the other defendants, may appeal without them.

THIS was an appeal from the Supreme Court of the Territory of Minnesota.

The facts of the case are fully stated in the opinion of the court.

It was argued for the appellant by *Mr. Stevens*, upon a brief filed by *Mr. Brisbin* and himself, and for the appellee by *Mr. Bradley.*

Mr. Stevens made the following points:

1. It is submitted that the court below erred in allowing to the plaintiff interest at the rate specified in the notes, after their maturity. That the legal and correct mode of estimating the amount due the plaintiff was to estimate the interest at the rates specified in the notes, respectively, up to the time of their maturity, (July 14th, 1855,) and from that time to the date of the decree at the rate of seven per cent. per annum.

Our statutes (vide Rev. Stat. of Minnesota, p. 155, chap. 35) fix the legal rate of interest at seven per cent. per annum, in all cases where no other rate is agreed upon by the parties, in writing.

The appellant agreed in writing to pay a certain sum, at a certain time, with interest thereon at a certain rate (or a certain other sum at interest) at the same time. His contract to pay interest did not extend beyond the time at which he agreed to pay it; the plaintiff, therefore, although entitled to interest upon his demand until the same is satisfied, is not so entitled by virtue of the defendant's contract to pay it, but by virtue of the law which allows interest upon all liquidated demands from the time they become due until they are paid.

Suppose the defendant, Brewster, had, at the maturity of the notes, paid the amount of interest then due, and taken the receipt of the plaintiff in full of such interest, would not his contract to pay interest have been thereby fully performed and discharged, and could the plaintiff have recovered interest thereafter upon the principal remaining unpaid at any greater rate than that fixed by law, upon all liquidated demands where the rate is not agreed upon by the parties?

The rate of interest specified in the notes, it is submitted, is qualified and limited by the time therein specified for its payment, and there being no express agreement to pay interest after the maturity of the notes, it can be recovered from that time only as damages for the non-payment of principal when due. This is the true and only construction of the notes in this case; they contain upon their face no agreement, except to pay a certain sum with certain interest at a certain time. If the parties intended, that in default of payment of the notes at maturity, the same rate of interest should continue until paid, they should have expressed that intention by the use of appropriate words, such as "and at that rate till paid;" or if the notes as drawn do not express the actual agreement which was made between the parties at the time the notes were given, the plaintiff should apply to a court of equity to reform them, and make them correspond with such agreement.

Bander *v.* Bander, 7 Barb. S. C. Rep., 560, and cases there cited.

2. Authorities directly in point upon the question raised in this case are not numerous.

In Macomber *v.* Dunham, (8 Wend., 550,) it was held that a loan company, which was authorized by its charter to charge interest for a full month where the loan was for a period over fifteen days and less than one month, was not entitled, where a loan made for twenty days remained unpaid, to demand interest at the same rate for any subsequent time. The loan had remained unpaid for several months after it was due, and it was contended, on the part of the company, that an implied agreement was to be presumed that the interest was to be charged according to the terms upon which the loan was originally made, but the court say (page 553:) "The true and only rational interpretation of this transaction is, that the loan which was made in December, in pursuance of the charter, not being renewed when it became due, the interest upon the debt then due, like the interest upon every other debt which has fallen due, is to be regulated by the general law of the State on that subject," that is, seven per cent. per annum. This case establishes the principle, that where the rate of interest re-

served by the contract is higher than the rate fixed by the statute, such higher rate continues only until the debt becomes due by the terms of the contract, and that after that the interest is recoverable only at the statute rate. This is precisely the principle contended for by the appellant.

In U. S. Bank *v.* Chapin, (9 Wend., 471,) it is held that a bank, which by law is limited to six per cent. interest upon all discounts, is entitled to recover at the rate of seven per cent. from the time the debt becomes due; that the clause in the charter limiting the rate of interest to six per cent. referred only to discounts in the ordinary course of business, and that the contract with the bank having been broken, the defendant was liable to pay the rate of interest fixed by the *lex loci* from the time the debt became due. In this case, the same principle was applied. By it, the lower rate (six per cent.) fixed by the law of the contract was increased to the statute rate, (seven per cent.,) after the debt became due. It operates both ways, simply because it is a principle.

The case of Ludwick *v.* Huntsinger, (5 Watts and Serg., 51, 60,) it seems to us, is directly in point. In that case it was held that "a note payable at a future day with three per cent. interest from the date, carries that interest till the day of payment, and after that, carries lawful interest."

This case is cited in a note to Chitty on Bills, (11 Am., from 9th Lond. ed.,) 682, marginal paging.

There are several cases in the Reports of the State of Alabama.

The first is the case of Clay *v.* Drake, (Minor, 164,) in which it is held, that where the rate of interest is not expressed in a contract, only the statute rate can be recovered in an action on such contract.

Another is the case of Henry *v.* Thompson, (Minor, 209,) and is as follows: "In Alabama, a contract to pay interest at a rate exceeding eight per cent. per annum (the statute rate) must be in writing, signed by the party to be charged, and express that it is for the loan of money, &c.; and such interest is recoverable only for the stipulated time of forbearance."

See, also, Kitchen *v.* Branch Bank of Mobile, 14 Alabama Rep., 233.

It is submitted that, upon principles of justice and of public policy, such extravagant and ruinous rates of interest as those specified in the notes in question should not be encouraged, but that on the contrary they should be discountenanced by the courts. Such contracts ought to receive a strict, rigid, and literal construction. If "so nominated in the bond," give "the pound of flesh," but "no jot of blood."

"The policy of all usury laws in modern times is to protect necessity against avarice, and to fix such a rate of interest as will enable industry to employ with advantage a borrowed capital, and thereby to promote labor and national wealth." Per Ch. J. Best, in the House of Lords, (3 Bing., 193;) and his Lordship might have added, with equal truth, that the policy of these laws is to check the spirit of wild and extravagant speculations.

Mr. Bradley. Two preliminary questions arise on the face of this record:

1. Can the case be brought to this court by appeal?

2. Can Brewster alone take the appeal, and without making the other defendants parties?

As to the first: The case is somewhat anomalous. The proceeding certainly is not in a court of equity, or of admiralty and maritime jurisdiction, but a court of law created by statute which has abolished the distinction of law and equity. It is a final judgment in a civil action other than in a case of equity, or of admiralty and maritime jurisdiction, and as such is by statute the subject of a writ of error.

Act 24 Sept., 1789, sec. 22, 1 Stat., 83.

3 March, 1803, sec. 2, 2 Stat., 244.

Courts of equity are distinct in their forms and modes of proceeding, as well as their jurisdiction, from courts of common law, and they are peculiarly placed under the direct control of this court; with this limitation, they are understood to be governed by the principal usages and rules of the English courts of chancery at the time of the Revolution.

See 1 Stat., 276.

4 Stat., 278.

5 Stat., 499.

Vattier *v.* Hinde, 7 Pet., 274.

Their jurisdiction, rules of decision, and remedies, are the same in all the States.

Boyle *v.* Zacharie, 6 Pet., 658.

Neves *v.* Scott, 13 How., 268.

From any other court except a court of equity or admiralty jurisdiction, a case can be brought to this court by writ of error only.

The San Pedro, 2 Wheat., 132.

McCollum *v.* Eager, 2 How., 61.

Parish *v.* Ellis, 16 Pet., 451.

As to the second question: It is a case in which there are several defendants claiming in the same right immediately or derivatively, against whom the same joint decree has passed, finally settling their rights, and the appeal is prayed by one only.

An appeal will not lie in such a case by one only.

Owings and others *v.* Kincannon, 7 Peters, 399.

Todd and others *v.* Daniel, 16 Peters, 521.

It is submitted the case ought to be dismissed.

If the case is properly before this court, the points following will be relied on by the defendant in error upon its merits:

I. The rate of interest having been agreed on by the parties, and reduced to writing, the contract is authorized by the statute.

Rev. Stat. Min., p. 155, ch. 35.

II. The contract being in writing, it is the province of the court to interpret and carry it into effect according to the intention of the parties.

Story on Con., p. 556, sec. 633, 634.

7 Barb. S. C., 560.

Chitty on Con., 74, (7 Am. ed.)

III. If the terms are ambiguous, or the intention is doubtful, they are to be taken most strongly against the promissor.

The maxim, "*verba chartarum fortius accipiuntur contra proferentem,*" (Co. Litt., 36 a,) is as applicable to contracts not under seal as to those of greater solemnity.

Mayer *v.* Isaacs, 6 Mees. and Wels., 612.

Hargrave *v.* Smee, 6 Bing., 248.

Stephens *v.* Pell, 2 Cr. and M., 710.

Edis *v.* Bury, 6 B. and C., 433.

IV. Interest is a compensation for the use or detention of money, and is regulated by contract, express or implied, or given by law. The latter should more fitly be called damages. They rest on different principles, the one arising from the assent of the parties, the other from a duty created by law. This is an express contract for the use of the money. The terms import a continuance of the same rate for its detention.

1. It uses the words "interest;" "interest from date."

These words have a definite signification. They show that it was made with reference to an understood compensation, the right to which would continue until the payment of the principal sum, with all the accumulated interest, or until judgment recovered, when the statutory interest would begin and run on the gross sum of principal and interest to that date; for if an amount equal to the principal debt should be paid, that would be applied first to the payment of the interest, and the residue would still bear interest. Nor could the promissor have paid the debts, or either of them, before the appointed time, so as to stop the interest; for the time is a part of the contract, and of the consideration on which the money was lent, and was made so for the benefit of the creditor.

Ellis *v.* Craig, 7 Johns. Ch., 7.

2. The interest is to run from the date of the notes in the one case at the rate of twenty per cent. per annum; in the other, at the rate of two per cent. per month. Language could with difficulty be found more clearly to import that the parties contemplated the possibility of the non-payment of the debts at their maturity, and intended in that event to fix the rate of interest to be allowed and paid for its detention. They do not say the debt is to be paid at the expiration of twelve months, with twenty per cent. in the one case, and twenty-four in the other, added. But the notes are to bear interest from their date, at certain fixed rates. Without such agreement, the rate of interest would have been seven per cent. That

would have run either from the time the debt became due, or such other time as the parties specified in writing. When, then, they in terms say the interest shall be at certain rates agreed upon by them in writing, they can intend neither more nor less than that rate shall take the place of the statutory rate, with all its incidents. It is but substituting, in the terms allowed by the statute, the conventional interest agreed upon by themselves.

V. It is to be construed as every other contract, to make compensation for the use of another man's property. The hire of labor, the rent of a house or machinery, stand on the same principle. If there is no contract, the owner is entitled to recover whatever the jury may find he should reasonably receive. But if there is a contract for a definite period, at a certain rate, and the relation of the parties continues unchanged, the rate of compensation likewise continues. So here the hire of this money and the rate of compensation being fixed by agreement, the rate must continue so long as the money is detained in the use or employment of the borrower. The statute does not come to the relief of the party who has made his own law.

It is therefore submitted that there is no error in the decree of the court below.

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

This case comes before the court upon appeal from the judgment of the Supreme Court of the Territory of Minnesota, before its admission into the Union as a State.

It appears that a suit was instituted in the District Court, in the county of Ramsey, by Wakefield, the appellee, against the appellant and others, in order to foreclose a mortgage made by the said Brewster and his wife, of certain lands, to secure the payment of three promissory notes mentioned in the proceedings. The notes are not set out in full in the transcript, but are stated by the complainant in his petition, or bill of complaint, to have been all given by Brewster on the 11th of July, 1854, whereby, in one of them, he promised to pay, twelve months after the date thereof, to the order of

Wakefield, the appellee, the sum of five thousand five hundred and eighty-three dollars and twenty-five cents, with interest thereon at the rate of twenty per cent. per annum from the date thereof, for value received; and in another, promised to pay to the order of the said Wakefield the further sum of two thousand dollars, twelve months after the date thereof, with interest thereon at the rate of two per cent. per month from the date; and by a third one, promised to pay to the order of the said Wakefield, six months after date, the further sum of one thousand dollars, with interest at the rate of two per cent. per month. This last-mentioned note is admitted to have been paid, and these proceedings were instituted to recover the principal and interest due on the two first.

No defence appears to have been made by the appellant, and the notes were admitted to be due. But when the court was about to pass its decree for the sale of the mortgaged premises, and ascertain and determine the sum due, the appellant, by his counsel, appeared and objected to the allowance of more than the legal rate of interest (seven per cent.) after the notes became due and payable. Wakefield, on the contrary, claimed that interest should be allowed at the rate mentioned in the notes, up to the time of the judgment or decree for the sale. And of this opinion was the court, and by its decree, dated June 20th, 1855, adjudged that the sum of $10,670.77 was then due and owing for principal and interest on the said two notes, and ordered the mortgaged premises, or so much thereof as might be necessary, to be sold to raise that sum.

This decree or judgment was carried by writ of error, according to the practice in the Territory, before the Supreme Territorial Court; and was there, on the 29th of January, 1857, affirmed, with ten per cent. damages, and also legal interest on the sum awarded by the District Court, amounting altogether to the sum of twelve thousand five hundred and thirty-eight dollars and nine cents. For the payment of that amount, with costs, the mortgaged premises were ordered to be sold.

From this last-mentioned decision an appeal was taken to this court.

There is no question as to the validity of the notes or mortgage; and it is admitted that no part of the debt has been paid. The question in controversy between the parties is, whether, after the day specified for the payment of the notes, the interest is to be calculated at the rates therein mentioned, or according to the rate established by law, when there is no written contract on the subject between the parties. The question depends upon the construction of a statute of the Territory, which is in the following words:

"Sec. 1. Any rate of interest agreed upon by the parties in contract, specifying the same in writing, shall be legal and valid.

"Sec. 2. When no rate of interest is agreed upon or specified in a note or other contract, seven per cent. per annum shall be the legal rate."

Now, the notes which formed the written contracts between the parties, as we have already said, are not set out in full in the record. We must take them, therefore, as they are described by the complainant, as his description is not disputed by the appellant; and, according to that statement, the written stipulation as to interest, is interest from the date to the day specified for the payment. There is no stipulation in relation to interest, after the notes become due, in case the debtor should fail to pay them; and if the right to interest depended altogether on contract, and was not given by law in a case of this kind, the appellee would be entitled to no interest whatever after the day of payment.

The contract being entirely silent as to interest, if the notes should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision in the contract. And, in this view of the subject, we think the Territorial courts committed an error in allowing, after the notes fell due, a higher rate of interest than that established by law, where there was no contract to regulate it. The cases of Macomber *v.* Dunham, 8 Wend., 550; United States Bank *v.* Chapin, 9 Wend., 471; and Ludwick *v.* Huntsinger, 5 Watts and Serg., 51, 60, were decided upon this principle, and, in the opinion of this court, correctly decided.

Nor is there anything in the character of this contract that should induce the court, by supposed intendment of the parties or doubtful inferences, to extend the stipulation for interest beyond the time specified in the written contract. The law of Minnesota has fixed seven per cent. per annum as a reasonable and fair compensation for the use of money; and where a party desires to exact, from the necessities of a borrower, more than three times as much as the Legislature deems reasonable and just, he must take care that the contract is so written, in plain and unambiguous terms; for, with such a claim, he must stand upon his bond.

A question has been raised by the appellee, as to the jurisdiction of this court. The laws of the Territory have abolished the distinction between cases at law and cases in equity, and both are blended in the same proceeding, without any regard to the forms and rules of proceeding, either at law or in equity, and a case cannot be removed from an inferior to an appellate Territorial court, except by writ of error. And it is urged that this case, under the laws of Minnesota, ought to be regarded as a case at law, and removable to this court by writ of error only, and not by appeal.

But the case presented by the record is not a case at law, according to the meaning of those words, in courts which recognise the distinction between law and equity. On the contrary, it is a proceeding in the nature of a bill in equity to foreclose a mortgage, in which the facts as well as the law are to be decided by the court; and an appeal, and not a writ of error, was the appropriate mode of bringing the case before this court. The laws or practice of the Territory cannot regulate the process by which this court exercises its appellate power. Nor, indeed, can there be any such thing as a suit at law, as contradistinguished from a suit in equity, in the courts of the Territory, where legal rights and equitable rights must be blended together and prosecuted in the same suit, without any regard to the rules and practice of courts of common law or courts of equity.

Nor was it necessary that the parties who acquired liens on the mortgaged premises subsequent to the mortgage in ques-

tion should join in the appeal. They were not necessary parties in a proceeding in equity to foreclose the mortgage, and none of them have appeared to the suit to contest the claim of Wakefield. And if it had been otherwise, yet the question in controversy here is the amount of the debt due from the appellant; and in the case of Forgay *v.* Conrad, 6 How., 201, this court decided that a defendant in equity, whose interest is separate from that of the other defendants, may appeal without them.

We have no doubt of the jurisdiction of the court upon this appeal; and the judgment and decree of the Supreme Court of the Territory must be reversed, for the error above mentioned.

BRYAN ROACH AND DENNIS LONG, COMPOSING THE FIRM OF ROACH & LONG, LIBELLANTS AND APPELLANTS, *v.* WILLIAM CHAPMAN AND OTHERS, CLAIMANTS OF THE STEAMER CAPITOL, AND DANIEL EDWARDS AND JOSEPH MAILLOT, SURETIES.

Where a steamboat was built at Louisville, in Kentucky, and the persons who furnished the boilers and engines libelled the vessel in admiralty in the District Court of the United States for the eastern district of Louisiana, that court had no jurisdiction of the case.

A contract for building a ship, or supplying engines, timber, &c., is not a maritime contract. This court so decided in 20 Howard, 400, and now reaffirms that decision.

The State law of Kentucky, which creates a lien in such a case, cannot confer jurisdiction on the courts of the United States; and the preceding decisions of this court do not justify an inference to the contrary.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Louisiana, sitting in admiralty.

The steamer Capitol was libelled in the District Court of the United States for the eastern district of Louisiana, by Roach & Long, residing at Louisville, in Kentucky. The libel was filed under the general admiralty law and the law of the State of Kentucky for $2,347.48, part of the price of the engine and boilers of the steamer Capitol, furnished at Louisville. The District Court sustained the claim, but the Circuit

Court reversed the decree, and dismissed the libel for want of jurisdiction. The libellants appealed to this court.

The case was argued for the appellants by *Mr. Benjamin*, no counsel appearing for the appellees.

Mr. Benjamin made the following points:

1. As to the existence of a lien in favor of the builder, under the general maritime law, the adverse opinion of the Circuit Court will not be called in question, as the decision of this court in the case of the People's Ferry Co. of Boston *v.* Beers et al., 20 Howard, 393, must be considered as conclusive on this point.

2. But a lien in this case was given both by the law of the State of Kentucky, where the boat was built, and by that of the State of Louisiana, where she was intended to be employed, and where the libel was filed.

Revised Statutes of Kentucky, 143, sec. 2.

La. Civ. Code, 3204.

This lien, under the law of Kentucky, where the contract for the work was made, was available for one year only from the time the cause of action accrued, as against a purchaser without actual notice, or such constructive notice as is afforded by endorsement on the enrolment.

The libel was filed before the adoption of the new twelfth rule in admiralty, which took effect only on the 1st May, 1859.

21 Howard's Rep., 4.

The cause of action accrued on the 5th January, 1855, and the libel was filed within the year, viz: on the 15th December, 1855.

3. The District Court, sitting in admiralty, had jurisdiction to enforce this lien.

Read *v.* the hull of a new Brig, 1 Story, 244.

Davis *v.* a new Brig, Gilpin's R., 473, 536.

The Young Mechanic, 2 Curtis, 402.

The Richard Busteed, 21 Law Reporter, 601.

1 Parsons on Mar. Law, 501, 499, note.

2 Parsons on Mar. Law, 504, 505, 639, and seq.

The Steamboat Superior, 1 Newberry, 176.

The Propeller Chs. Mears, 1 Newberry, 197.

4. The lien thus created was not divested by the departure of the vessel from the port of Louisville, nor by any subsequent change of ownership, nor by virtue of any provision of the law of Louisiana, if asserted within a reasonable period, and without laches.

Liens of material men follow the vessel into whatever hands it passes.

1 Parsons on Mar. Law, 500, note.

Sheppard *v.* Taylor, 5 Peters, 675.

The Sloop Canton, 21 Law Rep., 473.

The Barque Chusan, 2 Story, 456.

But in the present case there has been no bona fide change of ownership.

The vessel really belongs to the party to whom the engines were furnished. This being the case, there is no conflict with the law of Louisiana, as supposed by the circuit judge. Such conflict could only exist if the rights of third persons were involved.

5. The taking of drafts for the unpaid balance of the price of the engines was no waiver of the lien. The drafts were offered to be surrendered at the hearing in the District Court.

The Brig Nestor, 1, Sumner, 73.

The Barque Chusan, 2 Story, 455.

Leland *v.* Ship Medora, 2 Woodb. and Minot, 92.

Raymond *v.* Schr. Ellen Stewart, 5 McLean, 269.

Sutton *v.* the Albatross, 2 Wallace, 327.

Ramsey *v.* Allegre, 12 Wheaton, 611.

Mr. Justice GRIER delivered the opinion of the court.

The libellants claim to have a lien on the steamboat Capitol, for a balance due them for machinery furnished in her construction. The boat was built at Louisville, Kentucky, and the libellants furnished the boilers and engines. Payments were made as the work progressed, and bills of exchange taken for the balance due after the vessel was completed. These were not paid. The boat left the port and the State,

and was afterwards sold, and became the property of the claimants.

Among other things, the claimants pleaded to the jurisdiction of the court. This plea was sustained by the Circuit Court.

A contract for building a ship or supplying engines, timber, or other materials for her construction, is clearly not a maritime contract.

Any former dicta or decisions which seemed to favor a contrary doctrine were overruled by this court, in the case of the People's Ferry Co. *v.* Beers, (20 How., 400.)

It is said here, that the law of Kentucky creates a lien in favor of the libellants; and that, as this case originated before the adoption of our rule, which took effect on the first of May, 1859, it may, upon the principles recognised by this court in Peyroux *v.* Howard, (7 Peters, 343,) be enforced in the admiralty. But (to quote the language of the court in Orleans *v.* Phoebus, 11 How., 184) "that decision does not authorize any such conclusion. In that case, the repairs of the vessel, for which the State laws created a lien, were made at New Orleans, on tide waters. The contract was treated as a maritime contract, and the lien under the State laws was enforced in admiralty, upon the ground that the court, under such circumstances, had jurisdiction of the contract, as maritime; and then the lien, being attached to it, might be enforced according to the mode of administering remedies in the admiralty. The local laws can never confer jurisdiction on the courts of the United States."

It is clear, therefore, that the judgment of the Circuit Court, dismissing the libel for want of jurisdiction, must be affirmed, without noticing other questions raised by the pleadings.

THOMAS OTIS LE ROY AND DAVID SMITH, APPELLANTS, *v.* BENJAMIN TATHAM, JUN., HENRY B. TATHAM, AND GEORGE N. TATHAM.

The patent of the Tathams, for an improvement upon the machinery used for making pipes and tubes from lead or tin, when in a set or solid state, explained and sustained.

THIS was an appeal from the Circuit Court of the United States for the southern district of New York, sitting in equity.

It was a bill filed by the Tathams against the appellants, for an infringement of the patent for making lead pipe, which is particularly described in a former case reported in 14 Howard, 156.

The Circuit Court decreed that John Hanson and Charles Hanson, of England, were the first and original inventors and discoverers of the improvement in making pipes and tubes from metallic substances, set forth and described in the bill of complaint.

That the subject matter of the said invention and discovery is patentable.

That the complainants are the legal patentees and owners, within the United States, of the said invention and discovery, set forth in the bill of complaint, which sufficiently describes the same.

That the defendants have infringed and violated the said patent right of the complainants in the manner charged in the bill of complaint.

The court thereupon ordered a reference to a master to take an account of the damages sustained by the complainants. Upon the coming in of his report, sundry exceptions were filed by the defendants, which were overruled, and the court decreed the amount which the defendants should pay. An appeal from this decree brought the case up to this court.

The facts of the case are stated in the opinion of the court.

It was argued by *Mr. Stoughton* and *Mr. Noyes* for the appellants, and by *Mr. Keller* and *Mr. Goddard* for the appellees.

The principal ground upon which the counsel for the appellants sought to reverse the decree was, that the patent to the complainants was void, because the Hansons were not the original and first inventors of the improvements therein described and claimed.

The discussion of this proposition filled the court room with models and machines upon both sides, the description of which

would be of little interest to the readers of this volume. They will be, therefore, entirely passed over.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the final decree of the Circuit Court of the United States for the southern district of New York, on a bill filed by the appellees to restrain the infringement by the appellants of a patent for making lead pipe, and for general relief.

A suit at law was commenced, after the filing of the bill, on or about the 10th of May, 1847, to recover damages for the same infringement.

This action was twice tried—once on the 3d May, 1848, and resulted in a verdict for the appellants, which was set aside by the court, and a new trial awarded. It was tried in May, 1849, when the jury gave a verdict for the respondents for $11,394 in damages. Exceptions were taken to the charge, and the judgment was reversed, and a new trial ordered in December term, 1852. 14 How., 156.

Before this decision was made, and in January, 1852, it was stipulated between the counsel for the respective parties that the testimony taken on the last trial in the action at law should be read; and it forms the principal part of the evidence on both sides in this suit.

The action at law was not to be tried again; but the suit in equity was prosecuted in its stead.

The patent under which the plaintiffs claim bears date the 14th March, 1846; and in their schedule they say: "Our invention consists in certain improvements upon and additions to the machinery used for manufacturing pipes and tubes from lead or tin, or any alloy of soft metals, capable of being forced, by great pressure, from out of a receiver, through or between apertures, dies, and cores, when in a set or solid state, set forth in the specification of a patent granted to Thomas Burr, of Shrewsbury, in Shropshire, England, dated the 11th of April, 1820, recited in the Repertory of Arts, &c., London, &c."

The bill alleges that John and Charles Hanson, of England, were the inventors of the improvements specified, on or prior

to the 31st of August, 1837; that on the 10th of January, 1840, the Hansons assigned to H. B. & B. Tatham, two of the defendants in error, the full and exclusive right to said improvements; that on the 29th March, 1841, letters patent were granted for the improvements to the Tathams, as the assignees of the Hansons; that afterwards H. B. & B. Tatham assigned to G. N. Tatham, the remaining defendant, an undivided third part of the patent.

On the 14th March, 1846, the said letters patent were surrendered, on the ground that the specifications of the improvements claimed were defective; and a new patent was issued, which granted to the patentees, their heirs, &c., for the term of fourteen years from the 31st August, 1837, the exclusive right to make and vend the improvements secured.

The defendants denied the infringement charged.

A great number of facts were proved, showing the successful manufacture of lead in the mode stated in the specifications, and particularly that "pipes thus made are found to possess great solidity and unusual strength, and a fine uniformity of thickness and accuracy is arrived at, such as, it is believed, has never been attained by any other machinery." And they say the essential difference in the character of this pipe, which distinguishes it, as well as that contemplated by Thomas Burr, from all others heretofore known or attempted, is, that it is wrought under heat, by pressure and constriction, from set metal, and that it is not a casting formed in a mould.

"And it was proved, that in all the modes of making lead pipe previously known and in use, it could be made only in short pieces; but that, by this improved mode, it could be made of any required length, and also of any size; and that the introduction of lead pipe made in the mode described had superseded the use of that made by any of the modes before in use, and that it was also furnished at a less price." And it was proved that lead, when recently become set, and while under heat and extreme pressure, in a close vessel, would reunite perfectly after a separation of its parts.

In the case of the Household Company *v.* Neilson, Webster's Patent Cases, 683, it is said: "A patent will be good, though

the subject of the patent consists in the discovery of a great, general, and most comprehensive principle in science or law of nature, if that principle is, by the specification, applied to any special purpose, so as thereby to effectuate a practical result and benefit not previously attained."

Mr. Justice Clerk Hope, in his charge to the jury, said: "The specification does not claim anything as to the form, nature, shape, materials, numbers, or mathematical character, of the vessel or vessels in which the air is to be heated, or as to the mode of heating such vessels."

Now, in this case it must not be forgotten that the machinery was not claimed as a part of the invention; but the jury were instructed to inquire "whether the specification was not such as to enable workmen of ordinary skill to make machinery or apparatus capable of producing the effect set forth in said letters patent and specification;" and that, in order to ascertain whether the defendants had infringed the patent, the jury should inquire whether they "did, by themselves or others, and in contravention of the privileges conferred by the letters patent, use machinery or apparatus substantially the same with the machinery or apparatus described in the plaintiffs' specification, and to the effect set forth in said letters and specification."

Now, as no specification was claimed in regard to the machinery, it is not perceived how the patent could be infringed, unless upon the principle that, having claimed no specific mode of applying the heat, he could use any mode he might prefer, in defiance of the rights of other patentees.

Now, this cannot be law; certainly it is not law under the patent act of this country. That act requires the making and constructing "the thing, in such full, clear, and exact terms as to enable any person, skilled in the art or science to which it appertains, to make, construct, and use the same."

Alderson B. Webster's Patent Cases, 342, says: "The distinction between a patent for a principle and a patent which can be supported is, that you must have an embodiment of the principle in some practical mode described in the specification of carrying into actual effect; and then you take out

your patent, not for the principle, but for the mode of carrying the principle into effect."

"It is quite true, that a patent cannot be taken out solely for an abstract philosophical principle—for instance, for any law of nature or any property of matter, apart from any mode of turning it to account. A mere discovery of such a principle is not an invention, in the patent-law sense of the term." Web. Cases, 683.

However brilliant the discovery of the new principle may be, to make it useful it must be applied to some practical purpose. Short of this, no patent can be granted. And it would not seem to be a work of much labor for a man of ingenuity to describe what he has invented.

The "newly-discovered property in the metal, and the practical adaptation of it, by these means, to the production of a new result, namely, the manufacture of wrought pipe out of solid lead," was the discovery. "There can be no patent for a principle; but for a principle so far embodied and connected with corporeal substances as to be in a condition to act and to produce effects in any trade, mystery, or manual occupation, there may be a patent."

"It is not that the patentee conceived an abstract notion that the consumption in fire-engines may be lessened; but he discovered a practical manner of doing it, and for that he has taken his patent. This is a very different thing from taking a patent for a principle."

The principle may be the new and valuable discovery, but the practical application of it to some useful purpose is the test of its value.

In the case of Leroy *v.* Tatham, 14 How., 136, it was said, "that in the view taken by the court in the construction of the patent, it was not material whether the mere combination of machinery referred to were similar to the combination used by the Hansons, because the originality did not consist in the novelty in the machinery, but in bringing a newly-discovered principle into practical application, by which a useful article is produced, and wrought pipe made, as distinguished from cast pipe."

Now, it must be observed that the machinery used was admitted to be old, and any difference in form and strength must arise from the mode of manufacturing the pipes. The new property in the metal claimed to have been discovered by the patentees belongs to the process of manufacture. The result is before us. We see the manufactured article, and are told that its substance is greatly modified and improved, but we derive little or no knowledge from inspecting it. Except by the known process of its formation, we cannot appreciate its value, or comprehend the various purposes for which it was made. We want to see and understand the processes by which it was formed, the machinery in action, and a full explanation of its parts.

The claimants say: "We wish it to be understood that we do not confine ourselves to the mode of operation herein described, by making the cylinder rise with the hydraulic ram and other parts, and keeping the piston stationary, as the same effects will take place when the cylinder is stationary, and the power of the ram is applied to the top of the piston to cause it to descend into the cylinder, and our improvements might be applied to a cylinder and press, fitted up in other respects upon Burr's plans, whereby the pipe is received over the top of the machinery, &c., all which and other variations will readily suggest themselves to any practical engineer, without departing from the substantial originality of our invention.

"The combination of the following parts above described is claimed, to wit, the core and bridge, or guide-piece, with the cylinder, the piston, the chamber, and the die, when used to form pipes of metal, under heat and pressure, in the manner set forth, or in any other mode substantially the same."

To the above is added: "We do not claim as our invention and improvement any of the parts of the above-described machinery, independently of their arrangement and combination above set forth."

The machinery described in both the above sentences is only claimed when used to form pipes of metal under heat and pressure. And it must be admitted, that the machinery described and illustrated by the drawings is sufficiently explicit to show

the nature of the invention. If it be admitted that the machinery, or a part of it, was not new when used to produce the new product, still it was so combined and modified as to produce new results, within the patent law. One new and operative agency in the production of the desired result would give novelty to the entire combination.

The specifications are drawn with care and no ordinary skill, and they cannot be misunderstood. No one can be supposed to mistake the new product for the machinery through which it is developed. And in regard to a practical application of the new conception, it is as necessary as the conception itself; and they must unite in the patent. "The apparatus described is properly regarded by the patentees as subordinate, and as important only as enabling them to give practical effect to the newly-discovered property, by which they produce the new manufacture." Certainly no comparison was instituted between the mechanical contrivance used, and the new discovery.

In the case of Leroy *v.* Tatham, 14 Howard, 176, the court instructed the jury, "that the originality of the invention did not consist in the novelty of the machinery, but in bringing a newly-discovered principle into practical use."

Principle is often applied to a machine to describe its movements and effect; and we are told that the originality of this invention did not "consist in the novelty of the machinery, but in bringing a newly-discovered principle into practical effect." Whether the new manufacture was the result of frequent experiments or of accident, it will be admitted that the process has been demonstrated to the satisfaction of all observers; and this has been done in the mode described.

In the complicated and powerful machinery used to produce this result, it is not perceived why it should not be adverted to, as showing the most natural and satisfactory explanation of the discovery. It is only necessary to examine the machinery combined, to see that its parts are dissimilar to others in use; and there would seem to be no other reason for the use of the new principle, to the exclusion of the mechanical structures employed, except a higher reach of knowledge.

However this may be, it would seem that, when dealing with a patentable subject, its appropriate name should be given to the machinery by which it was developed. The admitted want of novelty in the machinery, referred to so frequently, might invite criticism, if it were necessary, to the case in 14th Howard; but the case now before us is in chancery, and has been deliberately considered.

Up to the year 1837, the date of Hanson's invention, two methods only were known of making wrought pipe from lead, in the set or solid state, and these were the Burr method and the draw-bench method. As soon as the plan of the Hansons was introduced, they superseded all other methods.

Both of the above methods were defective—the draw-bench on account of the great labor, limited length of pipe produced, and unequal thickness; and the Burr, because of the difficulty of holding the core central in the die, in forming pipes of small calibre.

The superiority of the Burr method, for the general purposes of manufacturing leaden pipes which require different sizes to be made, was so slight, as it seems, that for seventeen years after the date of the Burr patent, not one of such machines was put in use in the United States or in Europe.

In this combination of machinery there are six essential parts:

First. A metal cylinder, capable of receiving the lead in a fluid state, and permitting it to become set or solid therein, and of great strength.

Second. A piston, which is a solid metallic body, fitted to the bore of the cylinder, to work therein accurately, to prevent the charge of lead from escaping around it, and so connected with a hydraulic press, or other motor of great power, as to traverse the length of the cylinder with a force applied of several tons, to force out the charge of lead not in the liquid state.

Third. A die, which is simply a block of steel, with a central hole of a cylindrical form, and of a diameter of the pipe to be made.

Fourth. A core, which is simply a short cylindrical rod of steel, of the diameter of the calibre of the pipe to be made.

Fifth. A bridge or core-holder, which is a plate of metal with apertures, having four or more arms radiating from the central part, which has a central hole of the size of the core.

Sixth. A chamber of construction, located between the bridge and the die, and extending from the one to the other, and either conical or cylindrical, provided the end next the bridge be made of greater diameter than the die.

It is rare that so clear and satisfactory an explanation is given to the machinery which performs the important functions above specified. We are satisfied that the patent is sustainable, and that the complainants are entitled to the relief claimed by them.

ORDER.

The cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the southern district of New York, and was argued by counsel; on consideration whereof, it is the opinion of this court that the complainants in the court below are entitled to recover from the defendants the sum of $16,815.57. Whereupon, it is now here ordered, adjudged, and decreed, by this court, that the same is hereby affirmed to the extent of the aforesaid sum of $16,815.57, and that it be reversed as to the residue; and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to enter a decree for that amount in favor of the complainants. And it is further ordered and decreed by this court, that the costs in the court below be paid by respondents in that court, the appellants here, and that each party pay his own costs in this court.

THE CITY OF NEW ORLEANS, PLAINTIFF IN ERROR, *v.* MYRA CLARK GAINES.

Where streets were opened in New Orleans, a sum of money, as indemnity, was allowed to G, as being the supposed owner of the property condemned.

D claimed to be the owner of the property, and brought a suit against the city for the money, in which suit G was cited for the purpose of having the question decided, to whom the property belonged, and judgment was rendered against the city in favor of D.

Afterwards, G brought a suit in the Circuit Court of the United States, and the city pleaded the former judgment in bar.

But, as these facts were not given in evidence upon the trial, nor did the judge make any statement of facts found by him, the record presents only the judgment against the city in favor of G, and there is no ground of error upon which this court can reverse the judgment.

THIS case was brought up by writ of error from the Circuit Court of the United States for the eastern district of Louisiana.

The facts of the case are stated in the opinion of the court.

It was argued by *Mr. Benjamin* for the plaintiff in error, and by *Mr. Phillips* for the defendant, upon which side there was also a brief filed by *Mr. Perin.*

Mr. Benjamin, before proceeding to the argument, referred to an agreement of counsel, which had been filed, to make a part of the case.

The record in this case shows that the cause was tried before the judge, under the Louisiana practice, without the intervention of a jury, and, as originally printed, contained no statement of facts which could form a substitute for a verdict, so as to enable this court to correct any error of law that might be apparent in the decision of the lower court. This defect has been supplied by the consent of counsel, since filed, which shows that the case was decided below exclusively on the written deeds and record evidence, copied at length into the transcript filed in this court, and the proper construction of these deeds and records and their legal effect being matters of law, afford the court the necessary basis for the exercise of its revisory powers.

Mr. Phillips said that all he knew about the agreement was, that *Perin* signed it, understanding the court would grant a *certiorari*. *Mr. Perin* says that the agreement was solicited and obtained from him long after the transcript had been filed in this court. But he could not imagine that that paper would be offered as a substitute for bills of exceptions to the reception or rejection of evidence, or to an agreed statement of

facts, which should have been reserved or made on the trial of the cause.

Mr. Phillips then proceeded, as *Mr. Benjamin* had done before, to discuss the merits of the cause; but, as the admission of this agreement was a necessary preliminary to the discussion of the merits, and as this agreement was entirely passed over in the opinion of the court, the reporter refrains from admitting the argument of the merits upon either side.

Mr. Justice CATRON delivered the opinion of the court.

The city of New Orleans instituted proceedings by suit in a city court, pursuant to a statute of Louisiana, for opening two streets in the city, and appropriating the private property requisite for that purpose; and on the tableau of assessment, certain squares of ground were put down as belonging to Mrs. Gaines, and the damages done to owner fixed at $2,363.

The assessment was decreed to Mrs. Gaines by the court where the proceeding was had; and she brought suit on this judgment against the city, in the United States Circuit Court.

The defendant, (the city,) by its answer, admitted the proceeding, and the damages assessed on the property described in the petition; but, in avoidance of the demand, averred that a suit had been brought by one Durell against the city, claiming that he was the true owner of the property through which the streets run, and which the commissioners of assessment had supposed to be owned by Mrs. Gaines, and demanding payment to him of the damages claimed by her; that in the suit so brought by Durell, Mrs. Gaines had been personally cited as a party, at the instance of the city, for the purpose of having the question decided between her and Durell, as to the ownership of the property, and as to their respective claims on the city for the sum awarded; and that in said suit judgment was rendered, determining the question in favor of Durell; and this judgment is pleaded in bar of the present suit.

Various documents were exhibited with the answer, and filed in the Circuit Court, on behalf of the city, including a record of the suit by Durell against the city, and the recovery

of the damages for extending the streets; but nothing appears in the record showing that these documents were given in evidence on the trial; nor did the judge before whom the cause was heard make any statement of the facts found by him, as the usual practice is, where the Circuit Court in Louisiana tries issues of fact without the intervention of a jury.

The cause as presented to us simply shows a judgment in Mrs. Gaines's favor, with regular pleadings to warrant it; and beyond this, contains nothing that this court can notice, as a court of error.

It is ordered that the judgment below be affirmed.

JOHN C. HALE, PLAINTIFF IN ERROR, *v.* WILLIAM H. GAINES AND MARIA GAINES HIS WIFE, ALBERT BELDING, HENRY BELDING, AND GEORGE BELDING, HEIRS AND LEGAL REPRESENTATIVES OF LUDOVICUS BELDING, DECEASED, DEFENDANTS.

In an action of ejectment for the Hot Springs in Arkansas, wherein one party claimed title through a pre-emption claim which they were allowed to enter by the register and receiver, and the other party through a New Madrid certificate, (the title of the United States not being drawn into question,) the former party had the better title.

There was no regular survey and location of the New Madrid certificate until 1838, a prior application for a public survey in 1818, and certificate of a private survey in 1820, being irregular.

The act of Congress of April, 1822, required these locations to be made within one year from the date of its passage. Consequently, the right to locate the New Madrid certificate expired in April, 1823.

Nor does the act of 1843 support the survey of 1838, because it is not included within the provisions of the act.

Whether or not the title acquired under the pre-emption is valid, is a question not now before this court; because the case is brought up from the Supreme Court of Arkansas under the twenty-fifth section of the judiciary act, and the decision of that court was in favor of the validity of the action of the register and receiver; and, moreover, the opposing party cannot set up an outstanding title in the United States. In order to bring himself within the rule of that section, he must have a personal interest in the subject in litigation.

The claim set up under a prior pre-emption was of no value, the land having been reserved from sale when an offer to locate the pre-emption right was made.

THIS case was brought up from the Supreme Court of the State of Arkansas, by a writ of error, issued under the twenty-fifth section of the judiciary act.

It was an action of ejectment brought by William H. Gaines and the other defendants in error against John C. Hale, to recover the southwest quarter of section thirty-three, in township two south, of range nineteen west, containing one hundred and sixty acres. This claim was under the pre-emption act of Congress of the 29th of May, 1830, (4 Stat. at L., 420,) and the supplementary act of the 14th July, 1832, (4 Stat. at L., 603.)

The defendant below (Hale) claimed to hold by virtue of the fifth section of the pre-emption act of the 12th April, 1814, (3 Stat. at L., 122,) together with the act of 1st March, 1843, (5 Stat. at L., 603.)

The jurisdiction of this court was therefore clear.

The action was brought in the Hot Springs Circuit Court, (State court,) which, after a trial, gave the following judgment:

"It is therefore considered by the court that said plaintiffs, William H. Gaines and Maria Gaines his wife, Albert Belding, Henry Belding, and George Belding, do have and recover of and from the said defendant, John C. Hale, as well the possession of the tract or parcel of land described in their declaration in this behalf, as all that part of a certain tract or parcel of land designated on the public surveys as the southwest quarter of section thirty-three, in township two south, of range nineteen west, which lies between a dividing line sometimes called Mitchell's line, heretofore established by one Milus H. Wood and said Hale, between their respective possession on said quarter section and the northern or upper line of a place in Hot Springs Valley, commonly called Texas, and which part of said quarter section of land includes and embraces all the buildings, houses, out-houses, bath-houses, lots, enclosures, and gardens, connected with or pertaining to the tavern stand, sometimes and generally known as Hale's tavern stand, immediately below and south of the premises used and occupied by Warren & Stidham as a tavern stand during

the summer of the year 1851, and the said sum of five hundred dollars for their damages sustained in this behalf, and so as aforesaid assessed by the jury, as also all their costs in this behalf expended to be taxed, &c. And it is ordered by the court, that said plaintiffs do have execution hereof, by writ of possession for said land and premises, with command by levy and collect the damages and cost aforesaid, as is by law in such cases provided."

In the course of this trial, sundry bills of exceptions were taken, which, for the purpose of this report, it is not necessary to state particularly. Under them, the case was carried to the Supreme Court of Arkansas, which affirmed the judgment of the court below, except as to a question of damages, which need not be further mentioned.

The case was brought up to this court by a writ of error issued under the twenty-fifth section of the judiciary act.

It was argued in this court by *Mr. Frederick P. Stanton* for the plaintiff in error, and by *Mr. May* and *Mr. Watkins*, upon a brief filed by *Mr. May*, *Mr. Brent*, and *Mr. Watkins*, for the defendant in error.

Mr. Stanton, for the plaintiff in error, first attacked the title of the Beldings, as between them and the United States; but, as the court did not decide this point, the argument upon it is omitted.

The next point was to show that the act of 1843 extended to the benefit of pre-emptioners under the act of April 12th, 1814. As this was the principal point in the case, his argument is reported as follows:

The act of 1814, already referred to as the foundation of Hale's title, relates back to the act of February 5th, 1813. Stat. at Large, 2 vol., 797, 798.

These earliest among the pre-emption laws have no prohibition against a sale or transfer of the right derived under them, and hence such transfers were always treated as valid until subsequent laws made them null. The record shows Hale's title to be regularly derived from John Percifull, who settled

on the land in 1812, and continued to occupy it for many years afterwards.

Although in 1814 the land in question was in the county of Arkansas, one of the organized counties of the Missouri Territory, and therefore supposed to be subject to settlement and pre-emption, the General Land Office subsequently held the contrary, because the Indian title had not then been extinguished. By the treaty with the Quapaw Indians, made November 15th, 1824, the land was ceded to the Government.

The reservation act above quoted was passed April 20th, 1832.

The remedial act for the benefit of pre-emptioners under the act of 1814 was passed on the 1st March, 1843, (5 Stat., 603:) and as everything depends on the construction of this law, it is deemed proper to quote it at large, as follows:

"An act to perfect the titles to lands south of the Arkansas river, held under New Madrid locations and pre-emption rights under the act of 1814.

"*Be it enacted, &c.*, That the locations heretofore made of warrants issued under the act of 17th February, 1815, entitled 'An act for the relief of the inhabitants of the late county of New Madrid who suffered by earthquakes,' which were made on the south side of the Arkansas river, if made in pursuance of the provisions of that act in other respects, shall be perfected into grants in like manner as if the Indian title to the lands on the south side of said river had been completely extinguished at the time of the passage of said act.

"Sec. 2. *And be it further enacted*, That in all cases in which the locations so made, &c., may have been sold, &c., the owner of the warrants, &c., shall have a right to enter other lands, &c.

"Sec. 3. *And be it further enacted*, That every settler on the public lands south of the Arkansas river shall be entitled to the same benefits accruing under the provisions of the pre-emption act of 1814, as though they had resided north of said river.

"Sec. 4. *Be it further enacted*, That all Cherokee pre-emptions which have been or may be located * * * south of the base line in Arkansas, shall be confirmed, and patents shall issue as in other cases."

The Indian title to the lands north of the Arkansas river had been extinguished by the treaty with the Osages, made 10th November, 1808.

7 Stat., 107.

In view of the rights of a bona fide settler on the Hot Springs tract in 1814, does the act of 1843 repeal the reservation act of 1832? The department holds the negative. Yet it is believed that the repugnance of the two statutes is such that they cannot be construed to stand together.

Not only the title, but the whole scope of the law, indicates that the purpose of Congress was to remove the difficulty arising from the Indian title resting on the lands south of the Arkansas in 1814, and subsequently. As a historical fact bearing on this point, the court is referred to the report of the committee which introduced the bill into the Senate. They expressly say that, inasmuch as the Indian title south of the Arkansas river had not been extinguished in 1814, and some pre-emptions had on that account been decided to be unlawful, "the bill therefore provides that the settlers on both sides of the Arkansas river shall be placed upon the same footing."

Sen. Rep. No. 36, 2d sess. 27th Cong.

The act of 1843 intended to confirm the pre-emption rights south of the Arkansas river *ab initio*—that is to say, it intended to place the pre-emptor in the position he would have occupied if the Indian title had been previously extinguished. That Indian title was the only obstacle; and the professed object of the law of 1843 was to remove that obstacle, to cure that defect of title, and to give full force and effect to the law of 1814, south of the Arkansas as well as north of it.

"A remedial act shall be so construed as most effectually to meet the end in view, and to prevent a failure of the remedy."

Dwar., Stat., 614.

"Beneficial statutes, therefore, have always been taken and expounded *ultra* the strict letter, but not, it is well and wisely said, *contra* the letter."

Ibid., 623.

"Every affirmative statute is a repeal of a precedent affirmative statute, where its matter necessarily implies a negative;

but only so far as it is clearly and indisputably contradictory and contrary to the former act 'in the very matter,' and the repugnancy such that the two acts cannot be reconciled; for then *leges posteriores priores contrarias abrogant.*"

Ibid., 530 to 531, and authorities there quoted.

The enactment of 1843 is, that "every settler south of the Arkansas shall be entitled." John Percifull was one of those settlers, and he is included in the very words of the law—as much so as if the settlers had been enumerated and called by name. The Hot Springs were reserved in 1832, but John Percifull was settled there in 1814. The repugnance of the two laws is "in the very matter;" they cannot stand together.

Against this construction have been quoted:

Wilcox *v.* Jackson, 13 Pet., 513.

Gear *v.* United States, 3 How., 120.

Of these, the latter alone deserves consideration, having an apparent application to the case in hand.

In the case of Gear, a lead mine was claimed by pre-emption, upon the ground that all the lands in a certain district were directed to be sold by a law passed in 1834, which law made some special exceptions, but did not except lead mines. This court held that the general law of 1807, which reserved all lead mines and salt springs from sale, was operative in the district mentioned, notwithstanding the broad terms of the law of 1834.

The facts of this case are almost the reverse of those now before the court. The act of 1807 was a general law reserving all salt springs and lead mines, and the policy of that law had been thereafter uniformly and consistently maintained in the disposition of all the public lands. On the other hand, the act of 1832 was a special reservation of an isolated exceptional tract of land, which at that time was already occupied by a settler.

The act of 1834, in Gear's case, was an act of ordinary legislation, establishing a new district for the sale of lands, apparently not contemplating a departure from the general policy prevailing in other land districts, and only indirectly and inferentially affecting rights of pre-emption, which were not the

primary object of the law. On the contrary, again, the act of 1843 was a special act, designed to operate retrospectively upon a specified class of settlers, and to confirm a certain number of pre-emptions from their inception in 1814.

In Gear's case, from a series of laws *in pari materia*, and not necessarily repugnant, a presumption is attempted to be raised against the uniform well-settled policy of the laws, merely because the general terms of the last law do not exclude that presumption; while in the Hot Springs case there is no mere inference or implication to be drawn from general expressions or omissions, but there is an affirmative law, including this particular object in its very terms, and passed for that very purpose.

In the Gear case, the law might very reasonably be understood to mean, "all the lands in this district shall be sold, as far as the general policy of the laws allow such sales, and no further." In the present case, it would be necessary to interpolate in the law words of exception, thus: "Every settler on the public lands south of the Arkansas river," except the old pioneer, John Percifull, shall be entitled, &c.; the remedial policy of curing the defects of title under the act of 1814 shall not have its full effect; it shall cure everybody's title except John Percifull's.

Finally, in the one case, the general reservation was made long before the party had performed any act out of which his claim arose; in the other case, the act of settlement was performed long before the reservation, and the remedial act comes afterwards to recognise the meritorious character of the original act, and to remove an obstacle which prevented its operation at the time. The act of 1843 goes a quarter of a century behind the act of 1832, and legislates upon a particular state of facts known to have existed at that early day.

There is not a single argument used by the majority of the court in Gear's case, which has any bearing whatever on the present controversy. It is true there is one general expression, which is thought to cover this case, being a statement of the abstract rule or principle of construction applicable to the facts. It is as follows:

"The rule is, that a perpetual statute, (which all statutes are, unless limited to a particular time,) until repealed by an act professing to repeal it, or by a clause or section of another act directly bearing in terms on the particular matter of the first act, notwithstanding an implication to the contrary may be raised by a general law which embraces the subject matter, is considered still to be the law in force as to the particulars of the subject matter legislated upon."

It has already been shown that in the Hot Springs case there is "a section of another act directly bearing in terms on the particular matter of the first act," inasmuch as the words "every settler" necessarily comprehend the plaintiff in error. Indeed, so far as this court knows or can know from this record and the laws, John Percifull was the only settler in 1814 south of the Arkansas. There may have been others; but if there were not, then the law of 1843 would be without any operation, unless this case should be included. It can hardly be maintained that the construction of the law depends upon the number of cases included within it, or that Percifull's interest in the law of 1843 is to be defeated or established, according to the fact that the benefit of it is or is not to be shared by others.*

But, again, referring to the abstract rule stated by the court, as quoted above, it is not a mere "implication," raised by the act of 1843 against the reservation of 1832. It is a special and direct contradiction or repugnancy "in the very matter," for the reason already stated, viz: that the pre-emption on the Hot Springs tract is as certainly included in the very words

* Since this brief was prepared and in print, I have received the following letter from the Commissioner of the General Land Office:

GENERAL LAND OFFICE, *January* 26, 1859.

F. P. STANTON, Esq., present:

SIR: Your letter of the 12th instant, desiring to be furnished with a statement of the number of the pre-emptions claimed under the third section of the act of 1st March, 1843, entitled "An act to perfect the titles to lands south of the Arkansas river," &c., has been received, and in reply I have to state, that with the exception of the "Hot Springs" case, this office is not aware that any claims by pre-emption have been made under the above-mentioned act.

Very respectfully, &c., THOMAS A. HENDRICKS, *Commissioner.*

and in the necessary intendment of the law, as if it had been the only case of settlement south of the Arkansas river, in the year 1814.

Quere. Does the case of Gear *v.* the United States establish anything more than this: that a subsequent law directing lead mines to be sold does not so far repeal the act of 1807 as to make such mines subject to settlement and pre-emption?

The right of pre-emption not being the object of the law of 1834, but only an incident to the fact of lands being in market, that incident does not attach in the prohibited cases of lead mines and salt springs. If this be a fair statement of the point decided in Gear's case, it is evidently not at all like the case now before the court, because, in the latter, the very object of the law of 1843 was to confirm pre-emption rights themselves.

It has been already stated that the reservation act of 1832 presents a similar difficulty in the way of the Belding title under the act of 1830 and the supplementary act of the 14th July, 1832. But there is this difference in the two cases: the two acts—that of the 20th April, and that of the 14th July, 1832—were passed at the same session of Congress, and of course, according to the established rule of construction, must have a more intimate relation than the acts of 1832 and 1843. Inasmuch as Belding had acquired no right under the act of 1830, the reservation act of April might well be considered as an exception from the terms of the act passed in July following.

Unless this act of 1843 be construed to repeal the reservation act of 1832, it is admitted that no right accrues under the act of 1814. The land office, having uniformly maintained the existing validity of the act of 1832, the parties to this record were never in a condition to make proof of their right to the satisfaction of the register and receiver. In 1851, the Secretary of the Interior authorized an investigation, and it was then that he allowed the heirs of Belding to make their entry, as stated above, although he still insisted that the land was reserved from sale or entry by the law of 1832.

In the record will be found the proceedings of the register and receiver on the pre-emption claim of John Percifull. They differed in his case, as they did in that of Belding's heirs. If

these officers constitute a judicial tribunal, from which there was no appeal under the laws of 1814 and 1830, then both parties stand upon precisely the same footing; nor can it be of any importance that the Secretary of the Interior has undertaken to pronounce in favor of the one and against the other. It was not his province to decide at all.

All the later pre-emption laws provide for an appeal to the Commissioner, and finally to the Secretary. In the absence of any appellate power, the general principle of law applicable would pronounce the divided opinion to be equivalent to an adverse decision.

But it may be that the register and receiver, or either of them, have been so grossly partial, or so plainly regardless of credible testimony, as to give evidence of actual fraud. Is the false decision of the register and receiver, in such a case, to preclude forever the just claims which have been either corruptly, or capriciously and perversely, ignored?

In the case of Cunningham *v.* Ashley et al., 14 How., 377, the register and receiver had not acted on the proof at all; yet it was held that the proof ought to have been satisfactory to them, and this court decreed in favor of the pre-emption. What is the distinction between refusing to hear proof at all, and refusing to give it a fair and rational bearing upon the rights of parties? According to the principle laid down in Lytle *v.* the State of Arkansas, it is only when the register and receiver "act within the law, and the decision cannot be impeached for fraud or unfairness," that "it must be considered final."

In the cases quoted, however, the legal title had passed from the United States, and was in litigation between the parties. No such question is now presented to this court. Neither party to the record has the legal title; that still remains in the Government. The utmost result of the present proceeding will be to transfer the mere possession from one party to the other, without any power on the part of the court to compel the issuance of a patent. If, however, the jurisdiction be such as to authorize the court to determine the possession according to the equitable rights of the parties under all the

acts of Congress, there can be no doubt that the department will recognise and act upon the decision.

The action of the register and receiver being incomplete, their judgment being inoperative, and the grant suspended, the courts must examine the facts, in order to ascertain which party, under the laws, is entitled to hold the land. If, upon the facts, the register and receiver ought to decide in favor of one, and the President ought to issue a patent accordingly, if the case is still in that condition which admits of doing justice through the action of the executive officers themselves, even undoing all that may have been improperly done, surely the court will not hesitate to leave the naked possession with that party which has the superior equity, and is entitled to remain on the land.

The court below refused to hear any testimony, either to invalidate the entry made by Belding's heirs, or to establish the pre-emption right of John Percifull. No opportunity was given to prove fraud, which would make void the title of the plaintiffs below. The case must be sent back, in order that the material facts may be determined by a jury.

The New Madrid Location.

This was not merely an outstanding title. Hale had purchased a portion of that interest, and produced it in his own right, as a defence to the action. All testimony on this point was excluded, although all formal objections to the New Madrid certificate and survey were waived.

Attorney General Reverdy Johnson thought this New Madrid location good and valid.

5 vol. Opinions, 237.

Cushing thought the contrary. See his opinion, 30th August, 1854.

The following points are taken from the argument of *Mr. Watkins* for defendants in error:

The New Madrid claim of Langlois, under which the plaintiff in error claims, is void, because it could not have been located as alleged in 1819. The title of the Juappan Indians

to the land south of the Arkansas river had not been extinguished at the passage of the New Madrid act of 1815.

2 Ins. and Opin., pages 158, 81, 91, 28, 10, 11, 13, 25, and 816.

The claimant had only a floating certificate of a right to locate, and there was an application in his name, by third persons, whose authority has not been proved, for a survey to include the Hot Springs; but there was no official survey, nor any record of it. Until returned to the recorder of land titles at St. Louis, from whose quasi judicial office the title emanated, and approved by him, and the claimant had reconveyed his injured land to the United States, and received a patent certificate from the recorder, no location could take place, so to give him a vested right to the land in question. Down to that period, and until the exchange of land took place, the claimant was not bound, but might abandon his proposed location, or change it for another, or sell his float, or elect to keep his injured land; and so the United States would be free to grant or dispose of its own land in any lawful way. A location begun, but not ended, is no location.

Bagnell *v.* Broderick, 13 Peters, 436.

Barry *v.* Gamble, 3 Howard, 51.

Lessieur *v.* Rice, 12 Howard, 60.

Cabune *v.* Lindel, 12 Missouri, 184.

Kennett *v.* Cole, 13 Missouri, 140.

At the time of the alleged location, in 1820, no location could have been made in Arkansas Territory, because Congress, by the act creating that Territory, had diminished the area of location. Nor had the land in question been attached to any land office. It had not been surveyed, and was in no sense authorized to be sold.

Stoddard *v.* Chambers, 2 Howard, 284.

Mills *v.* Stoddard, 8 Howard, 365.

Easton *v.* Salsbury, 23 Missouri, 100.

None of the subsequent New Madrid acts affect this case, so as to cure a defective location where none had been made, or where, if made, it would have been void.

In 1838, on application to the surveyor general of *Arkan-*

sas, a survey was made, and returned to the recorder of land titles in *Missouri*, who issued a patent certificate to Langlois. These proceedings were void, because those officers had no power over the subject. Arkansas was then a State, and no such location could be made. By the act of 26th April, 1822, the time for making locations had absolutely expired.

See Easton *v.* Salsbury, 21 Howard, 426.

So far as concerned the rights of the United States, this land had been reserved, and any location of it forbidden by act of 20th April, 1832. And the land was appropriated to the Belding pre-emption by the act of 29th May, 1830, at which time the right of the pre-emptor became vested. For like reasons, this New Madrid claim is not aided by the act of March 1st, 1843, which is in general terms, and might well apply to locations made during the life of the law, and valid in all other respects, except the one that act was intended to cure.

The Belding pre-emption is valid, notwithstanding the act of 20th April, 1832. The right of the pre-emptor had become vested on the 29th May, 1830. By the act of 14th July, 1832, he, as well as all persons so entitled, were allowed until after the completion of the public surveys to make proof and payment. Congress, no more than the settler, could know, in advance of the public surveys, on what tract his improvement would fall; and, taking the acts of the same session *in pari materia*, the reservation act must be construed to prohibit any future location or entry, but not to impair a right already vested, or to take the land of one man, and reserve or grant it to another. Unless the pre-emption vested on the 29th May, 1830, the grant was illusory; and Congress, by the act of 14th July, 1832, recognised its plain duty of completing the public surveys, so as to enable claimants to comply with the conditions of the original law. All the decisions sustaining pre-emption rights as against a subsequent *grantee* of the Government, proceed upon the idea, that pre-emption acts, like other laws offering rewards upon conditions, are proffered contracts. When the conditions are complied with, the pre-emptor has a title by *contract*, with *relation* to the acts done, determining the period of time when the right vested.

Lytle *v.* the State, 9 Howard, 334.
McAfee *v.* Keirn, 6 Smedes and Marsh., 789.
Taylor *v.* Brown, 5 Cranch, 234.
McArthur *v.* Browder, 4 Wheaton, 448.
Fenley *v.* Williams, 9 Cranch, 164.
Isaacs *v.* Steele, 3 Scam., 79.
Benner *v.* Manlove, ib., 339.

No reservation or appropriation can prevail against a pre-emption right, unless it existed at the passage of the act, as was expressly held in Wilcox *v.* Jackson, 13 Peters, 511, and United States *v.* Fitzgerald, 15 Peters, 407. This precise question was adjudicated by this court in Lytle *v.* the State, 9 Howard, 334, and Bernard *v.* Ashley, 18 Howard, 45, where the question was between a pre-emption claim under the act of 1830, and grants made by Congress, after that act had expired, and before the act of 14th July, 1832.

This court has jurisdiction to sustain an equitable title, made a legal one by State legislation, subordinate to the powers of Congress, even though the rights of the United States be incidentally drawn in question. The only inquiry is, have the State courts correctly interpreted the laws of Congress?

United States *v.* Fitzgerald, 15 Peters, 407.
Wilcox *v.* Jackson, 13 Peters, 511.
Carroll *v.* Safford, 3 Howard, 441.
Ross *v.* Barland, 1 Peters, 656.
Clark *v.* Smith, 13 Peters.
Bagnell *v.* Broderick, ib., 451.
Irvine *v.* Marshall, 20 Howard, 558.
Rector *v.* Gaines, 19 Ark., 80.

In Fenn *v.* Holme, 21 Howard, 481, the plaintiff in ejectment had no location, but a mere floating right; and the scope of the decision is limited to actions commenced in the United States courts.

Mr. Justice CATRON delivered the opinion of the court.

A contest for the ownership of the Hot Springs, in Arkansas, has been pending for some years before the General Land

Office, and in the courts of that State. One party derive their title through a pre-emption claim, as an occupant under the acts of Congress of 1830 and 1832, and the other by the location of a New Madrid warrant on the same land.

In December, 1851, the heirs of Belding were allowed to enter the quarter section, including the springs. This entry was held to be valid by the State courts, and to clothe them with a sufficient legal title to sustain an action of ejectment, according to the laws of Arkansas. They held the decision of the register and receiver, in favor of the occupant claimants, to be conclusive evidence of title, as against all persons who could not show a better opposing claim.

As between the titles of the United States and Belding's heirs, the State courts did not decide; but only, that the outstanding title in the United States could not be relied on by the defendant in this action; nor is the validity of the entry of Belding's heirs drawn in question in this court.

The defendant relied on a survey made in June, 1838, founded on a New Madrid certificate for 200 arpens.

To support this survey, an application was produced, dated 27th January, 1819, signed by S. Hammond and Elias Rector, addressed to William Rector, surveyor of the public lands, &c., asking to have surveyed and to be allowed to enter the recorder's certificate for 200 arpens, granted by him to Francis Langlois, or his legal representatives, and dated the 26th November, 1818, (No. 467.) The survey to be made in a square tract; the lines to correspond to the cardinal points, and to include the Hot Springs in the centre. In 1818, the spring was in the Indian country, to which, of course, no public surveys extended. And as the act of 1815, providing for the New Madrid sufferers, only allowed them to enter their warrants on lands "the sale of which was authorized by law," the unsurveyed lands could not be legally appropriated; and, of necessity, the surveyor general disregarded the application to have a survey made for Langlois. And thus the claim stood from 1818 to 1838.

The defendant offered in evidence the certificate of a private survey of the claim of Langlois, made by James S. Conway,

D. S., dated July 16th, 1820, which includes the spring. This paper the court also rejected.

Until the survey on Langlois's claim was presented to the recorder of land titles at St. Louis, and recognised by him as proper and valid, it could have no force, as this was the only mode of location contemplated by the act of 1815. So it has been uniformly held. Bagnell *v.* Broderick, 13 Peters, 436; Lessure *v.* Price, 12 Howard, 9.

The act of April 26th, 1822, validated locations of New Madrid certificates then existing, and which had been made in advance of the public surveys; but the second section of the act declared that future locations should conform to the public surveys, and that all such warrants should be located within *one year* after the passage of that act.

As the public surveys then existing in Missouri and Arkansas Territory were open to satisfy these claims, there was no difficulty in complying with the act of 1822.

Reliance is placed on the act of Congress of March, 1843, to maintain the survey of 1838, of the New Madrid certificate. That act provides, that locations before that time made on New Madrid warrants, on the south side of Arkansas river, if made in pursuance of the act of 1815 *in other respects*, shall be perfected into grants, in like manner as if the Indian title to the lands on the south side of the river had been completely extinguished at the time of the passage of said act of 1815. The act of 1843 does not apply to the survey and location of Langlois made in 1838, for several reasons:

1. The sale of the land thus surveyed was not authorized by law; the act of April 20th, 1832, having reserved from location or sale the Hot Springs, and four sections of land including them as their centre.

2. The attempted location was void, because barred by the act of 26th April, 1822, which act was not repealed or modified by the act of 1843. This act referred to locations made on the south of the river Arkansas, of lands regularly surveyed and subject to sale, and which locations had been made on or before the 26th April, 1823, when the bar was interposed.

We are of the opinion that the New Madrid survey of 1838

was altogether invalid, and properly rejected by the State courts.

It has been earnestly pressed on our consideration, that the entry of Belding's heirs is also void, because the land it covers was not subject to entry by an occupant claimant, or any one else, after the act of April 20th, 1832, had reserved it from sale.

Admitting it to be true, that the act of April, 1832, was passed when no individual claimant had a vested right to enter the land in dispute, still the 25th section of the judiciary act only gives jurisdiction to this court in cases where the decision of the State court draws in question the validity of an authority exercised under the United States, and the decision is *against* its validity. Here, however, the decision was in favor of the defendant's entry, and sustained the authority exercised by the department of public lands, in allowing Belding's heirs to purchase. Moreover, the plaintiff in error is not in a condition to draw in question the validity of Belding's entry. He relies on an outstanding title in the United States to defeat the action. Being a trespasser, without title in himself, he cannot be heard to set up such title. "To give jurisdiction to this court, the party must claim for himself, and not for a third person, in whose title he has no interest." Henderson *v.* Tennessee, 10 How., 323. The plaintiff in error must claim (for himself) some title, right, privilege, or exemption, under an act of Congress, &c., and the decision must be *against* his claim, to give this court jurisdiction. Setting up a title in the United States, by way of defence, is not claiming a personal interest affecting the subject in litigation. This is the established construction of the 25th section of the judiciary act. Montgomery *v.* Hernandis, 12 Whea., 132.

If it was allowed to rely on the United States' title in this instance, the right might be decided against the Government, where it was no party, and had not been heard.

A claim is set up in defence, that John Percifull was entitled to a preference of entry under the act of 1814; which act, it is insisted, was revived by that of 1843, section 3. Suppose

that Percifull's right to appropriate the land in dispute was undoubted, and that the register and receiver had allowed the heirs of Belding to enter wrongfully; still, the courts of Arkansas, in this action of ejectment, had no right to interfere, and set up Percifull's rejected claim.

But this is of little consequence, as, when the act of April, 1832, was passed, reserving the Hot Springs from sale, Percifull had no vested interest in the land that a court of justice could recognise. Then, the United States Government was the legal owner, and had the power to reserve it from sale; so that the offer to purchase in 1851, under the assumed preference to entry claimed for Percifull, was inadmissible. Had the entry been allowed, in face of the act of Congress, such proceeding would have been merely void.

These being the only questions within our jurisdiction worthy of consideration in the causes Nos. 15, 16, 17, 18, and 19, it is ordered that the respective judgments rendered therein by the Supreme Court of Arkansas be affirmed.

JUAN JOSE GONZALES, APPELLANT, *v.* THE UNITED STATES.

Where a grant of land in California describes it by name and boundaries, and then states that the land of which donation is made is one league in length and three-quarters of a league in breadth, a little more or less, as shown by the map which goes with the expediente, with the usual reservations of the sobrante or overplus to the use of the nation, the grant will be confirmed to the extent of one league in length and three-quarters of a league in breadth, without extending it to the boundaries mentioned.

THIS was an appeal from the District Court of the United States for the northern district of California.

All the title papers are set forth in the opinion of the court.

It was argued by *Mr. Hepburn*, upon a brief filed by himself and *Mr. Volney E. Howard*, for the appellant, and by *Mr. Stanton* for the United States.

The counsel for the appellant said this claim will be found, on examination, to be one of the most meritorious that has ever been presented for confirmation.

The Government has never opposed it; yet, under the present decision, the claimant gains but little benefit from his title.

The land commissioners, in their opinion, say that it is a grant by metes and bounds, and that, consequently, no *sobrante* can result; but, in their decree, they limit the extent of the land from east to west to three-quarters of a league, a little more or less.

The District Court affirmed the decision of the commissioners.

The claimant contends that the land should be confirmed to the boundaries mentioned in the decree of concession, making him, in the language of the decree of concession, "the owner of the land known by the name of San Antonio, or El Pescadero, bounded by the rancho of Antonio Buelna, the sierra, the coast, and the Arroyo del Butano," without limitation as to quantity, there being none in the decree of concession.

The quantity of land mentioned in the grant was erroneously inserted, through a clerical error, as we will show hereafter.

But, even admitting that it was inserted correctly, it is insisted by the claimant that the quantity should be disregarded where all the boundaries are given in a grant, as in this case.

The naming of a quantity of land in a grant, and reservation of the surplus to the nation, does not prevent the title from passing to the grantee, if all the boundaries are given. A clause in the grant, naming quantity and reserving surplus, in such a case, is an unmeaning formula. The utmost effect that could be given to the clause would be to reserve the right to the Government, on proper proceedings, to divest the title as to the surplus; but, in the mean time, the title to the whole land is vested in the grantee.

This land is not claimed by any adverse claimant. The Government never interfered with Gonzales in any way.

It will be seen, by the testimony of Manuel Jimeno, that Gonzales had occupied the land from 1833. If the Government had the right to resume the ownership of the surplus, its non-action for so long a period raises a presumption of a relinquishment of the right.

The quantity named in the grant is a clerical error. It was taken from the marginal note on the map, written by some illiterate person, and which the court will perceive, by inspection of the traced copy in the record, is such as would readily mislead.

It describes the land as one league from north to south. We cannot make out the word which professes to give the distance from east to west.

The map was made as part of the petition of Gonzales to Figueroa for the land, and it was presented to Figueroa with the petition. Gonzales, in that petition, refers to the map, and says that the ranch delineated on it includes "*a square of about four leagues*, extending from the coast to the sierra, and from the rancho of San Gregorio (rancho occupied by the citizen Antonio Buelna) to the rancho Punta de Año Nuevo," and asks for the whole tract, without any limitation of quantity.

It may be remarked here that Gonzales states, in his petition to Figueroa, that he had a family of thirteen persons, and the grant recites that it is for his benefit and that of his family. He also states that he had five hundred head of cattle.

The rancho is pasture land. Four leagues was little enough to provide for Gonzales's family and the increase of his stock.

There can be no doubt the Governor would have granted him that quantity, or much more, if he had asked for quantity. The land had been abandoned by the mission of Santa Cruz, and it was a benefit to the country to have it occupied.

Witnesses were examined, by order of Figueroa, before he made the decree of concession. Salvio Pacheco says the rancho is one league to a league and a half from east to west. Manuel Larios says that it is two leagues from the beach to the hills.

We may presume that the marginal note had not then been

written on the map, or, if written, it was not properly read by the clerk who made out the grant.

The decree of concession evidently intended to invest Gonzales with the title to the whole tract, and it calls upon the interested party again to "present his title, that it may be revalidated."

If the party is to get only the quantity named in the grant, he will be deprived by it, practically, of the greater part of his property.

The decree of concession gave him the whole tract. Does the grant, which was made by virtue of the decree, and in order to "revalidate" it, take away the greater portion of the land given by the decree?

The grant refers to the map, to ascertain the land, and the map exhibits the natural objects which are its boundaries.

"When a deed of land describes the subject matter by monuments clearly defined, such as a river, a spring, a mountain, a marked tree, or other natural object, and courses, distances, and quantity, are likewise inserted, which disagree with the monuments, the description by monuments shall, in general, prevail; for it is more likely that a party purchasing or selling land should make mistakes in respect to course, distance, and quantity, than in respect to natural objects, which latter, from being mentioned in the deed, are presumed to have been examined at the time.

"The monuments which shall control course, distance, etc., under such circumstances, may be any objects which are visible and clearly ascertained, as lands of other individuals or their corners."

4 Phillips on Evidence, Cowen and Hill's notes, page 548, and authorities there cited.

It is evident that the land commissioners thought that the extent of the land from east to west, as delineated on the map, was no more than three-quarters of a league, otherwise they would have confirmed the claim to a greater extent.

They have followed the phraseology of the grant, and added the words, "a little more or less," to the designation of quantity, and perhaps these words give the claimant the whole

land; but as they would not enlarge the tract beyond three-quarters of a league, under the present ruling of those having charge of the making of surveys and the issuance of patents, a decision of this court is asked, to establish the rights of the claimant as to the extent of land to be confirmed to him.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the District Court of the United States for the northern district of California.

[Translation of Title.]

Provisionally authorized by the Administration of the Maritime Custom-House of Monterey, for the years 1832 and 1833.

Jose Figueroa, General of Brigade of the National Armies of Mexico, Commander General, Inspector, and Superior Political Chief of Upper California.

Whereas Juan Jose Gonzales, a Mexican by birth, has, for his own personal benefit and that of his family, petitioned for the land known by the name of San Antonio, or El Pescadero, bounded by the rancho Antonia Buelnos Sierra, the coast, and the Arroyo of Buntano, the proper measures and examinations being previously made, as required by laws and regulations, using the powers which are conferred on me in decree of the seventh of this month, in the name of the Mexican nation, I have granted him the aforesaid land, declaring to him the ownership of it by these presents—said grant being understood to be in entire conformity with the provisions of the laws, subject to the approval or disapproval of the most excellent territorial deputation and of the supreme Government, under the following conditions:

1. That he will submit to those which may be established by the regulation which is to be made for the distribution of vacant lands; and, in the mean time, neither the grantee nor his heirs can divide or alienate that which is granted to them, subject to any tax, entail, pledge, mortgage, or other encumbrance, even for pious purposes, nor convey it in mortmain.

2. He may enclose it, without prejudice to the crossings, roads, and servitudes; he will enjoy it freely and exclusively,

making such use or cultivation of it as may best suit; but within one year, at furthest, he shall build a house, and it shall be inhabited.

3. When the ownership is confirmed to him, he will request the proper magistrate to give him juridical possession in virtue of this title, by whom the boundaries will be marked out—in which, besides the bounds, he will place some fruit or forest trees, of a useful character.

4. The land of which donation is made him is one league in length by three-quarters of a league in breadth, a little more or less, as shown by the map which goes in the expediente; the magistrate who may give the possession will cause it to be in conformity with the ordinance, in order to mark out the boundaries, leaving the surplus which may result to the nation, for its convenient uses.

5. If he contravene these conditions, he will lose his right to the land, and it will be subject to denouncement by another person.

In consequence I order, that the present serving him for a title, and being held as firm and valid, note be made of it in the corresponding book, and it be delivered to the person interested.

Given in Monterey, on the 24th December, 1833.

JOSE FIGUEROA.

(Signed) AGUSTIN V. ZAMORANO, *Sec'y.*

OFFICE OF THE SURVEYOR GENERAL OF THE UNITED STATES FOR CALIFORNIA.

Samuel D. King, surveyor general, &c., and as such now having in my office and under my custody a portion of the archives of the former Spanish and Mexican Territory or Department of Upper California, do hereby certify that the fifteen preceding and hereunto annexed pages of tracing paper, numbered from one to ——, inclusive, and each of which is verified by my initials, (S. D. K.,) exhibit true and accurate copies of certain documents on file and forming part of the said archives in this office.

In testimony whereof, &c.

[Translation of Expediente.]

Provisionally authorized by the maritime custom-house of Monterey, for the years one thousand eight hundred and thirty-three and 1834.

(Signed) FIGUEROA.

(Signed) JOSE RAFAEL GONZALES.

To his Excellency the Commanding General:

I, citizen Juan Jose Gonzales, native of the mission of Santa Cruz, resident of the town of Branciforte, residing and employed in said mission of Santa Cruz, and mayor domo of the same; married, with a family of thirteen persons; having served the nation eight years and two months as a soldier, and having obtained my discharge from his excellency the commanding general Don Manuel Victoria, with the condition of furnishing a recruit, which I did at my own expense; and finding myself with 500 head of large cattle, and having no land or place to settle on; tired of the trouble of being together in the same village where I have been, and am unable to progress, on account of the same; living where I have rated a great loss in the stock which I have placed twelve years ago; and being now actually favored by the same mission of Santa Cruz, where my deceased father sacrificed himself for twenty years, and where I served in his place, the salaries of this post rent in the same mission, (Friar Antonio Real,) satisfied with my services and those of my deceased father, has wished to favor me, by assigning to me the rancho of San Antonio, formerly El Pescadero Realengo, which is not occupied by said mission, is distant twelve leagues to the northwest, bounded by the rancho of San Gregoria, which place —— delineated on the accompanying paper, including a square of about four leagues, extending from the coast to the sierra, and from the rancho of San Gregoria (rancho occupied by citizen Antonio Buelna) to the rancho of La Punta de Nuevo, which is the further occupied by the mission, and desiring a security or guaranty in the same place, I apply, with the consent of the minister, to your excellency, with the due respect, praying that you will be pleased to give me in possession the aforesaid place, in consideration of my family, and which will

confer favor and grace on your most attached subject and servant, who wishes you many years of life, &c.

JUAN GONZALES.

SANTA CRUZ, *November* 26, 1833.

MONTEREY, *November* 29, 1833.

In conformity with the laws on the matter, let the ayuntamiento of the town of Branciforte report whether the person interested in this petition possesses the requisites to the —— attended to in his petition; whether the land he asked is included in the 20 leagues from the boundary, or 10 from the sea shore, referred to in the law of August, 1824; if it is irrigable, dependent on the seasons or pasture of land; if it belongs to the ownership of any private individual, corporation of pueblo, with everything else which may be proper to explain the matter.

This being concluded, it will pass this expediente to the reverend father minister of the mission of Santa Cruz, that he may report what he knows on the matter. Senor Don Jose Figueroa, general of brigade and commandant, inspector general, and superior political chief of the territory, thus ordered, decreed, and signed; to which I certify. FIGUEROA.

AGUSTIN V. ZAMORANO, *Sec'y.*

In compliance with your excellency's —— to this ayuntamiento, under your command in the decree of November 29th, 1833, to report whether the person interested in this petition possesses the requisites to be attended to in his request, and if the land he asks for be included in those referred to in the law:

The land asked for by the person interested in this petition may now be granted to him, for he has all the circumstances required to be attended to, and is entitled to it.

It is an unoccupied place; has no irrigable lands; has land dependent on the seasons; has been recognised as the property of the missson of Santa Cruz; and for the purposes it may serve, I sign this with the second regidor, on account of the absence ——, in the town hall of the town of Branciforte, on the 2d December, 1833.

(Signed) ANTONIO ROBLES.

(Signed) JOSE MARIA SALASON.

I agree to there being granted the petitioner, Juan Jose Gonzales, the place he asks for, as it is a place which this mission does not at present occupy; nor is it deemed necessary for it, in consideration of the fact that it has land enough for its cattle, and that, being unoccupied, it is considered public land; besides, when the mission occupied it —— had abundance of cattle, —— have died and diminished, and the few that remain do not need the land. He is a person of merit, and the mission ought to place him before any other person. He has all the requisites, and is entitled to it; and —— testimony I sign, on the 7th December, 1833.

Friar ANTONIO SURRA DEL REAL,
Minister of Santa Cruz.

MONTEREY, *December* 10, 1833.

Let it pass to the alcalde of this capital, before whom the party will produce, on information of three fit witnesses, who will be questioned upon the following points:

1. If the petitioner is a Mexican by birth; if he has served in the army; if he is married, and has children; if he is of good conduct.

2. If the land he asks for is of the ownership of any individual, or corporation or pueblo; if it is irrigable, dependent on the seasons, or pasture land, and what is its extension.

3. If he has cattle with which to stock it, or the possibility of acquiring them.

This examination being made, let him return the expediente for its decision. His excellency the political chief, commanding general, inspector and general of brigade, Don Jose Figueroa, thus ordered, decreed, and signed it, to which I certify.

(Signed) JOSE FIGUEROA.
(Signed) AUGUSTUS V. ZAMERANO.

Let the party interested in this expediente be notified to present the witnesses who are to be examined on the points included in the superior decree of the 10th instant which precedes this.

Thus I, the alcalde, decreed, ordered, and signed it, with the assisting witnesses, in the established form.

MARCELINO ESCOBAR.

Assisting witnesses:

(Signed) JOSE MARIA MALDORADO.

(Signed) JOSE ANTONIO ROMERO.

On the same day, present Juan Jose Gonzales, the foregoing act was made known to him, and having understood it, he said that he heard it, and that he presents citizens Salvio Pacheco, Manuel Larios, and Felipe Hernandez, and he signed it with me and the assisting witnesses.

(Signed) N. ESCOBAR.

(Signed) JUAN GONZALES.

Assisting witnesses:

(Signed) JOSE MARIA MALDORADO.

(Signed) JOSE ANTONIO ROMERO.

In the port of Monterey, on the 13th day of the month of December, one thousand eight hundred and thirty-three, present, Salvio Pacheco, witness presented on the part of the persons interested, oath was received in form of law.

The petitioner is a Mexican by birth; was in the army; has thirteen children. The land petitioned for has no private ownership; understood it belongs to the mission of Santa Cruz; that its extent is from a league to a league and a half from east and from north to south; he does not know how much of it is, as it is a canon which reaches to the rancho of citizen Antonio Buelna. He has two hundred head of cattle, a drove of mares and tame horses, &c.

Manuel Larios, a witness, says he is a Mexican; was in the army; is married; has children; knows that the land petitioned for pertains to the mission of Santa Cruz; that the said place is dependent on the seasons; that the land is about a league or more wide, and two from the beach to the hills.

A witness, Felipe Hernandez, repeats the same facts as stated by the prior witness.

MONTEREY, *December* 3, 1833.

The official acts ordered in the foregoing superior being fin-

ished, let the expediente be returned to the superior political chief for the superior decision. N. Escobar.

Monterey, *December* 17, 1833.

Having seen the petition with this expediente, commences the report of the municipal authority of the town of Branciforte, that of the Rev. father minister of Santa Cruz, the declarations of the witnesses, together with all other things which were presented and deemed proper to be seen, in conformity with the provisions of the laws and regulations on the matter, Juan Jose Gonzales is declared owner in fee of the land known by the name of San Antonio, (or El Pescadero,) bounded by the rancho of Antonio Buelna, the sierra, the coast, the Arroyo del Bratano, subject to the conditions which may be stipulated. Let the corresponding patent issue, let note be made in the proper book, and let this expediente be directed for the approbation of the most excellent territorial, in which case the person interested, who will be made to know this decree, will again present his title, that it may be revalidated. Jose Figueroa.

The committee on colonization and vacant lands, to whom was referred the expediente, the formation of which was caused by the petition of citizen Juan Jose Gonzales for the place named San Antonio, or El Pescadero, having examined it with the corresponding circumspection, taking into consideration at the same time the law of August 18th, 1824, those agreeing with it, and the general directions which, on the 24th November, 1828, the supreme Government of the Union gave for the better fulfilment of the first; from the examination of the expediente, the committee has become impressed with the opinion which it before held of the scrupulousness and tact with which his excellency the political chief ordered it to be made, so that neither in its formation, nor in the steps taken, in any essential requisite wanting; wherefore the committee concludes by offering to the deliberation of this most excellent deputation the following proposition:

1. Approved the grant made to citizen Juan Jose Gonzales of the place named San Antonio El Pescadero, on the 24th

December, 1833, in entire conformity with the provisions of the law of August 18th, 1824, and article 5th of the regulation of November, 1828.

MONTEREY, *May* 10, 1834.

(Signed) CARLOS ANTONIO CARRILLO.
(Signed) JOSE CASTRO.
(Signed) JOSE T. ORTEGA.
(Signed) JOSE A. ESTUDILLO.

MONTEREY, *May* 17, 1834.

In sessions of this day, the proposition of the foregoing report was approved by the most excellent deputation ordering that the expediente be returned to his excellency the superior political chief, for the convenient purposes.

(Signed) JOSE FIGUEROA.
JUAN B. ALVARADO, *Secretary.* GEORGE FISHER, *Secretary.*

Opinion of the Board by Com'r R. Aug. Thompson.

For the place called San Antonio, or El Pescadero.—Claim of for one square league of land in the county of Santa Cruz.

This claim is founded on a grant made by Governor Figueroa, on 24th December, 1833, to the present claimant, which was duly approved by the territorial deputation on the 17th day of May following. The grant describes the land as that known by the name of San Antonio, or El Pescadero, bounded by the rancho of Antonio Buelna, the sierra, the coast, and the Arroyo de Butano. The fourth condition states that the land of which donation is made is one league in length and three-quarters of a league in breadth, a little more or less, as shown by the map which goes with the expediente, with the usual reservations of the sobrante or overplus to the use of the nation. The boundaries are distinctly marked out on the map; and although there is no scale on the map, by which the extent of the boundaries can be ascertained, yet there is a note made upon it, stating that they extend one league from north to south, and three-quarters of a league from east to west. This description, taken in connection with that contained in the grant, shows very clearly that it is a grant by metes and bounds, and that consequently no sobrante can result.

The original grant is in evidence, and the genuineness of the signatures of the Governor and Secretary appearing thereon are duly proved by the deposition of David Spence. Manuel Jimeno proves that the claimant has occupied the land since 1833; that he had a house, horses, and sowings on it, and he still lives on it.

Entertaining no doubt, from the facts of the case, that the grant is a valid one to the extent of one league in length, and three-quarters of a league in breadth, it is hereby confirmed to that extent; the three-fourths of a league to be surveyed within the out-boundary represented on the diseno.

Mr. Justice CAMPBELL delivered a separate opinion, in which Mr. Justice NELSON concurred.

The plaintiff was confirmed in his claim to a parcel of land designated as San Antonio, or El Pescadero, in the county of Santa Cruz, by the board of commissioners. The description of the land in their decree is as follows:

"Being the same which has been held and occupied by the present claimant since the year 1833 to the present time, and is bounded as follows: Beginning at the mouth of the Arroyo de Butano, and running along the sea coast, and bordering thereon, to the boundary line of Antonio Buelna, the distance being one league, a little more or less; thence with the line of said Buelna east three-quarters of a league; thence a line southerly parallel with the sea coast until it intersects the Arroyo del Butano, at the distance of three-quarters of a league from the coast; thence along said arroyo and bordering thereon to its mouth, the place of beginning; the same being in extent three-fourths of a square league, a little more or less. For a more particular description, reference being had to the original grant and map contained in the expediente from the archives now in the custody of the United States surveyor general for California, the first of which and a traced copy of the latter are filed in the case."

The parties appealed to the District Court, and, upon the hearing of the cause, the decree of the commissioners was affirmed, and it was further ordered, that the claim of the

said Juan Jose Gonzales is a good and valid claim to the land known by the name of San Antonio, or Pescadero, to the extent and within the boundaries mentioned in the grant and map, the original of the former and copy of the latter being on file in the records of this case. From this decree the plaintiff appealed. The only question presented on the appeal is, whether the grant is to be located according to the natural calls in the grant, or whether the claimant is to be confined to the quantity specified in the 4th condition of the grant. But the decision of this question is reserved in the decree of the District Court, and will properly arise after the location. The failure to direct the precise manner of the location is not erroneous. The result therefore is, that the decree must be affirmed.

THE UNITED STATES EX RELATIONE RICHARD R. CRAWFORD *v.* HENRY ADDISON.

Where the matter in controversy was the right to the mayoralty in Georgetown, the salary of which office was $1,000 per annum, payable monthly, and the duration of which office was two years, this court has jurisdiction of a case coming up by writ of error from the Circuit Court of the United States for the District of Columbia.

The fact that the salary is payable monthly makes no difference; the appropriation, when made, being made for the whole sum.

A judgment of ouster being rendered in the Circuit Court, and the defendant having filed the necessary bond, and sued out a writ of error to this court, this amounts to a supersedeas upon the judgment.

The case is not a proper one for a mandamus from this court to the judges below, or for a rule upon them to show cause why they should not carry out the judgment of ouster.

The fact that the term of office will be about to expire when the writ of error is returnable, viz: December term, 1860, is not a sufficient reason for the interposition of this court at the present stage of the proceedings.

THIS was an application for a peremptory mandamus or for a rule to show cause why the judges of the Circuit Court of the District of Columbia should not execute a judgment in that court, by which Henry Addison had been directed to be

ousted of the mayoralty of Georgetown. Addison had sued out a writ of error, returnable to December term, 1860, and filed the usual bond, which the Circuit Court decided to amount to a supersedeas, and accordingly suspended the judgment of ouster. *Mr. Brent* and *Mr. Carlisle*, counsel for Crawford, filed his petition, accompanied by a transcript of the record, and moved for a peremptory mandamus or a rule to show cause. The motion was opposed by *Mr. Bradley* and *Mr. Henry Winter Davis*. The reporter has only notes of the arguments of *Mr. Carlisle* and *Mr. Bradley*.

It was agreed by the counsel, that the office of mayor, referred to in the proceedings in this case, is elected for two years, and that the salary is $1,000 per annum, payable monthly. The record so stated.

Mr. Carlisle contended that the writ of error had been improvidently issued in this case, and consequently there was no supersedeas. The act of 1816 (3 Stat. at L., 261) provides that no cause shall hereafter be removed from the Circuit Court of the United States for the District of Columbia to the Supreme Court of the United States by appeal or writ of error, unless the matter in dispute in such cause shall be of the value of $1,000 or upwards, exclusive of costs. He then made the following points:

1. Whether, assuming that the Government is entitled to execution of the judgment of ouster, and the relator to his execution for costs, the proper remedy is by mandamus from this court. That it is the proper and only adequate remedy where execution is improperly denied by the court below, and in other like cases, has been repeatedly held by this court.

United States *v.* Peters, 5 Cranch, 115.

Livingston *v.* Dorgenois, 7 Cranch, 577.

Life and Fire Insurance Co. *v.* Wilson, 8 Peters, 303.

Postmaster General *v.* Trigg, 11 Peters, 173.

Stafford *v.* Union Bank of Louisiana, 16 Howard, 135.

Stafford *v.* Union Bank of Louisiana, 17 Howard, 276.

2. That it is mere matter of discretion, whether the rule to show cause or, to prevent delays, the alternative mandamus is to be granted. It must depend upon the nature of the case.

Life and Fire Insurance Co. *v.* Adams, 9 Peters, 571.

In the present case, the record shows in advance the sole cause against the mandamus. The question is concerning the title to an office of public trust, the term of which will be about immediately expiring at the commencement of the next term of this court. Nearly one-half the term has been consumed in the proceedings below; and as the record here shows, it is established by verdict and judgment, that during all the time which has elapsed, the office has been occupied without any lawful warrant, to the defeat of the popular will, in violation of the charter of the city, and to the prejudice of the relator's right. It seems not easy to imagine a case where the discretion of the court can be more appropriately exercised in dispensing with the rule, and proceeding at once to consider the cause shown.

It remains now to inquire whether the cause shown by the record is sufficient for the denial of the motion.

That cause is, that the judgment of ouster and for costs is superseded by reason of the matters in that behalf spread upon the record.

And the sole question now is, is the judgment effectually superseded under the statutes of the United States?

The means of determining the question are before the court, in the transcript filed with the petition.

It cannot be denied, that this court will entertain such a question, and determine the legality of the supposed supersedeas, where it is alleged as cause against the mandamus. The cases already cited abundantly show this. In the case in 16 Howard, this court itself suggested the remedy by mandamus, where a supersedeas had been improvidently allowed by the court below. And in the case in 5 Cr. (U. S. *v.* Judge Peters) the cause of refusing execution being shown to be an act of the Legislature of Pennsylvania, this court, upon the motion for mandamus, considered the constitutionality of that act, pronounced it unconstitutional, and awarded a peremptory mandamus.

So that it would seem, when the question of supersedeas or no supersedeas arises, and is necessary to be determined

upon a mandamus for execution, this court will determine every question, of whatever nature, necessarily involved in the principal inquiry.

In other instances, the question of the validity of the supersedeas has arisen here in cases where there was an admitted jurisdiction of the cases on writ of error or appeal—the question being whether, notwithstanding such admitted jurisdiction, the judgment or decree below ought not to be executed, by reason of a failure to comply with the terms of the statute regulating the supersedeas.

Here we maintain that there could be no possible supersedeas, because the case is not one in which a writ of error lies.

If that writ of error were here, a simpler and more obvious course would be, to move to dismiss it. But the judgment below was rendered since the commencement of the present term of this court, and the writ is returnable to the next term, when the office will have nearly expired.

If it be clear that no writ of error lies, it would seem to be a singular defect in the law, if the successful party below can be practically and absolutely defeated of his right by the suing out of such writ. With a court below, scrupulous of deciding, in the first instance, the question of the jurisdiction of this court, it would be easy to imagine examples and to put cases where the cause of justice would be entirely perverted.

I propose, then, to show that there is no supersedeas, because no writ of error lies in such a case.

It professes to be sued out under the act of April 2, 1816, (3 Stat., 261.)

The section has been already recited.

Its language does not differ substantially from that of the 22d section of the act of 1789.

So far as it differs at all, it is more stringent and explicit. The original act was that of 27th February, 1801, (2 Stat., 106,) which uses affirmative language, allowing appeals, &c. This is negative, "that no cause shall, &c., unless, &c."

What is the "matter in dispute" in this cause? And what is "its value?"

It is a public office of personal trust and confidence.

It is not property in any sense of the term. It can neither be bought, nor sold, nor mortgaged, nor assigned. It cannot be aliened absolutely, or in any qualified form. It has none of the attributes which are inseparable from property. The proceeding below did not in any degree depend upon any profits to be earned in the office, or in any manner to arise out of it. The information would lie in the name of the United States, if the office were purely honorary, (as it is in effect, the salary being small,) it being an office of public trust, touching the rule and government of a city. It would lie as well on the relation of any private citizen and voter in the town, as on the relation of the true incumbent *de jure.*

Again: The record shows, by stipulation, that in fact there is an annual salary annexed to the office, payable month by month, as earned. This salary, if earned, for a whole year, would be one thousand dollars. Is a year's salary, or the salary for the whole term of two years, the matter in dispute here, or is the matter in dispute of that value? Clearly not. The judgment of ouster neither gives nor takes away the salary for the whole term, or for any part of it. When the information was filed, two months' salary had accrued; when the judgment was rendered, nine months' salary had accrued. During all this time, the defendant, as mayor *de facto*, received his salary, and the judgment could not deprive him of it. For the unexpired term, who will say, that if he be not ousted, he will live and earn the salary for any single month or day of it? And unless he live, and earn it, it matters not to him whether the judgment be reversed or not.

There is no value in dispute; for the services to be rendered by the defendant are to be taken as a full equivalent for the salary to be paid.

There is a wide difference between this case and that of a life estate in lands, or chattels, which, though it depend on life, is yet the subject of sale—is property—and its value in market may be ascertained.

With these principles in view, the following cases are referred to:

Ritchie *v.* Mauro, 2 Pet., 243.

Barry *v.* Mercein, 5 How., 103. (Op. Taney, C. J., 118.)

Scott *v.* Lunt, 6 Pet., 349, case of the rent charge of $73 per annum.

See the Argument of Swann, and the Op. of Marshall, C. J.

Grant *v.* McKee, 1 Pet., 248, where it was argued, that in substance and effect, a very large property was involved.

To the same effect is Ross *v.* Prentiss, 8 How., 772, and numerous other cases which might be cited.

Against these cases I am not aware of any which may be relied on by the other side, except the Col. Ins. Co. *v.* Wheeling, 7 Wheat., 534; and Lee *v.* Lee, 8 Peters, 44.

So far as these cases may be thought inconsistent with those cited by us, they are overruled by the latter.

The case in 7 Wheat. (decided in 1822) has been steadily adhered to by the court upon the principal point determined by it, and the only one which appears to have been argued, viz: that a judgment for mandamus is a final judgment. It was cited and reaffirmed for the purpose in the case of United States *v.* Kendall, and in the case of Holmes *v.* Jennison.

Having decided this point, the court directed the counsel for the plaintiff in error to produce affidavits of the value of the salary attached to the offices of directors of the company. But upon the production of them, the writ was quashed for want of jurisdiction.

In the case of Mauro *v.* Ritchie, 2 Peters, (1829,) the very question of value was the whole question. The court there, instead of directing affidavits, lay down the principle that an office which is of no value except so far as it affords compensation for labor and services, thereafter to be earned, is not the subject of a writ of error from the Circuit Court of this District.

And as to the case of Lee *v.* Lee, it is an exceptional case, which does not seem to be reconcilable with the uniform current of decisions in this court. It was decided in 1834, and there is only one member of the court (Mr. Justice McLean) who was then on the bench, and he appears to have concurred in its decision of Barry *v.* Mercein.

It is curious to contrast the conclusion announced in the case of Lee *v.* Lee with that of the latter case. In the former, the court took jurisdiction because liberty was "not susceptible of pecuniary estimation;" in the latter they disclaimed it, because the paternal rights, duties, and affections, were in like manner "utterly incapable of being reduced to any pecuniary standard of value, as it rises superior to money considerations."

Mr. Bradley made the following points:

1. The office of mayor of Georgetown is elective for two years; the salary is fixed by law at $1,000 a year, payable monthly.

2. By the act of 1816, 3 Stat., 261, sec. 1, this court has jurisdiction in cases where the pecuniary value of the thing in controversy is $1,000.

The value of an office is fixed by the salary annexed to it.

Wheelright *v* Columbian Ins. Co., 7 Wheat., 534.

3. The writ of mandamus is a high prerogative writ, and never to be used except where there is no other adequate legal remedy, and never where it would be nugatory.

Tappan on Mandamus, p. 15, and cases in notes.

The record and the return to the *certiorari* show that the jury first rendered a verdict, in substance, that neither of the candidates had the greatest number of legal votes, but it was a tie vote.

By the amended act of incorporation, 4 Stat., it is provided, in such case, that the councils of Georgetown shall in joint meeting elect a mayor from those having an equal number.

Therefore it is material that this court shall see upon what facts the jury passed, when they responded to the fourth issue, that Addison had not a majority of the legal votes.

And for this purpose it is competent to look behind the judgment and verdict.

1 Green. Evi., sec. 532, and notes.

The councils of Georgetown, as has been conceded in the argument, in point of fact, having been furnished with a copy of the verdict so returned by the jury in writing, proceeded to elect Mr. Addison in joint meeting, &c.

The mandamus, therefore, prayed for by this motion, would be nugatory—

Because it is clear, as between the real parties to this controversy, it has been ascertained by a competent authority that there was an equality of votes; and

Because the election subsequent to that finding is pursuant to the charter; and, Addison being rightfully in under this election, the writ of ouster could not remove him from the said office.

Mr. Justice McLEAN delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Columbia.

Richard R. Crawford, of the city of Georgetown, in the District of Columbia, states, that on the fourth Monday of February, 1857, in pursuance of an act of Congress to amend the charter of Georgetown, approved the 31st May, 1830, and an act to amend the same charter, approved the 11th August, 1856, by ballot to elect some fit and proper person, having the qualifications required by law, to be mayor of the corporation of Georgetown, to continue in office two years, and until a successor shall be duly elected, said Crawford, being duly qualified, received the greatest number of legal votes, and was elected mayor of the said corporation, and took the oath as mayor, and continued to discharge the duties for two years.

On the fourth Monday of February, 1859, another election was held for mayor, at which he received the greatest number of legal votes, and was by the judges declared to be duly elected; on which he presented himself in the presence of the two boards of the common council of the said corporation, and claimed that the oath should be administered; but the said two boards, alleging that there was a mistake in the returns, and that there was in fact a majority of one vote in favor of Henry Addison, who was the opposing candidate, and to whom the oath of office was administered, and who took possession of the office, and continues to exercise the duties of the same.

And your petitioner represents, that at the ensuing term of

the Circuit Court of the District of Columbia, being the court then and still having jurisdiction in the premises, an information, in nature of quo warranto, upon the relation of your petitioner, was filed in the said court by Robert Ould, Esq., the attorney of the United States for the District of Columbia, on which due process was issued against the said Henry Addison, requiring him to answer before the said court by what warrant he claimed to exercise the said office of mayor of the corporation of Georgetown.

And the said Addison having pleaded to the said information, and certain replications having been made to said plea by the said attorney of the United States, certain issues were joined thereon at the October term, 1859, of the said court, and amongst others the issue to try whether the said Henry Addison had, as alleged by him in his plea, received the greatest number of legal votes for mayor at the said last-mentioned election; and upon the issue it was found by the jury, duly empannelled and sworn to try the same, that the said Henry Addison did not receive the greatest number of legal votes for mayor at the said election; and thereupon the said court rendered judgment of ouster against the said defendant, and for the costs of your petitioner, as relator in the said proceeding, to wit, on the —— day of December instant.

Whereupon due process for the execution of the said judgment, to remove the said defendant and for the recovery of the costs aforesaid, was duly prayed of the said court; but the said Henry Addison, pretending that the proceedings upon the said information in matter of law may be reviewed by this honorable court upon writ of error, sued out such writ of error, filed a bond, and caused a citation to be issued and served upon your petitioner, to appear and answer to the said writ of error on the return thereof, to wit, at the December term, 1860. And thereupon the said Circuit Court, for the express and sole reason that such writ of error and bond operated as a supersedeas, (which is expressed in their order in that behalf,) refused to execute the said judgment, or to issue any process to remove the said defendant or for the recovery of the costs aforesaid.

Your petitioner is advised, and humbly submits, that this honorable court hath no jurisdiction of the matter of the said writ of error, and that the same must be dismissed on the return thereof. But, as hereinbefore stated, the said writ is not returnable until December term, 1860, and the term of office for which your petitioner was elected as aforesaid will then be about to expire.

Your petitioner is advised that his only adequate and proper remedy is by a mandamus from this honorable court, directed to the judges of the said Circuit Court of the District of Columbia, commanding them to issue process for the execution of the judgment aforesaid. And for that the transcript of record herewith filed plainly expresses on its face the sole cause for the refusal of such process, so as distinctly to present the whole matter of law for the consideration of the court, he prays that a peremptory mandamus may issue, or, in the alternative, that such interlocutory order may be passed to that end, as this court may direct.

Under the thirteenth section of the judiciary act of 1789, the Supreme Court has "power to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the United States." The power of the Circuit Courts to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. Kendall *v.* United States, Curtis, 12th vol., 851.

On a mandamus, a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised; but they will, in a proper case, require the inferior court to decide. Life Insurance Company *v.* Wilson's Heirs, 8 Peters, 294. It has repeatedly been declared by this court that it will not by mandamus direct a judge as to the exercise of his discretion; but it will require him to act. 13 Pet., 279.

A mandamus is a remedy where there is no other appropriate relief, and it is only resorted to on extraordinary occasions.

The writ of error is a common law writ, and is almost as old as the common law itself. This writ, to operate as a

supersedeas, must be issued within ten days after the rendition of the judgment, and on security being given for a sum exceeding the amount of the judgment. Where no supersedeas is required, security for the costs of the Supreme Court must be entered. So that, in these respects, the writ of error is said to be a writ of right, though regulated by statute.

The condition on the supersedeas bond is: "that the said Henry Addison shall prosecute the said writ of error to effect, and answer all damages and costs if he shall fail to make his plea good; then the above obligation to be void; otherwise to be and remain in full force and virtue."

In the Columbus Insurance Company *v.* Wheelright and others, 7 Wheat., 534, it was held that a writ of error will lie from this court upon the judgments of the Circuit Courts awarding a peremptory mandamus, if the matter in controversy is of sufficient value. But in that case, it did appear that the office of director of the insurance company, which was the matter in controversy, was of less value than one thousand dollars, and that its value was to be ascertained by the salary paid; the court held it had no jurisdiction.

The weight of this authority is not lessened by the fact on which the question of jurisdiction turned. The salary of the mayor of Georgetown was established by law at one thousand dollars per annum; and if this be the matter of controversy, it settles the jurisdiction.

But it is contended that a year's salary cannot be regarded as the amount in controversy, as the salary is paid monthly or quarterly, as may be most convenient to the mayor. The law regulates the pay of all salaried officers by the year, and the estimates are so appropriated in the reported bills. Any departure from this annual allowance would derange, more or less, the fiscal action of a Government or corporation.

But it is said that the remedy by writ of error is inappropriate and ineffectual, as the office of the relator will expire about the time the writ of error is made returnable. This may be a defect in the law, which the legislative power only can remove. A writ of error returnable instanter would give

more speedy relief, and might be more satisfactory, but we must administer the law as we find it.

The bond and security given on the writ of error cannot be regarded as an idle ceremony. It was designed as an indemnity to the defendant in error, should the plaintiff fail to prosecute with effect his writ of error.

We can entertain no doubt that the writ of error is the legal mode of revising the judgment of the Circuit Court in this case; and that security having been given on the judgment, as the law requires, it is superseded.

Mr. Justice WAYNE and Mr. Justice GRIER dissented.

DAVID MAXWELL, AND THOMAS WATKINS AND MARY WATKINS HIS WIFE, PLAINTIFFS IN ERROR, *v.* ISRAEL M. MOORE, MADISON M. MORRIS, HENRY MORRIS, JAMES P. KELLEN, JOHN F. BLACK, JAMES F. BATTE, AND WILLIAM M. CRAIG.

An act of Congress, passed in 1812, (2 Stat. at L., 729,) gave a bounty of 160 acres of land to every regular soldier of the army, and made void all sales or agreements by the grantee before the patent issued.

Another act, passed in 1826, (4 Stat. at L., 190,) permitted the soldier, under certain circumstances, to surrender his patent, and select other land. This act did not contain the avoiding clause contained in the first act.

These acts have no necessary connection in this particular, and an agreement to convey, made after the first patent was surrendered, and before the second was issued, held to be valid and binding.

THIS case was brought up from the Supreme Court of the State of Arkansas by a writ of error issued under the 25th section of the judiciary act.

Maxwell and Watkins brought an ejectment against Moore and others, to recover the northeast quarter of section ten, in township seven north, range seven west, containing 160 acres of land, in the county of White, and State of Arkansas. The plaintiffs claimed under the heirs of one McVey, upon the ground that, under the two acts of Congress of 1812 and 1826, McVey could not alienate his land, or covenant to convey it away

before the issuance of a patent. There were other points involved in the trial in the State courts, as will be seen by a reference to 18 Arkansas Rep., 475. But the above was the only point before this court.

It was submitted on printed arguments by *Mr. Fowler* for the plaintiffs in error, and *Mr. Watkins* for the defendants.

Mr. Fowler contended, on the part of the plaintiffs in error, that the several amendatory acts engrafted on the act of May 6, 1812, continue also in force the prohibitory clause, declaring all sales, contracts, &c., void, where they are made before the patent issues. And, if so, the contract of sale made by McVey to Pelham was null and void; and the land, entered and patented in McVey's name, enured to the benefit of his heirs and their assignees, after the patent was issued, and not to Pelham, or his assignees, under such void contract.

The Circuit Court twice expressly decided that the contract of sale from McVey to Pelham was valid, denying distinctly the rights of McVey's heirs and their assignees, under these acts of Congress; which the Supreme Court of the State broadly affirmed. See the bill of exceptions, the judgment of the Supreme Court, and its opinion, in 18 Ark. Rep., p. 475 to 480.

Hence, the plaintiffs have a right to a revision of the judgment, under the 25th section of the judiciary act of 1789.

The whole legislation upon these bounty lands, especially the acts above referred to, shows conclusively the intention of Congress to guard and protect the rights of the soldier and his heirs, and to prevent speculation in the lands.

And in all such cases, the courts construe such acts favorably and liberally, for the protection of the recipients of the bounty of the Government, and against the speculators in such bounty.

See 2 Laws, Instr., and Opin., p. 177, Opinion of Attor-General Taney, No. 115.

4 Ark. Rep., 279, Nicks's Heirs *v.* Rector.

1 Pet. Rep., 667, Ross *v.* Doe, ex dem. Barland et al.

16 Ark. Rep., 462, Wynn *v.* Garland.

2 Porter (Ala.) Rep., 152, McElyea *v.* Hayter.

The established rule of construction, and which is insisted, on the part of the plaintiffs in error, is applicable to and protects them in this case, is:

That where there are several legislative acts, *in pari materia*, relating to the same subject matter, as these are, they must be taken and compared together, in their construction, as one act, because they are considered as having one object in view, and as acting upon one system. And they must be considered as all governed by one spirit and policy, and intended to be consistent and harmonious in all their parts and provisions.

See 1 Kent's Com., (5th ed.,) 463.

23 Miss. Rep., 74, White *v.* Johnson.

1 Burr. Rep., 447, Rex *v.* Loxdale et al.

1 Dougl. Rep., 30, Ailesbury *v.* Pattison.

Smith's Com. on Stat. and Const. Construction, secs. 636, 637, 638, 639, 642, 643.

And the foregoing rule applies, although some of the statutes may have expired, or are not referred to in the subsequent acts.

See 1 Kent's Com., (5th ed.,) 463.

1 Burr. Rep., 447, Rex *v.* Loxdale et al.

Smith's Com. on Stat. and Const. Construction, secs. 637, 638.

Even a subsequent and amendatory act of limitations, not providing for a case specified in the former act, it will by the court be intended and presumed that the Legislature designed the latter to be governed by the previous act.

See 23 Miss. Rep., 301, Robertson *v.* De Moss.

See, also, on this point, Smith's Com. on Stat. and Const. Construction, secs. 638, 643.

The intention of Congress, from a fair construction of the several acts on the subject, was manifestly to protect the soldier in his float, as much as in his original warrant, and in either case to make all contracts of sale before the issuing of the patent void. And an object or thing which, within the intention of the Legislature in making a statute, is as much within the statute as if it were within the letter.

15 Johns. Rep., 380, 381, People *v.* Utica Ins. Co.
Smith's Com. on Stat. and Const. Construction, sec. 510.

Mr. Watkins said:

It is true that the military bounty act of 1812 contained a prohibition against any sale or assignment by the soldier of his bounty, until after the issuance of the patent, and declaring all such assignments void. Such restrictions are of very questionable utility, either by way of benefit or protection to the soldier, as all past experience has proved; are contrary to the almost universal policy of our laws, to allow, if not to favor, the right to free alienation of property, real as well as personal. As it regards that particular enactment, however, there was a motive, as expressed in the act itself, which was to prevent the land, so long as the title remained in the Government, from being subject to the debts of the soldier. And the reason of the law was to take away from the soldier the temptation of selling his equitable interest in a tract of land, drawn for him in the wheel, situate in a new and wild region of country, at a great distance from the soldier, and which he had never visited, and had no opportunities for judging of its value. There was also a reason, with perhaps the additional one of preventing frauds on the Government, for the analogous restriction (and that of short duration) in the first general pre-emption act of 1830, because it was supposed that, in many instances, the settlers in remote and frontier regions of country might sell their improvements or settlement rights, in ignorance of the terms and provisions of the act for their protection, or even of the passage of such an act.

But, as those military bounties were selected by lottery, it inevitably resulted, that in many instances the lands proved unfit for cultivation, and worthless. And on the 22d May, 1826, an act of Congress was passed, authorizing the soldier to surrender and reconvey to the United States the bounty tract which had been patented to him, and to locate in lieu of it a like quantity of the public land within the military district, on proof, to the satisfaction of the proper register and receiver, that the tract originally patented to him was unfit for cultiva-

tion, and that his right to it had not been divested or encumbered by sale or otherwise; and in order to entitle himself to the benefits of the act, the soldier must have removed to the Territory of Arkansas, with a view to actual settlement on the land drawn by him. This act was revived and extended by various acts, until the act of 27th of May, 1840, which revived and extended it for five years from that date. Such rights to locate were called "floats," and, as proved in this case, and indeed a part of the public history of Arkansas, were the common subject of sale and transfer. Neither the act of 1826, nor any of the subsequent acts extending it, contained any restriction whatever against alienation; and no presumption ought to be indulged in favor of a restraint on alienation, when no conceivable reason continued to exist, which might be supposed to have influenced the prohibition in the first instance. The soldier had become a settler, fully cognizant of all his rights, receiving his certificate of a floating right, not as a mere gratuity, but upon consideration of reconveying to the Government the land originally patented to him. At the time McVey sold his right of float to William Pelham, the act of 1840, authorizing such floats, was in force. If it was a power coupled with an interest, it did not cease after McVey's death. But if it was a mere naked power, it did cease, and the location, &c., was void; and the plaintiffs, as heirs of McVey cannot claim under it. But the plaintiffs are bound to claim under the patent, and so recognise the validity of Pelham's acts, and, as a consequence, the validity of his title, because, unless he acted for himself, and not as the mere naked agent of McVey, he had no power to act.

This restriction against assignment in the bounty act of 1812 is not included within the terms, spirit, or policy, of the acts of 1826, 1830, and 1840, allowing floats. Here, the sale was not of the land drawn by the soldier, but of his floating right, a mere chose in action, (Mulhollan *v.* Thompson, 13 Ark., 232,) and after all the purposes of the act of 1812 had been accomplished. McVey, in receiving pay for the sale of his float, would be guilty of an immoral and fraudulent act, to attempt to repudiate it. His supposed heirs, or rather those

who tampered with them, stand in no better situation. Besides, according to the whole theory of our Government, laws restricting alienation are to be strictly construed, and not extended without an express intention appears. It is inconsistent with the nature of property, if the individual owning property, or a right to property, has not the power to alienate it.

4 Kent Com., 479.

Mr. Justice CATRON delivered the opinion of the court.

This cause is brought before us by writ of error to the Supreme Court of Arkansas, and presents a single question for our consideration.

Allen McVey served as a regular soldier in the war of 1812, and was entitled to a tract of 160 acres of land as a bounty for his services. The land was located and granted in what is now the State of Arkansas. By the act of May 6, 1812, which granted the bounty lands, all sales or agreements made by a grantee of these lands before the patent issued were declared to be void.

Many tracts of the lands granted turned out to be unfit for cultivation, so that the soldier took no benefit; and, as compensation, the act of May 22, 1826, declares that the soldier, or his heirs, to whom bounty land has been patented in the Territory of Arkansas, and which is unfit for cultivation, and who has removed or shall remove to Arkansas with a view to actual settlement on the land, may relinquish it to the United States, and enter a like quantity elsewhere in the district, which may be patented to him. This act was continued in force by that of May 27th, 1840.

McVey surrendered his first patent according to the act of 1826, and in 1842 another issued in his name for the land in dispute.

In 1834, McVey gave William Pelham a bond to convey to him the land that might be entered on his certificate of surrender, (known as a float,) and a power of attorney to locate the same, and obtain the patent. McVey died in 1836. In 1842, Pelham entered the land in controversy in McVey's name.

A special act of the Legislature of the State of Arkansas was passed, authorizing McVey's administrator to convey the land to Pelham, which was done.

Afterwards, the plaintiffs in error obtained a conveyance from the heirs of McVey, on which their action of ejectment is founded. As the title vested in Allen McVey's heirs by the patent of 1842, they could well convey the land unless the administrator's deed stood in the way. Galloway *v.* Findley, 13 Peters, 264. That the special act of Assembly authorized the administrator to make a valid deed, and divest the title of the heirs, was decided in this case by the Supreme Court of Arkansas, and which decision on the effect of the State law is conclusive on this court. We exercise jurisdiction to revise errors committed by State courts, where the plaintiff in error claims title by force of an act of Congress, and the title has been rejected on the ground that the act did not support it. And this raises the question, whether the act of 1826, allowing the soldier to exchange his land, carried with it the prohibition against alienation contained in the act of 1812.

The court below held that it did not, and that Allen McVey did lawfully bind himself to Pelham for title.

It is insisted that the acts of 1812 and 1826 are on the same subject, must stand together as one provision, and the last act carry with it the prohibition found in the first. We are of the opinion that the acts have no necessary connection; that there was no good reason why the soldier who removed to Arkansas, and inspected his tract of land, then patented, and alienable, should not contract to convey the tract he might get in exchange. We can only here say, as we did in the case of French *v.* Spencer, (21 How., 238,) that the act of 1826 is plain on its face and single in its purpose; and that in such cases the rule is, that where the Legislature makes a plain provision, without making any exception, the courts of justice can make none, as it would be legislating to do so.

There being no other question presented by the record within the jurisdiction conferred on this court by the 25th section of the judiciary act, we order that judgment of the Supreme Court of Arkansas be affirmed.

SAMUEL VERDEN, APPELLANT, *v.* ISAAC COLEMAN.

No appeal can be taken from the final decision of a State court of last resort, under the 25th section of the judiciary act, to the Supreme Court of the United States. A writ of error alone can bring up the cause.

THIS was an appeal from the Supreme Court of the State of Indiana, purporting to be brought up under the twenty-fifth section of the judiciary act.

It was a case of foreclosure of a mortgage brought in the Benton Circuit Court, (State court.) In the progress of the trial, there was a bill of exceptions signed and sealed by the presiding judge, and the case then carried up by appeal to the Supreme Court of the State. That court affirmed the judgment of the court below, upon which an appeal was prayed to the United States Supreme Court, which prayer was granted. The appeal bond recited that Samuel Verden hath "prosecuted a writ of error to the Supreme Court of the United States," &c., but no writ of error was sued out.

It is not necessary to notice the nature of the case any further.

Mr. Justice CATRON delivered the opinion of the court.

Coleman sued Verden in a State court of Indiana, on a note of hand, and a mortgage of lands, to secure its payment. On various pleadings and proofs, the cause was submitted for judgment to the court, the parties having dispensed with a jury. Judgment was rendered against Verden, who appealed to the Supreme Court of Indiana. There the judgment of the circuit was affirmed.

This occurred on the 26th day of June, 1858. And then we find the following entry of record: "And afterwards, to wit, at a court began and held on the 24th of May, 1858, and continued from day to day till July 16th, 1858, at which time come the appellant, by Hon. D. Mace, his attorney, and prays an appeal to the United States Supreme Court, which prayer is granted."

Bond was given to prosecute the appeal, and the clerk certifies the record to be a true copy of the proceedings.

No *appeal* can be taken from the final decision of a State court of last resort, under the twenty-fifth section of the judiciary act, to the Supreme Court of the United States. A writ of error alone can bring up the cause. We refer to the appendix of Curtis's Digest for the mode.

It is ordered that the case be dismissed.

ROBINSON LYTLE AND LYDIA L. HIS WIFE, NATHAN H. CLOYES, AND OTHERS, PLAINTIFFS IN ERROR, *v.* THE STATE OF ARKANSAS, CHARLES B. BERTRAND, AND OTHERS.

Where the decision of a State court was against the validity of an entry of land which had been allowed by the proper officers of the United States, this court has jurisdiction, under the 25th section of the judiciary act, to revise that judgment, whether the invalidity was decreed upon a question of fact or of law.

The adjudication of the register and receiver is subject to revision in the courts of justice, on proof, showing that the entry was obtained by fraud and the imposition of false testimony on those officers, as to settlement and cultivation. This court has so decided heretofore.

Over the questions raised in the court below, of the effect of a bona fide purchase and of the statute of limitations, this court has no jurisdiction.

But the evidence shows that the entry was obtained by false affidavits as to residence and cultivation. The judgment of the Supreme Court of Arkansas is therefore affirmed.

THIS case was brought up from the Supreme Court of the State of Arkansas by a writ of error issued under the 25th section of the judiciary act. It was a chancery case, but correctly brought up by writ of error. See preceding case of Verden *v.* Coleman.

It was before this court at a preceding term, and is reported in 9 Howard, 314. It will be perceived, by referring to that case, that this court decided that the pre-emption act of 1830 conferred certain rights upon settlers upon public lands, upon proof of settlement or improvement being made to the satis-

faction of the register and receiver, agreeably to the rules prescribed by the Commissioner of the General Land Office. And their decision must be considered final, unless impeached on the ground of fraud or unfairness. 9 Howard, 333. The principal point now decided was, that the entry then recognised was obtained by false affidavits as to residence and cultivation.

The cause, as decided in 9 Howard, having gone back to Arkansas, the bill was amended, and various new parties, both complainants and defendants, were introduced. Most of the defendants answered; decrees were taken against some of those who did not answer, and the bills dismissed as to other.

The State court decided many questions upon which their decision was final, and not subject to be reviewed by this court under the 25th section of the judiciary act. The principal one before this court was, whether or not Cloyes imposed on the register and receiver by false affidavits as to cultivation and residence.

The case was argued in this court by *Mr. Bradley*, upon a brief filed by *Mr. Stilwell* and himself, for the plaintiffs in error, and by *Mr. Watkins* and *Mr. Pike* for the defendants in error, upon which side there was also filed a written argument by *Mr. Hempstead.*

The arguments which were filed were very voluminous, and the record contained nearly a thousand printed pages. The opinion of the Supreme Court of Arkansas was, that, from the proof in the cause, the pre-emption claim set up in the bill was and is fraudulent in fact and in law; and this was the judgment sought to be reversed by this court. The evidence upon the question constituted a large part of the record. The opinion of this court refers to a portion of it, and the residue of it the reporter does not intend to touch. The counsel for the plaintiff in error contended that the decree of the land officers, whilst it stands, is conclusive as to the title of the pre-emptioner and those claiming under him; that it could not be

impeached collaterally, but could be impeached for fraud only in a direct proceeding, by either an original or cross bill; and that, as the defendants had not so impeached or attempted to impeach it, they cannot be permitted to speak about fraud as a mere matter of defence.

18 Howard, 43, and authorities there cited.

The views of the counsel on both sides, upon the question of the jurisdiction of this court in this case, were as follows:

The counsel for the plaintiff in error said:

It may be insisted that this court has no jurisdiction of the case.

Had the Supreme Court of Arkansas simply affirmed the decree of the court of original jurisdiction, there would appear more plausibility in this; though, then, we think the jurisdiction clear.

The right set up by the plaintiffs in error arises under an act of Congress, and the decision of the Supreme Court of Arkansas was against that right; consequently, this court has jurisdiction of the case, without regard to the particular ground upon which the decree of the State court is based.

14 Howard's Rep., 389.

Cunningham *v.* Ashley et al., ib., 98.

1 Howard's Rep., City of Mobile *v.* Emanuel.

The right grows out of an act of Congress, and is sanctioned against all laws and judicial decisions of the States.

5 Cranch's Rep., 344, Owings *v.* Norwood's Lessee.

5 Peters's Rep., 257, Fisher's Lessor *v.* Cockerell.

It is sufficient that the validity of a treaty, or statute of, or an authority exercised under the authority of the United States, was drawn in question, and the decision was against their validity.

1 Wheaton's Rep., 304, 322, 352, Martin *v.* Hunter's Lessee, et seq.

3 Condensed R., 474. Same case.

The evidence for the defence was admitted, for the purpose of impeaching the right claimed under the act of Congress, and granted to them by the land officers acting under it;

consequently, the decision of the State court, upon the effect of such evidence, may be fully considered here, and the decree reversed or affirmed.

4 Howard's Rep., 447, Mackay *v.* Dillon.

The power to revise and reverse a decision of a State court, depriving a party of his right to transfer his case from a State court to a Circuit Court of the United States for trial, has been exercised.

14 Howard's Rep., 103, Gordon *v.* Longest.

In Neilson *v.* Lagow, 7 Howard's Rep., 775, the plaintiff claimed the land under an authority exercised by the Secretary of the Treasury in behalf of the United States, and the decision was against the validity of the authority thus exercised; and on motion to dismiss, Chief Justice TANEY said: "We think it is evidently one of the cases prescribed for in the twenty-fifth section of the act of 1789."

In this case, the decision was against an authority exercised by the register and receiver, subordinates of the Secretary of the Treasury, but under the same authority.

The jurisdiction exists wherever the laws of Congress and the acts of officers executing them in perfecting titles to public lands have been drawn in question and construed by the Supreme Court of a State, and the decision is against the title set up under the laws of Congress and the authority exercised under them.

19 Howard's Rep., 207, Cousin *v.* Blanc's Executors.

In McDonogh *v.* Millaudon, 19 Howard's Rep., 704, Mr. Justice CATRON said: "Did this final judgment draw in question the construction of a treaty or statute of the United States, or of an authority exercised under the same, and was the decision against the validity of either or against the title or right set up under either? If these questions are answered in the negative, it follows that we have no jurisdiction to re-examine or reverse the judgment under the twenty-fifth section of the judiciary act."

Hence, it must follow, necessarily, if answered affirmatively any one of them, the court would have jurisdiction. The plaintiffs in this case claim under the authority exercised

under a statute of the United States, and a right set up under it, and the decision was against them.

Wynn *v.* Garland was similar to this in every respect, and the question was passed over without notice.

20 Howard's Rep., 7.

In order to give jurisdiction, it is sufficient, if the record shows, that it is clear from the facts stated, by just and necessary inference, that the question was made, and that the State court must, in order to have arrived at the judgment pronounced by it, have decided that question as indispensable to that judgment.

10 Peters Rep., 392, Crowell *v.* Randell.

1 id. Rep., 250, Wilson et al. *v.* the Blackbird C. M. Company.

1 Wheaton's Rep., 355, Martin *v.* Hunter's Lessee.

4 id. Rep., 311, Miller *v.* Nichols.

12 id. Rep., 117, Williams *v.* Norris.

The jurisdiction must be determined by reference to the record. And in doing so, the court will refer to the opinion of the State court, where it is made a part of the record by the laws of the State.

19 Howard's Rep., 207, Cousin *v.* Blanc's Executors.

In this case, there is no necessity, in the first instance, of looking behind the decree of the Supreme Court of Arkansas, to determine the ground of the decision; but, if need be, we may look back to the decision of the chancellor, whose decree was affirmed by the Supreme Court of Arkansas, and shall find that he overruled all the defences set up, except the invalidity of the pre-emption claim of Cloyes. (His opinion is made a part of the record—see Gould's Digest of the Laws of Arkansas, p. 242, sec. 17.) Certainly the fact that the Supreme Court decided against the right of the plaintiffs, upon the ground that it was fraudulent, cannot oust the jurisdiction. If that court had refused the relief because the proof showed that Cloyes never occupied or cultivated the land, the case would be the same; because the want of possession and cultivation, in the eyes of that court, constituted the fraud. The idea of fraud cannot be disconnected from the act of Congress.

If there was any fraud, it was a fraud upon the law, and upon the United States through her land officers.

The decision being against the right, the Supreme Court has jurisdiction to re-examine the case, and determine, not whether the decision was right upon the particular ground, but whether the right was properly denied. The decree of the State court would not have been what it is, if there had not been a decision against the right set up by the plaintiffs; and this is all sufficient.

12 Howard Rep., 124, Williams *v.* Oliver et al.

3 Peters Rep., 292, 302.

And the decision of the State court need not be confined exclusively and especially to the construction of the treaty act of Congress, &c., in order to give jurisdiction.

12 Howard Rep., 124, Williams *v.* Oliver.

Points may arise, growing out of and connected with the general question, and so blended with it as not to be separated, and therefore falling equally within the decision contemplated by the twenty-fifth section. The case of Smith *v.* the State of Maryland, 6 Cranch, 281, and Martin *v.* Hunter's Lessee, 1 Wheaton, 305, 355, afford illustrations of this principle.

Here the record shows affirmatively that the decision was against the right set up and the authority of the land officers, excluding the idea that the decision was made upon the other defence set up by the defendants, such as purchasers for a valuable consideration without notice, statutes of limitation, lapse of time, &c. And it follows, as a matter of course, that if the decision of the State court upon that point was wrong, the decree must be reversed.

The counsel for the defendant in error, *Mr. Watkins*, made the following point upon the question of the jurisdiction of this court in this case:

On a writ of error from a State court, where no question of law is presented, it is not the province or duty of this court to review the decision of an issue of fact merely, made by the court below, with its superior facilities for determining the fact according to the weight or credibility of testimony.

By the judiciary act of 1789, appeals were only allowed from the District to the Circuit Courts. There was no mode of bringing up any case to this court, except by writ of error.

Blain *v.* Ship Carter, 4 Dallas, 22.

The terms, appeal and writ of error, though used by the act, were not confounded. An appeal is a civil-law proceeding, which removes the cause entirely, and is a rehearing on the facts as well as the law.

Wischart *v.* Danchy, 3 Dallas, 321.

The great object of the judiciary act of 1789 was to confine the appellate jurisdiction of this court to the examination and decision of questions of law, on errors assigned and made to appear upon the record. By section nineteen, the Circuit Courts in equity were required to cause the facts, upon which they founded their decree, to appear upon the record, either by a statement of such facts by the parties, or by the court where they could not agree, being analogous to a special verdict or case stated in trials at law. This regulation appears to have been regarded with some jealousy, according to the report of the case last cited, (Wischart *v.* Danchy,) as conferring a power on the Circuit Courts in chancery, which might be abused by a determination of facts contrary to or not warranted by the evidence. That feeling probably led to the passage of the act of 3d March, 1803, providing for an appeal, in chancery causes, from the Circuit Courts to this court, and that on such appeal the transcript should contain all the pleadings, depositions, and documentary evidence, in the cause.

The policy of the act of 1803, as apparent from its history, was, to enable this court to review and correct any gross error of the Circuit Courts, in determining questions of fact, against or without evidence. The principle pervading the exercise of appellate jurisdiction by this court is only partially innovated upon. I apprehend that no appeal in chancery was ever decided by this court, without deference to the opinion of the Circuit Court, which tried the cause upon the facts which the evidence conduced to establish; while, on the other hand, their errors or misconstructions of law are freely examined. And considering that in theory, and usually in prac-

tice, a justice of this court presides at the circuit, he has all the opportunities afforded in equity and admiralty causes, for arriving at a just conclusion upon the facts.

In all the cases from Parsons *v.* Bedford, 3 Peters, 444, (where this court refused to give efficacy to the act of 26th May, 1824, as an entering wedge for the civil-law practice of Louisiana, whereby this court would be called on to re-examine facts ascertained in the court below,) to Minor *v.* Tillotson, 2 Howard, 392, and Fenn *v.* Holme, 21 Howard, 481, this court has perseveringly resisted all efforts to engraft upon the Federal Judiciary the civil-law practice, or the mongrel systems of Texas and other new States.

But, in any view of it, the act of 1803 does not apply to writs of error from a State court, under the 25th section of the judiciary act. And according to the construction repeatedly given by this court, touching the distinction between an appeal and a writ of error, where those terms are used in acts of Congress, nothing is examinable on a writ of error by this court, as one of appellate jurisdiction, except questions of error in law. In view of the tendency of modern law reforms, so called, to make law equity, to assimilate pleadings in all civil causes to the chancery forms of a complaint, answer, and reply, and bring upon the record a crude mass of testimony, it seems proper for this court to consider whether such innovations shall be suffered to impair its own usefulness. The time, the learning, and ripe experience of the judges of the highest appellate court in the world belong to the country, and need not be wasted in the investigation of paltry questions of fact, which are of no concern beyond the immediate parties to the dispute. The imposition of such a duty would not only be subversive of the theory of appellate jurisdiction, but is one which an appellate court is not competent to perform. When this cause was tried in 9 Howard, the facts confessed by the demurrer lay in a nut-shell. The decision is interesting and important as an affirmance of the doctrine, that an inchoate right of pre-emption vested under law is not defeated by a subsequent act of Congress granting the land. But on this record, suppose the court here to enter upon a re-examination of facts, and after

a patient and laborious collation of the testimony, and without indeed those aids attendant upon the court which tried the cause, and breathing the atmosphere of the witnesses, could instinctively appreciate their worth or credibility, should arrive at the conclusion that the claim of Cloyes was unfounded in fact, and fraudulent, the decision, settling no question of law, would not be worthy of a place in the reports. I take it, that amid all changes and fluctuations in the jurisprudence of the States, the principle governing the appellate jurisdiction of this court should remain unchanged; so that whatever mode of trial may be provided in the local tribunals, and to which the parties have resorted, the ascertainment of a fact, according to the mode provided, is to be regarded as final and conclusive of the fact.

I venture to submit, that it is only according to a technical veiw of the judiciary act that this court has any jurisdiction in the premises. It is true, that because the plaintiffs in error claim under a law of Congress, and the decision is against the right claimed, they come literally within the terms of the 25th section; so that the court, according to its practice, might refuse to entertain a motion to dismiss for want of jurisdiction, and out of abundant caution reserve the question until the final argument. Doubtless, if the plaintiffs in error can put their finger on any error or misconstruction of law by the chancellor in the determination of the fact, or, in other words, can show that he regarded those acts of the claimant as fraudulent, which, in the opinion of this court, and according to its construction of the law, were not so, then the decision of the court below would be examinable for that error. But, apart from the consideration of all other elements of *mala fides*, one essential fact, ascertained and decided by the court below, is, that Cloyes did not cultivate in 1829. While that determination stands, there never was any right, and consequently there is no jurisdiction.

Finally, if it be the pleasure of the court to go into a re-examination of the entire testimony, the defendants in error, whom I represent, confidently invite it, and are content to refer to the exposition of the evidence contained in the decis-

ions of the chancellor and Supreme Court of Arkansas, and in the argument of Mr. Hempstead.

Mr. Justice CATRON delivered the opinion of the court.

The first question presented on the record is, whether this court has jurisdiction to examine and revise the decision of the Supreme Court of Arkansas by writ of error, under the 25th section of the judiciary act? The question arises on the following facts:

Nathan Cloyes, ancestor of the principal complainants, entered as an occupant, at a land office in Arkansas, a fractional quarter section of land, in 1834, under the pre-emption acts of 1830 and 1832. The fraction adjoined the village of Little Rock on its eastern side, and was for twenty-nine acres. The same land had been patented in 1833 by the United States to John Pope, Governor of the Territory of Arkansas, to be appropriated to the erection of public buildings for said Territory. The heirs of Cloyes claimed to have an earlier equity, by force of their pre-emption right, than that of the Governor of Arkansas.

They filed their bill in equity in the proper State court, to enforce this equity. That bill contained appropriate allegations to exhibit an equitable title in the plaintiffs, and the opposing right of the patentee, and thus to enable the courts to compare them. Some of the defendants demurred to the bill; others answered, denying the facts of the settlement and cultivation, and pleading the bona fides of their purchase and the statute of limitations.

The courts of Arkansas dismissed the bill on the demurrer; which judgment was reversed in this court, and the cause remanded for further proceedings. Lytle *v.* Arkansas, 9 How., 314. It was prepared for hearing a second time, and the courts of Arkansas have again dismissed the bill, and the cause is a second time before us.

The cause was fully heard on its merits below; and the claim of Cloyes rejected, on the ground that he obtained his entry by fraud in fact and fraud in law; and the question is, can we take jurisdiction, and reform this general decree? It

rejected the title of Cloyes; and, in our opinion, it is not material whether the invalidity of the title was decreed in the Supreme Court of Arkansas upon a question of fact or of law. The fact that the title was rejected in that court authorizes this court to re-examine the decree. 14 Peters, 360.

The decision in the Supreme Court of Arkansas drew in question an authority exercised under the United States, to wit: that of admitting Cloyes to make his entry; and the decision was against its validity, and overthrew his title, and is therefore subject to be re-examined, and reversed or affirmed in this court, on all the pleadings and proofs which immediately respect the question of the proper exercise of authority by the officers administering the sale of the public lands on the part of the United States.

In the case of Martin against Hunter's Lessee, (1 Whea., 352,) the foregoing construction of the 25th section of the judiciary act of 1789 was recognised, and has been followed since, in the cases of Choteau against Eckhart, (2 How., 372,) Cunningham against Ashley, (14 How., 377,) Garland against Wynn, (20 How., 6,) and other cases.

Another preliminary question is presented on this record, namely: whether the *adjudication* of the register and receiver, which authorized Cloyes's heirs to enter the land, is subject to revision in the courts of justice, on proof, showing that the entry was obtained by fraud and the imposition of false testimony on those officers, as to settlement and cultivation. We deem this question too well settled in the affirmative for discussion. It was so treated in the case of Cunningham against Ashley, (14 How., 377;) again, in Bernard against Ashley, (18 How., 43;) and conclusively, in the case of Garland against Wynn, (20 How., 8.)

The next question is, how far we can re-examine the proceedings in the State courts.

In their answers, the respondents rely on the act of limitations of the State of Arkansas for protection. As this is a defence having no connection with the title of Cloyes, this court cannot revise the decree below in this respect, under the 25th section of the judiciary act.

Many of the defendants also relied in their answers on the fact that they were bona fide purchasers of the lots of land they are sued for, and therefore no decree can be made here to oust them of their possessions. The State courts found that a number of the respondents were purchasers without notice of Cloyes's claim, and entitled to protection as bona fide purchasers, according to the rules acted on by courts of equity. With this portion of the decree we have no power to interfere, as the defence set up is within the restriction found in the concluding part of the 25th section, which declares "that no other error shall be assigned or regarded by this court as a ground of reversal, than such as immediately respects the before-mentioned questions of validity or construction of the Constitution, treaties, statutes, commissions, or authorities, in dispute." Mr. Justice Story comments on the foregoing restraining clause, in the case of Martin *v.* Hunter's Lessee, (1 Whea., 358,) which construction we need not repeat.

Whether Cloyes imposed on the register and receiver by false affidavits, when he made proof of cultivation in 1829, and residence on the land in dispute on the 29th of May, 1830, is the remaining question to be examined. He made oath (23d April, 1831) that he did live on said tract of land in the year 1829, and had done so since the year 1826. Being interrogated by the register, he stated: I had a vegetable garden, perhaps to the extent of an acre, and raised vegetables of different kinds, and corn for roasting-ears; and I lived in a comfortable dwelling, east of the Quapaw line on the before-mentioned fraction. Being asked, did you continue to reside, and cultivate your garden aforesaid, on the before-named fraction, until the 29th of May, 1830? he answers: "I did; and have continued to do so until this time."

John Saylor deposed on behalf of Cloyes in effect to the same facts, but in general terms. Nathan W. Maynor and Elliott Bursey swore that the affidavit of Saylor was true. On the truth or falsehood of these depositions the cause depends.

In opposition to these affidavits, it is proved, beyond dispute, that Cloyes and his family resided at a house, for a part of the

year 1828, occupied afterwards by Doctor Liser. In the latter part of 1828, they removed from that place to some log cabins, situate on the lots afterwards occupied by John Hutt, and where the Governor of Arkansas resided in 1851, when the witnesses deposed. Both places were west of the Quapaw line—the cabins standing probably one hundred yards west of the line, and which line was the western boundary of the fractional quarter section in dispute. Cloyes resided at these cabins when he swore at Batesville, before the register; and continued to reside there till the time of his death, which occurred shortly after his return from Batesville, say in May or June, 1831, and his widow and children continued to reside at the same cabins for several years after his death.

Cloyes was by trade a tinner, and in December, 1826, rented of William Russell a small house, constructed of slabs set upright, in which he carried on his business of a tin-plate worker. He covenanted to keep and retain possession for Russell of this shop against all persons, and not to leave the house unoccupied, and to pay Russell two dollars per month rent, and surrender the house to Russell or his authorized agent at any time required by the lessor.

Under this lease, Cloyes occupied the house until the 19th day of June, 1828, when he took a lease from Chester Ashley for the same, and also for a garden. He covenanted to pay Ashley one dollar per month rent; to put and keep the building in repair; to keep and retain possession of the same, until delivered back to said Ashley by mutual consent, either party having a right to terminate the lease on one month's notice. The house and garden were rented by the month.

Under this lease, Cloyes occupied the house, as a tin-shop, to the time of his death. Both the leases state that the shop was east of the Quapaw line, and on the public lands.

This slab tenement was built by Moses Austin, about 1820. On leaving Little Rock, he sold it to Doctor Mathew Cunningham; it passed through several hands, till it was finally owned by Col. Ashley. Buildings and cultivated portions of the public lands were protected by the local laws of the Arkansas Territory; either ejectment or trespass could have

been maintained by Ashley against Cloyes to recover the premises, nor could an objection be raised by any one, except the United States, to these transfers of possession—neither could Cloyes be heard to disavow his landlord's title. He held possession for Ashley, and was subject to be turned out on a month's notice to quit.

Cunningham and other witnesses depose that the shop rented to Cloyes stood west of the Quapaw line. It however appears, from actual survey, that it was on the section line, which ran through the house, taking its southeast corner on the east side, but leaving the greater part of the shop west of the line.

Another pertinent circumstance is, that when Cloyes heard the pre-emption law of 1830 was about to pass, or had passed, (it is uncertain which, from the evidence,) he removed his wife and children, with some articles of necessary furniture, to the tinner's shop, from his residence at the Hutt place, and kept his family at the shop for a few months, and then they returned to their established home. This contrivance was probably resorted to at the instance of Benjamin Desha, who had agreed with Cloyes to pay into the land office the purchase money, and all incidental expenses, to obtain a title from the Government for an interest of one-half of the land. These evasions were mere attempts to defraud the law, and to furnish some foundation for the necessary affidavits to support his pre-emption claim at the land office.

On this aspect of the case, the question arises, whether Cloyes's possession as lessee and tenant of Ashley, occupying a shop as a mechanic, the corner of which accidentally obtruded over the section line, upon the public land, and who was subject to removal by his landlord each month, was "a settlement" on the public lands, within the true intent and meaning of the act of May, 1830?

That Cloyes never contemplated seeking a home on the public lands as a cultivator of the soil, is manifest from the proof; he worked at his trade, when he worked at all, (say the witnesses,) and followed no other avocation. Our opinion is, that the affidavits, on which the occupant entry was found-

ed, were untrue in fact, and a fraud on the register and receiver; and that Cloyes had no bona fide possession as tenant of the tinner's shop, within the true meaning of the act of 1830.

We are also of opinion, that the affidavits are disproved, as respects the fact of cultivation in 1829. There was no garden cultivated in that year, adjoining or near to the shop. To say the least, it is quite doubtful whether there was such cultivation east of the Quapaw line; and the State courts, having found that there was none, it is our duty to abide by their finding, unless we could ascertain, from the proof, that they were mistaken, which we cannot do; our impressions being to the contrary.

The question of cultivation in May, 1830, depended on parol evidence of witnesses. The judges below knew them; they decided on the spot, with all the localities before them; and as the evidence is contradictory, it would be contrary to precedent for this court to overrule the finding of a mere fact by the courts below.

On the several grounds stated, we order that the decree of the Supreme Court of Arkansas be affirmed, with costs.

Mr. Justice McLEAN and Mr. Justice CLIFFORD dissented.

Mr. Justice McLEAN:

I dissent from the opinion of the court, as now expressed, and shall refer to the former opinion, to show the nature of the case:

"After the refusal of the receiver to receive payment for the land claimed, an act was passed, 14th July, 1832, continuing the act of the 29th May, 1830, and which specially provided that those who had not been enabled to enter the land, the pre-emption right of which they claimed, within the time limited, in consequence of the public surveys not having been made and returned, should have the right to enter such lands, on the same conditions in every respect as prescribed in said act, within one year after the surveys shall be made and re-

turned. And this act was in full force before Governor Pope selected said lands. That the public surveys of the above fractional sections were made and perfected on or about the 1st of December, 1833, and returned to the land office the beginning of the year 1834. On the 5th of March, 1834, the complainant paid into the land office the sum of $135.76¼, in full for the above-named quarter section."

That a certificate was granted for the same, "on which the receiver endorsed, that the northwest fractional quarter section two was a part of the location made by Governor Pope in selecting 1,000 acres, adjoining the town of Little Rock, granted by Congress to raise a fund for building a court-house and jail for the Territory; and that the endorsement was made by direction of the Commissioner of the General Land Office." "That the register of the land office would not permit the said fractional quarter sections to be entered."

It appeared that "the patentees in both of said patents, at the time of their application to enter the lands, had both constructive and actual notice of the right of Cloyes, and that the present owners of any part of these lands had also notice of the right of the complainants."

In his dissenting opinion, Judge Catron says: "The proof of occupancy and cultivation was made in April, 1831, under the act of 1830, pursuant to an instruction from the Commissioner of the General Land Office having reference to that act. The act itself, the instruction under its authority, and the proofs taken according to the instruction, expired and came to an end on the 29th May, 1831. After that time, the matter stood as if neither had ever existed; nor had Cloyes more claim to enter from May 29, 1831, to July, 1832, than any other villager in Little Rock."

Now, although it may be true that, until the act of 1832 had passed, the act of 1830 having expired, the pre-emptive right of Cloyes could not be perfected, yet the policy of the law was, where vested rights had accrued, which, by reason of delays in the completion of surveys, could not be carried out, the Government gave relief by extending the law. And the inchoate right was secured by the policy of the Government. It

is therefore not strictly accurate to say, the party entering a pre-emption has no right. He has a right, recognised by the Government, by which he is enabled to perfect his right; and, under such circumstances, no new entry could interfere with a prior one, though imperfect.

This court say, the proof of the pre-emption right of Cloyes being entirely satisfactory to the land officers, under the act of 1830, there was no necessity of opening and receiving additional proof under any of the subsequent laws. The act of 1830 having expired, all rights under it were saved by the subsequent acts. No steps which had been taken were required again to be taken.

Did the location of Governor Pope, under the act of Congress, affect the claim of Cloyes? On the 15th of June, 1832, one thousand acres of land were granted, adjoining the town of Little Rock, to the Territory of Arkansas, to be located by the Governor. This selection was not made until the 30th of January, 1833. Before the grant was made by Congress of this tract, the right of Cloyes to a pre-emption had not only accrued, under the provisions of the act of 1830, but he had proved his right, under the law, to the satisfaction of the register and receiver of the land office. He had, in fact, done everything he could do to perfect this right. No fault or negligence can be charged to him.

"By the grant to Arkansas, Congress could not have intended to impair vested rights. The grants of the thousand acres and of the other tracts must be so construed as not to interfere with the pre-emption of Cloyes."

From the citations above made in the original opinion in this case, the following facts and principles of law are too clear to admit of doubt by any one:

1. That Cloyes's pre-emption to fractional quarter section No. 2 was clearly established, by the judgment of the land officers and of this court.

2. That the location of Governor Pope, being subsequent to the right of Cloyes, could not affect, under the circumstances, that right, and that the conveyance was subject to it. This appears by the certificate of the land office, by the uniform

action of the Government in all such cases, and the good faith which has characterized the action of Government, in protecting pre-emption rights, by giving time to protect such right, where the Government officers had failed in doing their duty. And in addition to these considerations, in the solemn declaration of this court, "that Congress could not have intended to impair vested rights." And the court say, "the grants of the thousand acres and of the other tracts must be so construed as not to interfere with the pre-emption of Cloyes."

This court say, "The Supreme Court of the State, in sustaining the demurrers and dismissing the bill, decided against the pre-emption right claimed by the representatives of Cloyes; and as we consider *that* a valid right as to the fractional quarter on which his improvement was made, the judgment of the State court was reversed."

"Now, the defendants demurred to the original bill, which they had a right to do, and rest the case on the demurrer's appearing on the face of the bill. But this court held Cloyes's right valid, and consequently reversed, on this head, the judgment of the State court. And the cause is transmitted to the State court for further proceeding before it, or as it shall direct on the defence set up in the answers of the defendants, *that they are bona fide purchasers of the whole or parts of the fractional section in controversy, without notice*, and that that court give leave to amend the pleadings on both sides, if requested, that the merits may be fully presented and proved, as equity shall require."

Now, it is perfectly clear that nothing was transmitted under the direction of this court to the State court, except the latter part of the sentence beginning, "*and the cause is transmitted to that court*," &c. And that part relates wholly to the inquiry whether the defendants were bona fide purchasers of the whole or parts of the fractional section in controversy. And for this purpose, leave was given to amend the pleadings.

If there is anything in this bill which afforded any pretence to the State court to open the pleadings, and examine any matters in the bill, except those specified in its close, it has escaped my notice.

It is said in the bill, "the register and receiver were constituted, by the act, a tribunal to determine the right of those who claimed pre-emptions under it. From their decision no appeal was given. If, therefore, they acted within their powers, as sanctioned by the commissioner, and within the law, the decision cannot be impeached on the ground of fraud or unfairness; it must be considered final."

The court here was speaking of its own powers of jurisdiction and investigation, and not the powers of any other tribunal. It was supposed that no superior court would willingly permit its judicial powers to be subverted, new parties made, new subjects introduced, and the whole proceedings reversed, at the will of an inferior jurisdiction, without the exercise of a controlling power.

This State record of Arkansas seems to have been a prolific source of controversy, as its proportions have grown to about a thousand pages, not including briefs and statements of facts. It certainly must require some skill in legislation, to draw into the State court so large an amount of business under the laws of Congress. And it may become a matter of public concern, when such a mass of judicial action is not only thrown into the State court, but new rules and principles of action are liable to be sanctioned, in disregard of the laws of the United States.

Without any authority, it does appear that the judgment of the Supreme Court has been reversed by the Arkansas court, its proceedings modified in disregard of its own judgments and opinions clearly expressed, and new rules of proceedings instituted and carried out; and this under an authority given to the Arkansas court to ascertain whether certain purchases had been made bona fide.

Cloyes, in his lifetime, by his own affidavit, and the affidavits of others, made proof of his settlement on, and improvement of, the above fractional quarter, according to the provisions of the act, to the satisfaction of the register and receiver of said land district, agreeably to the rules prescribed by the Commissioner of the General Land Office; on the 20th May, 1831, Hartwell Boswell, the register, and John Redman, the

receiver, decided that the said Cloyes was entitled to the pre-emption right claimed. "On the same day, he applied to the register to enter the northwest fractional quarter of section two, containing thirty acres and eighty-eight hundredths of an acre." But the register very properly decided that Cloyes could only be permitted to enter the fraction on which his improvement was made.

The Commissioner of the General Land Office, and the register and receiver, declare they were satisfied with the proof made in the case; but the Supreme Court of Arkansas decided against the pre-emption right claimed by the representatives of Cloyes; and the Supreme Court of the United States say, "as we consider *that* a valid right as to the fractional quarter on which the improvement was made, the judgment of the State court is reversed."

How does this case now stand? It stands reversed upon our own records by the Supreme Court of Arkansas, and by no other power. A majority of this bench entered the judgment, as it now stands, in 1849. But, through the reforming process, of a record of a thousand pages, not including notes and statements of facts, it has become a formidable pile, enough to fill with despair the first claimant of the pre-emption right.

It is true, the cause was sent down for a special purpose, every word of which I now copy:

"And the cause is transmitted to that court (the Supreme Court of Arkansas) for further proceedings before it, or as it shall direct, on the defence set up in the answers of the defendants, that they are bona fide purchasers of the whole or parts of the fractional sections in controversy, *without notice*, and that that court give leave to amend the pleadings on both sides, if requested, *that the merits of the case* may be fully presented and proved, as equity shall require."

Several of the defendants alleged they were bona fide purchasers of a part or the whole of the fraction, without notice; and the object in sending the case down was to enable persons to show they were purchasers of this character. This did not necessarily involve fraud. And this embraces the whole subject of inquiry.

It would have been inconsistent for this court to say, we consider the pre-emption claim by the representatives of Cloyes as a valid right, as to the fractional quarter on which his improvement was made, and on that ground to reverse the judgment of the State court, and at the same time send the case down, open to the charge of fraud and every conceivable enormity. The object was to know who were purchasers without notice. That this was the intention of the Supreme Court, is palpable from the language of the entry.

The majority of the Supreme Court had full confidence in the validity of Cloyes's claim, and consequently they reversed the judgment of the State court, leaving the question open, whether the defendants were purchasers without notice. It may be that this entry would have protected all the purchasers.

From the nature of pre-emption rights, it is presumed, a person desirous of such a right is the first applicant. And the proof of such a right, if sustained by the register and receiver and the Commissioner of the Land Office, the proof required, is deemed satisfactory. It is only where a fortunate selection appears to be made, by the prospect of a city, or some great local advantage is anticipated, that a contest arises as to such a claim.

The officers of the land department, whose peculiar duty it was to protect the public rights, seemed to have discharged their duty to the satisfaction of the Government. This was also entirely satisfactory to a majority of the judges of this court, with the single exception, that, from the answers, it was probable that there may have been purchasers of this right without notice. And from the evidence introduced, it would seem to have been considered that any one who at any time desired to purchase, considered himself as having a right to complain, although he had no means to make the purchase, or had no desire to make it.

If I mistake not, evidence was heard from witnesses from twenty to twenty-five years after the pre-emption right was sanctioned by the Government. Such a course tends greatly to embarrass land titles under the general land law. Every one knows that a man who endeavors to obtain a pre-emption,

must, in the nature of things, be a man of limited means, and incapable of maintaining an expensive suit at law; and it has always appeared to me the true policy to limit those questions to the land department of the Government. At all events, that they should be limited to the Federal tribunals, where, it may be presumed, the land department will have an uniform administration.

As this case now stands, I think the judgment of the Arkansas Supreme Court must be reversed on two grounds:

1. Because it has reversed the judgment of this court, entered by a majority of the members at December term, 1849, in these words: "The Supreme Court of the State, in sustaining the demurrers and dismissing the bill, decided against the pre-emption claimed by the representatives of Cloyes; and as we consider *that* a valid right, as to the fractional quarter on which his improvement was made, the judgment of the State court is reversed."

This is the judgment of this court as it now stands upon our docket. And

2. The judgment of the State court must be reversed, because it wholly disregarded the directions of this court in trying the issues transmitted to it.

GEORGE BONDIES, LATE MASTER AND PART OWNER OF THE STEAMBOAT KATE, INTERVENING, &C., APPELLANT, *v.* JAMES P. SHERWOOD, JOSEPH MCCLELLAND, AND BARNEY MCGINNIS, LIBELLANTS.

Where there was a contract for raising a sunken vessel upon certain stipulations, the party who raised the vessel cannot abandon it, and claim salvage in a court of admiralty.

This court does not now decide whether, in suits for salvage, the suit may be in personam and in rem jointly. The question is still an open one.

Nor does it decide whether the maritime law of salvage applies to a vessel engaged in the internal trade of a State, proceeding from a port in the same, up a river wholly within the same.

THIS was an appeal from the District Court of the United States for the eastern district of Texas, sitting in admiralty.

The facts of the case are stated in the opinion of the court.

The District Court decreed that the libellants (Sherwood, McClelland, and McGinnis) should recover the sum of fifty per cent. salvage upon $5,150, which sum was adjudged to the libellants against said steamboat Kate, and against George Bondies, the owner thereof; the money to be raised by a sale of the steamboat, and, in case of a deficiency, execution was to issue against Bondies, to be levied and collected on the estate, real and personal, credits and effects, of the said Bondies, wherever the same may be found.

From this decree Bondies appealed to this court.

It was submitted upon a printed brief by *Mr. Hale* and *Mr. Sherwood* for the appellants, no counsel appearing for the appellees.

The counsel for the appellants, as the principal point in the case, contended that the libellants could not set up that the contract had been mutually abandoned, and their claim to be aggrieved by the refusal of Bondies to comply with its terms. They must rest upon their allegation of a rescission of the contract, of which there is no proof whatever.

Mr. Justice GRIER delivered the opinion of the court.

The appellees, describing themselves as ship carpenters, residing in Galveston, filed their libel in the district court of Texas against the steamboat Kate, and against Bondies, late master and owner, in a "cause of salvage, civil and maritime."

They charge that the steamboat left the port of Galveston, for ports and places on the Trinity river, in said district of Texas, laden with merchandise. That the boat was snagged and sunk in the river near Morse's bluff, in Liberty county.

That on the 24th of April, 1856, the libellants entered into an article of agreement, under seal, with Bondies, who had become sole owner of both cargo and vessel, to raise the vessel.

In this agreement, the libellants covenant to proceed with

the necessary boats, apparatus, &c., and to raise the steamboat at their own cost in fourteen days after their arrival at the place where it lay, provided they were not hindered by high water; when raised, the boat to be taken to Galveston. Bondies covenants to convey the boat to them, on their payment to him of four thousand dollars, and also to subrogate them to all his claims against the cargo. But, in the mean time, until the covenants of libellants were performed, the legal possession of the boat and cargo was to be and remain in Bondies.

The libel alleges that "this agreement was mutually given up and abandoned." But this averment is not sustained by the evidence. On the contrary, it appears that the libellants proceeded under their contract to raise the vessel, but did not succeed till some time in July. The boat and merchandise being much injured in the operation and by the delay, it turned out that the costs and expenses would exceed the whole value of the boat and cargo when recovered. The bargain was therefore an unprofitable one, and the libellants concluded to repudiate it, and filed this libel for salvage.

Without adverting to the numerous other facts developed in the history of this case, but which cannot affect its merits, it is very plain, that assuming the services rendered by these mechanics to be in the nature of salvage services, and that a court of admiralty had jurisdiction to enforce the contract both against the owner and the boat as a maritime contract, yet the libellants, by their own showing, cannot recover under the contract. And it is equally clear that they cannot repudiate their contract, and libel the vessel far salvage.

(See the Mulgrave, 2 Hagg. Adm., 269, and Abbot on Shipping, 706.)

For this reason alone, the libel must be dismissed.

But there are two other questions which arise on the face of this record, and which it will not be necessary to decide, but which ought not to pass without notice, lest an inference should be drawn from our silence that the court considered them of no importance, or intended to decide them in favor of libellants:

1. By the 19th rule prescribed by this court for practice in

the courts of admiralty, it is ordered, that "in all suits for salvage the suit may be *in rem* against the property saved, OR *in personam* against the party at whose request and for whose benefit the salvage service has been performed." By reference to Mr. Conklin's treatise, page 42, it will be found that it is the prevailing opinion that both cannot be joined in the same libel. The point has not been brought before this court, and we notice it now only to show that it is not now decided.

2. The libel shows that the steamboat was engaged in the internal trade of the State of Texas, proceeding from a port in the same, up a river wholly within the same. It is not even alleged that she had a coasting license. That a court of admiralty had jurisdiction in such a case, or that the maritime law of wreck and salvage could be applied to it, are questions not made by the pleadings nor noticed in the argument, and therefore are not decided by the court.

Let the libel be dismissed, with costs.

EDWIN M. CHAFFEE, PLAINTIFF IN ERROR, *v.* THE BOSTON BELTING COMPANY.

Where a patentee, whose patent had been extended according to law, conveyed all his interest to another person, and the assignee brought suit against certain parties for an infringement of the patent, and these parties claimed, under a license granted by the original patentee before the assignment, it was necessary to show a connected chain of title to themselves, in order to justify their use of the improvements secured by the patent.

Having omitted to do this, the judgment of the court below, which was in favor of the defendants, must be reversed, and the case remanded for another trial.

Whether the patent was for a process or a machine, is not decided in the present case.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Massachusetts.

It was an action of trespass on the case brought by Chaffee against the Boston Belting Company, for an infringement upon a patent granted for the manufacture of India-rubber, granted to Chaffee in 1836, and extended for seven years from the 31st day of August, 1850.

The respective claims of the plaintiff and defendants are fully stated in the opinion of the court.

The presiding judge in the court below ruled that the defendants had a right to continue the same machinery for the same purposes, and in conformity with the directions contained in the specification, after the expiration and renewal of the letters patent, and, consequently, that the plaintiff could not recover.

To this ruling the plaintiff excepted, and brought the case up to this court.

It was argued by *Mr. Jenckes* and *Mr. Clarence A. Seward* for the plaintiff in error, no counsel appearing for the defendants.

The case having gone off upon a single point, the argument of the counsel for the plaintiff in error upon that point is alone reported.

The court below erred in charging the jury, that, under their title, the defendants had a right to continue to use the same machinery for the same purposes. This charge was predicated upon an assumption of title in the defendants, which they had not proved. They had proved that Goodyear, while the owner of the original term of the patent, had granted to Edwards a license for a specific purpose. They did not prove any privity between themselves and that license. They did not prove an assignment of that license to themselves. They did not prove the assent of Edwards to their use of the plaintiff's patent in the manufacture of the articles specified in the license. The only purpose for which the license seems to have been introduced was to identify the uses to which the defendants applied the plaintiff's patent, to wit: "for the preparation and application of India-rubber to the manufacture of the articles mentioned and described in the indenture between Goodyear and Edwards." This identification was not a justification of the use, by the defendants, of the plaintiff's patent. It proved satisfactorily the nature and extent of that use; but it proved nothing more. It did not prove that the defendants were rightfully in the enjoyment of the thing patented, during the original term of the patent.

The defendants, therefore, having failed to establish any privity between themselves and Goodyear, the owner of the original term of the patent, failed also to establish any right, as against the plaintiff, to use his patent during its extended term. The defendants, upon the record, appear as naked infringers of the plaintiff's patent.

The charge of the court below, therefore, was erroneous in assuming the existence of a license from Goodyear to the defendants, and entitles the plaintiff to a reversal of the judgment and to a *venire facias de novo*.

Mr. Justice CLIFFORD delivered the opinion of the court.

This case comes before the court on a writ of error to the Circuit Court of the United States for the district of Massachusetts. It was an action of trespass on the case, for the alleged infringement of certain rights secured by letters patent.

As the foundation of the suit, the declaration alleges, in effect, that the assignor of the plaintiff was the original and first inventor of certain improvements in the manufacture of India-rubber, and that in the year 1836 letters patent for such improvements were duly issued to him by the Commissioner of Patents, as is therein fully and correctly set forth and described.

Those improvements, as is alleged in the declaration, consist in a mode of preparing the rubber for manufacturing purposes, and of reducing it to a pasty state, without the use of the spirits of turpentine or other solvents, and of applying the same to cloths, and for other purposes, by the use of heated rollers and other means, as set forth in the letters patent, saving thereby, as is alleged, a large portion of the expense of reducing the original material to a proper degree of softness, and of fitting and preparing it for the various uses to which it may be applied.

On application subsequently made to the Commissioner of Patents, in due form of law, by the original inventor, the patent was extended for the further term of seven years, from the thirty-first day of August, 1850; and the plaintiff alleges that the patentee, on the first day of July, 1853, transferred,

assigned, and conveyed to him all his title to the invention and to the patent for the extended term.

By virtue of that deed of transfer, it is claimed in the declaration that the plaintiff acquired the right to demand and recover the damages for all infringements of the letters patent prior to the date of the transfer, as well as for those that have been committed since that time; and, accordingly, the plaintiff alleges that the defendants, on the thirty-first day of August, 1850, fraudulently commenced the use of those improvements, without law or right, and so continued to use them to the day of the commencement of this suit; averring, at the same time, that the defendants have prepared large quantities of the native rubber for manufacturing purposes, without the use of spirits of turpentine or other solvents, thereby making large gains, and greatly to the damage of the plaintiff.

As appears by the transcript, the action was entered in the Circuit Court at the May term, 1854, but was continued from term to term until the May term, 1857, when the parties went to trial upon the general issue.

From what is stated in the bill of exceptions, it appears that one Charles Goodyear was the owner of the original letters patent on the twenty-sixth day of January, 1846, and that he continued to own them for the residue of the term for which they were originally granted. On that day he entered into an indenture with one Henry Edwards, of the city of Boston, whereby, for certain considerations therein expressed, he sold and conveyed to the said Henry Edwards, his executors, administrators, and assigns, the exclusive right and license to make, use, and vend, any and all articles appertaining to machines, or in the manufacture, construction, and use of machines or machinery, of whatever description, subject to certain limitations and qualifications therein expressed.

By the terms of the instrument, it was understood that the right and license so conveyed was to apply to any and all articles substituted for leather, metal, and other substances, in the use or manufacture of machines or machinery, in so far as the grantor had any rights or privileges in the same, by virtue of any invention or improvement made or which should there-

after be made by him in the manufacture of India-rubber or gum-elastic goods, and in virtue of any and all letters patent or patent rights of the United States granted or belonging to him, or which should thereafter be granted or belong to him, for any and all inventions or improvements in the manufacture of such goods in this country, but excluding the right to make any contract with the Government of the United States. In consideration of the premises, the grantee paid the sum of one thousand dollars, as appears by the recital of the instrument, and agreed to pay a certain tariff, at the rate of five cents per superficial yard, or five cents per pound for the pure gum, according to the nature of the article manufactured.

Reference is made in the declaration to the letters patent, and to the deed of assignment from the patentee to the plaintiff, but neither of those instruments appears in the bill of exceptions or in any other part of the record.

At the trial of the cause, it was conceded and agreed that the defendants, before the date of the plaintiff's writ, used certain machinery, constructed in conformity with the specification annexed to the letters patent declared on, and that the defendants, in using the machinery, conformed to the directions contained in the specification, and that the same was so used for the preparation and application of India-rubber to the manufacture of the articles mentioned and described in the indenture from Charles Goodyear to Henry Edwards, and that all the machinery so used was constructed and in use as aforesaid before and at the time the original letters patent expired.

Upon this state of the case, according to the bill of exceptions, the presiding justice ruled and instructed the jury, that, under their title, the defendants had the right to continue to use the same machinery for the same purposes, and in conformity with the directions contained in the specification, after the expiration and renewal of the letters patent; and consequently, that the plaintiff could not recover.

Under the ruling and instruction of the court, the jury returned their verdict for the defendants; and the plaintiff excepted to the ruling, and his exceptions were duly allowed.

It is insisted by the counsel of the plaintiff, that the in-

struction given to the jury was erroneous; and that is the only question presented for decision at the present time. In considering that question, our attention must necessarily be confined to the evidence reported in the bill of exceptions, as the only means of ascertaining the precise state of facts on which the instruction to the jury was given. Whether the report of the evidence, as set forth in the bill of exceptions, may or may not be incomplete, or imperfectly stated, cannot be known in an appellate court. Bills of exception, when properly taken and duly allowed, become a part of the record, and, as such, cannot be contradicted.

By the admission of the parties in this case, it appears that the defendants, before the date of the plaintiff's writ, had used certain machinery, constructed in conformity with the specification of the plaintiff's patent. In the absence of any explanation or suggestion to the contrary, it must be inferred that the use of the machinery so admitted was without the license or consent of the plaintiff, and subsequent to the period when he became the owner of the patent for the extended term; and if so, the admission was sufficient, under the pleadings, to make out a *prima facie* case for the plaintiff. To maintain the issue on their part, the defendants proved in effect, or it was admitted, that all the machinery so used by them had been constructed, and was in use, as aforesaid, before and at the time the original letters patent expired, and that in using the machinery they had conformed to the directions contained in the specification, and that the same was so used for the purposes and in the manufacture of the articles specified and described in the before-mentioned indenture. As before stated, they had previously proved, or it had been admitted, that the owner of the original term of the patent had granted the exclusive right and license to a third party to use the invention for the same purposes for which the defendants, both under the original and extended term of the patent, had used their machinery; but they did not prove, and there is no evidence in the case to show, any privity between themselves, and that license, either by assignment or in any other manner. They offered no proof tending to show

that their use of the machinery in question, under either term of the patent, was with the license, consent, or knowledge, of the patentee, or of any other person who ever had or claimed to have any power or authority under him to convey the right. Provision is made by the eighteenth section of the act of Congress, passed on the fourth day of July, 1836, for the extension of patents beyond the time of their limitation, on application therefor, in writing, by the patentee, to the Commissioner of the Patent Office, setting forth the grounds for such extension. By the latter clause of that section, the benefit of such renewal is expressly extended to assignees and grantees of the right to use the thing patented to the extent of their respective interests therein. 5 Stat. at Large, p. 125. Under that provision, it has been repeatedly held by this court, that a party who had purchased a patented machine, and was using it during the original term for which the patent was granted, might continue to use the machine during the extended term. Bloomer *v.* McQuewan et al., 14 How., 549; Wilson *v.* Rosseau, 4 How., 646. That rule rests upon the doctrine that the purchaser, in using the machine under such circumstances, exercises no rights created by the act of Congress, nor does he derive title to it by virtue of the franchise or the exclusive privilege granted to the patentee.

When the patented machine rightfully passes to the hands of the purchaser from the patentee, or from any other person by him authorized to convey it, the machine is no longer within the limits of the monopoly. According to the decision of this court in the cases before mentioned, it then passes outside of the monopoly, and is no longer under the peculiar protection granted to patented rights. By a valid sale and purchase, the patented machine becomes the private individual property of the purchaser, and is no longer protected by the laws of the United States, but by the laws of the State in which it is situated. Hence it is obvious, that if a person legally acquires a title to that which is the subject of letters patent, he may continue to use it until it is worn out, or he may repair it or improve upon it, as he pleases, in the same manner as if dealing with property of any other kind. Apply-

ing these principles to the present case, as it is exhibited in the bill of exceptions, there would be no difficulty in sustaining the instructions given to the jury, provided it appeared that the machinery used by the defendants had been legally purchased by them of the patentee or his assigns during the original term of the patent. But nothing appears in the evidence reported to warrant the inference that they were either assignees or grantees of the thing patented, within the meaning of the act of Congress or the decisions of this court. All that the indenture offered in evidence showed was the nature and extent that the defendants had used the invention, but, as is well contended by the counsel for the plaintiff, it proved nothing more. It did not prove, or tend to prove, that the defendants were rightfully in the enjoyment of the thing patented during the original term of the patent, and having failed to establish any right or license to use their machinery during the extended term by any other proof, they appear in the record as naked infringers.

Their right to continue to use the machinery as against the plaintiff is predicated in the instruction upon the assumption that they had a title to it, and were rightfully in the use of it under that title, before and at the time the original letters patent expired. That assumed fact finds no support in the evidence reported. It is clearly error for the court, in its instruction to the jury, to assume a material fact as proved, of which there is no evidence in the case. United States v. Breitling, 20 How., 255. And when the finding of the jury accords with the theory of the instruction, thus assumed without evidence, the error is of a character to deserve correction.

Another position is assumed by the counsel of the plaintiff, which ought not to be passed over without a brief notice. They contend that the invention of the plaintiff, as described in the letters patent, is for a process, and not for a machine or machinery; and that the act of Congress, extending the benefit of renewals to assignees and grantees of the right to use the thing patented, when properly construed, does not include patents for a process, but should be confined to patents for machines. That question, if properly presented,

would involve the construction of the letters patent in this case, as well as the act of Congress; but as the patent is not in the record, it is not possible to determine it at the present time, and we only advert to it that it may not appear to have escaped attention.

The decree of the Circuit Court is reversed, with costs, and with directions to issue a new *venire*.

THE UNITED STATES, APPELLANTS, *v.* ROSA PACHECO AND OTHERS, DEVISEES UNDER THE LAST WILL AND TESTAMENT OF JUAN A. SANCHEZ DE PACHECO, DECEASED.

Where there was a grant of land in California included within certain boundaries laid down on a map, and the grant said it was made for two square leagues, but the map and the evidence clearly show that the intention was to give to the grantee a rancho of at least two leagues on each side line, the equity of the claim requires that it should be confirmed to that extent, situate within the given out-boundary.

It is for the United States to grant the legal title.

THIS was an appeal from the District Court of the United States for the northern district of California.

The facts of the case are stated in the opinion of the court.

It was argued by *Mr. Stanton* for the United States, no counsel appearing for the appellees.

Mr. Justice CATRON delivered the opinion of the court.

On the 31st of July, 1834, there was granted to Madame Pacheco a rancho of land, "included between the Arroyo de las Nueces and the Sierra de Golgones, bounded by the said places, and bounded by the ranchos Las Juntas, San Ramon, and Monte Diablo." This description was accompanied by a diseno, better defining the exterior boundaries than usual. But the grant has the following condition, amongst others: "The land of which mention is made is two square leagues, a little more or less, as shown by the map which goes with the expe-

diente. The magistrate who may give the possession will cause it to be measured in conformity with the ordinance, for the purpose of marking out the boundaries, leaving the surplus which may result to the nation, for its convenient uses."

The board of commissioners held that this condition must govern as to quantity, and decreed two square leagues.

In the District Court, that decree was reversed, and the land, as above described, and as it is represented on the plan, was decreed to the claimants, regardless of any exact quantity. From this decree the United States appealed. The validity of the grant is not disputed; the contest respects quantity only.

The plan presented by the party, and referred to in the grant, will furnish a guide to the surveyor, as respects boundaries within which the survey shall be made. But, in ascertaining the quantity intended to be given, we think neither the general description, nor the call for "two square leagues," found in the condition of the grant, can be relied on, as they are inconsistent, and plainly contradict each other, and the adoption of the one must necessarily reject the other. To find the true quantity intended to be granted, we are compelled to rely on other title papers and proofs.

The map shows, when taken in connection with the evidence of witnesses, explaining its contents, that the body of land petitioned for and granted was something more than two leagues long, and about two leagues wide. To this effect, the parol evidence is conclusive; and the map is equally so on its face, however inaccurate it may possibly be found when the objects called for, and laid down on the map, are sought on the ground. Nothing could be more manifest than that the grant was intended to give to Madame Pacheco a rancho of at least two leagues on each side line, making four leagues in superficies. And as the plan is part of and accompanies the last title paper, we feel bound to give it due weight, in reaching the undoubted equity of the claim.

This court is not dealing with a legal title; none such can exist until there is a survey, the land severed from the public domain, and the public title transferred by a final grant from the United States into private ownership.

What precise tract of land is to be surveyed and granted to Pacheco's heirs, "according to the principles of equity," must be ascertained in this proceeding, to the end that the United States may grant the legal title, in satisfaction of the treaty; and a concession by leagues being the rule, and one extending to indefinite out-boundaries the exception, we hold that it was intended in this case to grant equal to *two leagues square*, situate within the given out-boundary; that is to say, four leagues in one tract, if so much is found in the general description and diseno.

The decree of the District Court is therefore reversed, and the cause remanded to that court, to be further proceeded in, according to this opinion.

JOHN C. SINNOT, SAMUEL WOLF, AND JAMES SANDS, PLAINTIFFS IN ERROR, *v.* GORHAM DAVENPORT AND OTHERS, COMMISSIONERS OF PILOTAGE OF THE BAY AND HARBOR OF MOBILE.

A law of the State of Alabama, passed in 1854, requiring the owners of steamboats navigating the waters of the State, before such boat shall leave the port of Mobile, to file a statement in writing, in the office of the probate judge of Mobile county—setting forth, first, the name of the vessel; second, the name of the owner or owners; third, his or their place or places of residence; fourth, the interest each has in the vessel—is in conflict with the act of Congress passed on the 17th of February, 1793, so far as the State law is brought to bear upon a vessel which had taken out a license, and was duly enrolled under the act of Congress for carrying on the coasting trade, and plied between New Orleans and the cities of Montgomery and Wetumpka, in Alabama.

The State law, in such a case, is therefore unconstitutional and void.

An act of Congress, passed in pursuance of a clear authority under the Constitution, is the supreme law of the land, and any law of a State in conflict with it is inoperative and void.

THIS case was brought up from the Supreme Court of the State of Alabama by a writ of error issued under the 25th section of the judiciary act.

The facts of the case are stated in the opinion of the court.

It was argued by *Mr. Phillips* for the plaintiffs in error, and submitted on a printed brief by *Mr. C. C. Clay, jun.*, for the appellees.

Mr. Phillips gave a history of the case, and then proceeded:

The construction given to this act by the Supreme Court of the State includes boats engaged in commerce between the ports of another State and a port within its own territory. See cases of Cuba, Swan, and Bell, 28 Ala. Rep., 185. And the question thus presented is, whether this is not an interference with the power to regulate commerce, within the meaning of the Constitution of the United States, and in conflict with the acts of Congress on the same subject matter.

Commencing with the act of 1st September, 1789, 1 Stat., 55, we find a provision for registering vessels, coupled with the declaration, that vessels so registered "shall be deemed and taken to be and denominated vessels of the United States, and entitled to the benefits granted by any law of the United States to ships or vessels of the descriptions aforesaid."

This registry is to be made with the collector of the district to which the vessel belongs, and the form of a certificate is given, to be signed by the Secretary of the Treasury, the party applying having first made the prescribed oath, which, among other, contains the names of the owners and their residences.

Bond is to be given that the certificate thus issued shall not be transferred, and provision is made that, in case of any change of ownership, it is to be given up to be cancelled, and a new certificate issued. The 22d section of the act makes similar provisions as to enrolment.

These provisions are re-enacted in the act of December 31, 1792, 1 Stat., 287; 18th February, 1793, 1 Stat., 305.

The statute of 2d March, 1797, makes provision for the case of a sale by process of law. 1 Stat., 498.

The 2d section of the act 2d March, 1819, authorizes vessels licensed to trade between the different districts of the United States, to carry on said trade "between the districts included within the aforesaid great districts, and between a State in one and an adjoining State in another great district, in manner and subject only to the regulations that are now by law required to be observed by such ships or vessels in trading from one district to another in the same State, or from a district in one State to a district in the next adjoining State."

By the act 29th July, 1850, 9 Stat., 440, it is provided that no bill of sale, mortgage, &c., shall be valid against any other person than the grantor or mortgagor, and those having actual notice, unless the same be recorded in the office of the collector of customs where the vessel is registered or enrolled. It is made the duty of the collector to keep a record of all such conveyances, and shall, when required, certify the same, setting forth the names of the owners, their proportionate shares, &c., for which fees are allowed.

The power to regulate commerce conferred in the Constitution of the United States includes the regulation of navigation, and was one of the primary objects which led to its adoption.

Gibbons *v.* Ogden, 9 Wheat., 567.

State of Pennsylvania *v.* Wheeling Bridge, 18 How., 431.

The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used.

Cooley *v.* Portwardens Phil., 12 How., 316.

Is the power to regulate commerce thus granted to the Federal Government exclusive? In Gibbons *v.* Ogden the court say: "It has been concluded that, as the word 'regulate' implies in its nature full power over the thing to be regulated, it excludes necessarily the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated. There is great force in the argument, and the court is not satisfied that it has been refuted."

In Miln *v.* State of New York, (11 Peters, 130,) which involved the constitutionality of an act requiring captains of vessels arriving in the port of that State to furnish a list of passengers, &c., and which was sustained as a police regulation, the court "waived the examination of the question

whether the power to regulate commerce be or be not exclusive of the States."

In commenting on this case, Justice WAYNE says that the power to be exercised under State authority was after the passengers had landed. That on the question as to the exclusiveness of the power the judges were divided, four being in favor of the exclusiveness, and three opposed, and to this state of opinion was owing the waiver above quoted.

7 Howard, 431.

In the passenger cases (7 Howard) Justice MCLEAN said: "The power to regulate commerce, foreign and between the States, was vested exclusively in Congress." (P. 400.)

Justice WAYNE: This power "includes navigation upon the high seas, and in the bays, harbors, lakes, and navigable waters within the United States, and any law by a State in any way affecting the right of navigation, or subjecting the exercise of the right to a condition, is contrary to the grant." (P. 414.)

Justices CATRON and GRIER: "That Congress has regulated commerce and intercourse with foreign nations and between the several States, by willing that it shall be free, and it is therefore not left to the direction of each State in the Union either to refuse a right of passage to persons or property through her territory, or to exact a duty for permission to exercise it." (P. 464.)

In Cooley *v.* Portwardens of Philadelphia, the court say: "Although Congress has legislated on the subject of pilotage, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question, what other subjects under the commercial power are within the exclusive control of Congress, or may be regulated by the States in the absence of all Congressional legislation," &c.

12 Howard, 320.

But whether this power is exclusive or not, when Congress, in pursuance of the power, proceeds to regulate the subject

matter, it necessarily excludes State interference with the same subject matter.

In Houston *v.* Moore, (5 Wheat.,) the court say: "We are altogether incapable of comprehending how two distinct wills can at the same time be exercised in relation to the same subject, to be effectual, and at the same time compatible with one another."

In Prigg *v.* Commonwealth of Pennsylvania, (16 Pet., 617,) the language of the court is: "If Congress have a constitutional power to regulate a particular subject, and they do regulate it in a particular manner, and in a certain form, it cannot be that the State Legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is, as the direct provisions made by it."

The license granted to the steamer to carry on the coasting trade is a grant of authority to do whatever it purports to authorize. The States cannot add to the regulations made by the paramount authority, nor subtract anything from them.

Gibbons *v.* Ogden, p. 579.

The People *v.* Brooks, 4 Denio, 479.

The act of the State is in direct conflict with these principles, for, in effect, it declares that vessels engaged in foreign commerce, or the coasting trade, shall not navigate its waters, without complying with a condition not prescribed by the acts of Congress. If the State has the power to inflict a penalty for the violation of the condition, it is equally authorized to use force to prevent the violation.

It is not pretended that the act is based on the police power of the State; neither the preservation of the health, morals, nor the peace of the community, is affected by it. In the language of the Supreme Court of the State, its object is merely

to "advance the remedies for torts or contracts done or made by the agents of steamboats," &c.

While the power of the State over its legal remedies is admitted, this, like the taxing power of the State, cannot be exercised so as to interfere with the power delegated to Congress to regulate commerce.

Brown *v.* State of Maryland, 12 Wheat., 419.

Hays *v.* Steamship Company, 17 How., 599.

Towboat Company *v.* Steamboat Company, Law Register, March, 1857, p. 284.

The act of Congress of 29th July, 1850, provides the mode by which sales and transfers shall be made, and what shall be the evidence of ownership, while the act of the State disregards the mode thus provided, and declares a different rule shall prevail in its courts.

The case of the owners of the Swan against same defendant differs only in this—that the boat in question was engaged in the business of a lighter and tow between the wharves of the city and the vessels, and the vessels anchored in the lower part of the bay.

(See the succeeding case of Foster et al. *v.* Davenport et al.)

Mr. Clay's argument (adopting a brief filed by *Mr. J. T. Taylor*) was as follows:

There are three cases on appeal from the Supreme Court of Alabama, against this defendant, now pending. It is supposed they will all be submitted together, as the same question arises alike in all.

See the cases reported in 28 Alabama, 185.

The only question to be determined by this court is, whether the act of the Legislature of the State of Alabama is in violation of the Constitution of the United States.

The object sought, and the evil intended to be cured by the act, is clearly indicated on its face. The narrow and shallow channels in the bay and interior rivers of Alabama required the aid of legislative protection. Navigation would be impeded by the sinking of wrecks, discharging ballast, &c., by careless, negligent, and irresponsible seamen. On the narrow

rivers particularly, competition, strife, explosions, and collisions, were of frequent occurrence, against all which, the Legislature found it necessary to provide for the safety of navigation, and the protection of the life, property, and rights, of all persons trading or navigating the waters. But the whole of these police regulations were rendered inefficient, and irresponsible employés rendered more reckless, from the fact that responsibility could not be fixed on the *owner* and real wrong-doer. Even with the home vessels, in case of explosion, collision, or the boat becoming involved in debt, no responsible owner could be found; and if any name at all appeared, it was generally an irresponsible clerk or bar-keeper, or a man of straw. And as to those running from other States, the difficulty was greater; and where the vessel itself was lost, or exhausted by claims, no redress was or could be obtained for their injuries, depredations, and violation of law. To remedy this, the act referred to was passed, requiring simply the captain or managing officer of all *steamboats* running the waters to give the names of their owners, under such restrictions as would make the record *available*, in case of wrong, injury, or violation of law. It will be seen that the act does not in any way prohibit, obstruct, or interfere with *free* and uncontrolled navigation; and a compliance with it could not injure, but would encourage, both domestic and foreign trade and commerce. Neither is the law partial; it acts alike on *all*, and is for the benefit and protection of *all*.

The act, therefore, being for the purpose of carrying out and rendering effectual the undisputed *police regulations* of the State, is *itself* of the same *police* character, admitted, by undisputed authority, to be within the power of the States.

The coasting license authorizes the navigation of the waters, and the carrying on of trade and commerce within the States, but it does not pretend to authorize a disregard of the police laws passed by the States for the observance of its own citizens. And all laws for the protection of life, health, and property, inspection laws, and laws to prevent strife and confusion in bays, harbors, and rivers, and to secure the rights of

vessels navigating the waters, are of this kind. The following authorities sustain these propositions:

18 Alabama, 185.
11 Peters, 102.
4 Sandford, 492.
12 Howard, 299.
7 Iredel, 321.
16 B. Monroe, 699.
1 Parker C. R., 659, 583.
18 Mississippi, 283.
4 Rich., 286.
14 Texas, 153.
5 Texas, 426.
31 Maine, 360.
18 Connecticut, 500.
32 Maine, 383.
4 Georgia, 26.
12 Connecticut, 7.
7 Shep., 353.
2 Spears, 769.
2 Peters, 251.
14 Howard, 574.

The Legislature of New York passed "an act requiring the master of every vessel arriving at New York, from a foreign port, or any port of any other of the States, under certain penalties, to make a report in writing, containing the names, &c., of all passengers." The ship in question landed passengers, and failed and refused to file a *report*, as required. A suit was brought for the penalty. The defence was, that the law was unconstitutional; but it was held good by the Supreme Court of the United States, as a *police* law. The case at bar, and that above cited, differ in this only — one requires the names of *passengers* to be recorded, and the other requires the *owners'* names to be recorded. The law of New York was for the protection of her citizens only. The act of Alabama was for the mutual benefit of *all* persons and vessels.

2 Peters, 102.
2 Paine C. C., 429.

The State of Pennsylvania passed an act requiring all vessels to take a pilot, and on refusal shall pay to the master warden of the pilots, for the use of the society, &c., one-half the regular amount of pilotage. The Supreme Court of Pennsylvania and the Supreme Court of the United States held that this law was not void or inconsistent with the Constitution or any of the acts of Congress.

See 12 Howard, 299.

In this case, Justice DANIEL, in delivering the opinion, said: "The power delegated to Congress by the Constitution relates properly to the terms on which commercial engagements may be prosecuted, the character of the articles they may embrace, the permission and terms according to which they may be introduced, and do not necessarily, or even materially, extend to the means of precaution and safety adopted within the waters or limits of the States, by the authority of the latter, for the preservation of vessels and cargoes, and the lives of navigators or passengers; these last subjects are essentially local. In the case of Vezie *v.* Moore, 14 Howard, 574, this court says: "The design and object of the clause of the Constitution under consideration was to establish a perfect equality between the States, and to prevent unjust discriminations," &c.; and in accordance therewith have been the expositions of this court in the decisions quoted by counsel, &c.

And in nearly all the cases above referred to, it is held that a State has the right to make improvements in its navigable waters, in order to make the common right more beneficial to all, and to pass laws for mutual protection.

In Connecticut, it is held that an act of the State Legislature, imposing reasonable tolls as a compensation for improving the navigation, is constitutional and valid; that commerce is not crippled by such tolls, but the act of the Legislature comes in aid of the power of Congress.

18 Conn., 500.

In South Carolina, a law appointing a person to assign to vessels their proper places, and requiring a fee to be paid and a penalty for non-observance, &c., was held good by the Supreme Court of South Carolina.

4 Rich., 286.

It is also held by the Supreme Court of Texas, that an act of the Legislature, imposing wharfage dues on all vessels landing at Buffalou Bayou was constitutional, as these dues were limited to the improvement of the navigation of the bayou.

14 Texas, 157.

A case was lately decided in New York, where most of the authorities on this subject are collected. The case was this. The Legislature passed an act as follows:

"Whenever any steamboat shall be navigating in the night time, the master of such boat shall cause her to carry and show two good and sufficient lights—one to be exposed near her bow, and the other near her stern, and the last shall be at least twenty feet above her deck."

The defence was, that the steamer in that case was not bound to carry more than one light, because she was a vessel owned in another State, navigating a river subject to the jurisdiction of Congress, under a national enrolment and license. In this case, too, Congress had acted on this same subject matter. The act of Congress of 1838 made it the duty of masters and owners of every steamboat, running between sunset and sunrise, to carry one or more signal lights, under a penalty, &c., and it was further contended that the license prohibited a further requirement to be added by the State; but the court, after a full argument, held the State law good, and that the defendants were liable for all the penalties imposed for disregarding it. See the case and the numerous authorities there cited.

4 Sandford, 462.

II. If it should be considered that the act of Alabama is not a police regulation, still, as it is necessary for the protection and the security of the rights of all persons trading and navigating the rivers, and is not in direct conflict with any act of Congress, it will be held good. It was never intended by Congress, in passing general laws for all the waters of the Union, to prohibit the States from passing such other regulations, not in conflict, that might be found necessary for safe

and peaceful navigation, on particular streams or localities. In 14 Howard, United States, 296, it is said that "the grant of commercial power to Congress does not forbid the States from passing laws, not in conflict with the acts of Congress. The power to regulate commerce includes various subjects, upon some of which there should be uniform rule, and upon others different rules in different localities."

In the case 4 Sandford, the court, after commenting on the authorities of the Supreme Court of the United States, says: "If any principle may be deduced from the decisions and opinions of the judges of that high tribunal, it is this: that each State may pass such laws affecting commerce, to operate within its own limits, not in conflict with the provision of the Constitution of the United States, or acts of Congress, as are necessary for the preservation of the life, the health, the personal rights, and property of its citizens, and of those enjoying its protection." A great majority of the cases already cited hold the same. The object of the act of Alabama was to afford all passengers and persons trading, or navigating the waters, some certain evidence by which to sustain their rights or redress their wrongs, and a means of getting at the secret wrong-doers; to give fair play and ready redress to all. Upon examining this act with the acts of Congress, it will be seen that it does not conflict with the acts of Congress; it is rather in addition, or in aid of the objects of those laws.

III. There are three classes of these cases appealed from the Supreme Court of Alabama, one of which was engaged in running from Mobile to Montgomery, one in towing vessels in and about the port of Mobile, and one between New Orleans and Montgomery. As to the two first boats mentioned, they are domestic vessels entirely, running on our own waters within our limits, and so regularly occupied and engaged, and not between the ports of different States. The mere fact, therefore, that they happened to have a coasting license on board, can't help them. The Supreme Court of the United States, in 14 Howard, 573, says: "These categories are, 1st, commerce with foreign nations; 2d, commerce among the

several States; 3d, commerce with the Indian tribes. Taking the term commerce in its broadest acceptation, supposing it to embrace not merely traffic, but the means and vehicles by which it is prosecuted, can it properly be made to include objects and purposes such as those contemplated by the law under review? Commerce with foreign nations must signify commerce, which in some sense is necessarily connected with those nations, transactions which, either immediately or at some stage of their progress, must be extra territorial. It can never be applied to transactions wholly internal," &c.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Alabama.

The suit was brought by the plaintiffs below, commissioners of pilotage of the harbor of Mobile, against the steamboat Bagaby, of which Sinnot, the defendant, was master, to recover certain penalties for a violation of the law of the State of Alabama, passed February 15, 1854, entitled "An act to provide for the registration of the names of steamboat owners."

The 1st section of the act provides that it shall be the duty of the owners of steamboats navigating the waters of the State, before such boat shall leave the port of Mobile, to file in the office of the probate judge a statement in writing, setting forth the name of the steamboat and of the owner or owners, his or their place or places of residence, and their interest therein, which statement shall be signed and sworn to by the owners, or their agent or attorney, and which statement shall be recorded by the said judge of probate; and, also, in case of a sale of said boat, it is made the duty of the vendee to file a statement of the change of ownership, his place of residence, and the interest transferred, which statement shall be signed by the vendor and vendee, his or their agent or attorney, and recorded in the office of the aforesaid judge.

The 2d section provides, that if any person or persons, being owner or owners of any steamboat, shall run, or permit the same to be run or navigated, on any of the waters of the State,

without having first filed the statement as provided by the act, he or they shall forfeit the sum of $500, to be recovered in the name of the commissioners of pilotage of the bay of Mobile, either by a suit against the owners or by attachment against the boat, the one half to the use of the commissioners, and the other half to the person or persons who shall first inform said commissioners.

The steamboat Bagaby in question was seized and detained under this act until discharged, on a bond being given to pay and satisfy any judgment that might be rendered in the suit. A judgment was subsequently rendered against the vessel in the city court of Mobile, for the penalty of $500, with costs, which, on an appeal to the Supreme Court was affirmed.

The material facts in the case are, that the steamboat was engaged in navigation and commerce between the city of New Orleans, in the State of Louisiana, and the cities of Montgomery and Wetumpka, in the State of Alabama, and that she touched at the city of Mobile only in the course of her navigation and trade between the ports and places above mentioned; that she was an American vessel, built at Pittsburgh, in the State of Pennsylvania, and was duly enrolled and licensed in pursuance of the laws of the United States, and had been regularly cleared at the port of New Orleans for the ports of Montgomery and Wetumpka, whither she was destined at the time of the seizure and detention under the act in question.

The plaintiffs in error, the master, and stipulators in the court below, insist that the judgment rendered against them is erroneous, upon the ground that the statute of the Legislature of the State of Alabama is unconstitutional and void, it being in conflict with that clause in the Constitution which confers upon Congress the power "to regulate commerce with foreign nations and among the several States," and the acts of Congress passed in pursuance thereof. The act of Congress relied on is that of the 17th February, 1793, providing for the enrolment and license of vessels engaged in the coasting trade. The force and effect of this act was examined in the case of Gibbons *v.* Ogden, (9 Wh., pp. 210, 214,) and it was there held that vessels enrolled and licensed in pursuance of it had con-

ferred upon them as full and complete authority to carry on this trade as was in the power of Congress to confer.

The Chief Justice says, (speaking of the 1st section:) "This section seems to the court to contain a positive enactment that the vessels it describes shall be entitled to the privileges of ships or vessels employed in the coasting trade. These privileges cannot be separated from the trade, and cannot be enjoyed unless the trade may be prosecuted." Again, the court say, to construe these words otherwise than as entitling the ships or vessels described to carry on the coasting trade would be, we think, to disregard the apparent intent of the act. And again, speaking of the license provided for in the 4th section, the word "license" means permission or authority; and a license to do any particular thing is a permission or authority to do that thing, and, if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license.

The license is general in its terms, according to the form given in the act of Congress: "License is hereby granted for the said steamboat (naming her) to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

In the case already referred to, it was denied in the argument that these words authorized a voyage from New Jersey to New York. The court observed, in answer to this objection: It is true that no ports are specified; but it is equally true that the words used are perfectly intelligible, and do confer such authority as unquestionably as if the ports had been mentioned. The coasting trade is a term well understood. The law has defined it, and all know its meaning perfectly. The act describes with great minuteness the various operations of vessels engaged in it; and it cannot, we think, be doubted that a voyage from New Jersey to New York is one of those operations.

On looking into the act of Congress regulating the coasting trade, it will be found that many conditions are to be complied

with by the owners of vessels, before the granting of the enrolment or license. 1. The vessel must possess the same qualifications, and the same requisites must be complied with, as are made necessary to the registering of ships or vessels engaged in the foreign trade by the act of December 31, 1792. These conditions are many and important, as will be seen by a reference to the act. 2. A bond must be given by the husband, or managing owner, and the master, with sureties to the satisfaction of the collector, conditioned that such vessel shall not be employed in any trade by which the United States shall be defrauded of its revenues; and also the master must make oath that he is a citizen of the United States; that the license shall not be used for any other vessel or any other employment than that for which it is granted, or in any trade or business in fraud of the public revenues, as a condition to the granting of the license. These are the guards and restraints, and the only guards and restraints, which Congress has seen fit to annex to the privileges of ships and vessels engaged in the coasting trade, and upon a compliance with which, as we have seen, as full and complete authority is conferred by the license to carry on the trade as Congress is capable of conferring.

Now, the act of the Legislature of the State of Alabama imposes another and an additional condition to the privilege of carrying on this trade within her waters, namely: the filing of a statement in writing, in the office of the probate judge of Mobile county, setting forth: 1. The name of the vessel; 2. The name of the owner or owners; 3. His or their place or places of residence; and 4. The interest each has in the vessel. Which statement must be sworn to by the party, or his agent or attorney. And the like statement, mutatis mutandis, is required to be made each time a change of owners of the vessel takes place. Unless this condition of navigation and trade within the waters of Alabama is complied with, the vessel is forbidden to leave the port of Mobile, under the penalty of $500 for each offence.

If the interpretation of the court, as to the force and effect of the privileges afforded to the vessel by the enrolment and license in the case of Gibbons *v.* Ogden, are to be maintained,

it can require no argument to show a direct conflict between this act of the State and the act of Congress regulating this trade. Certainly, if this State law can be upheld, the full enjoyment of the right to carry on the coasting trade, as heretofore adjudged by this court, under the enrolment and license, is denied to the vessel in question.

If anything further could be necessary, we might refer to the enrolment prescribed by the act of Congress, by which it is made the duty of the owner to furnish, under oath, to the collectors, all the information required by this State law, and which is incorporated in the body of the enrolment. Congress, therefore, has legislated on the very subject which the State act has undertaken to regulate, and has limited its regulation in the matter to a registry at the home port.

It has been argued, however, that this act of the State is but the exercise of a police power, which power has not been surrendered to the General Government, but reserved to the States; and hence, even if the law should be found in conflict with the act of Congress, it must still be regarded as a valid law, and as excepted out of and from the commercial power.

This position is not a new one; it has often been presented to this court, and in every instance the same answer given to it. It was strongly pressed in the New York case of Gibbons *v.* Ogden. The court, in answer to it, observed: "It has been contended, that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes in conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other, like equal opposing forces." But, the court say, the framers of the Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with or are contrary

to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress or treaty is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it. The same doctrine was asserted in the case of Brown *v.* the State of Maryland, 12 Wh., pages 448, 449, and in numerous other cases. (5 How., pages 573, 574, 579, 581; 2 Peters, 251, 252; 4 Wh., pages 405, 406, 436.)

We agree, that in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together; and, also, that the act of Congress should have been passed in the exercise of a clear power under the Constitution, such as that in question.

The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an act of the Legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the State law must give way; and this, without regard to the source of power whence the State Legislature derived its enactment.

This paramount authority of the act of Congress is not only conferred by the Constitution itself, but is the logical result of the power over the subject conferred upon that body by the States. They surrendered this power to the General Government; and to the extent of the fair exercise of it by Congress, the act must be supreme.

The power of Congress, however, over the subject does not extend further than the regulation of commerce with foreign nations and among the several States. Beyond these limits the States have not surrendered their power over the subject, and may exercise it independently of any control or interference of the General Government; and there has been much

controversy, and probably will continue to be, both by the bench and the bar, in fixing the true boundary line between the power of Congress under the commercial grant and the power reserved to the States. But in all these discussions, or nearly all of them, it has been admitted, that if the act of Congress fell clearly within the power conferred upon that body by the Constitution, there was an end of the controversy. The law of Congress was supreme.

These questions have arisen under the quarantine and health laws of the States—laws imposing a tax upon imports and passengers, admitted to have been passed under the police power of the States, and which had not been surrendered to the General Government. The laws of the States have been upheld by the court, except in cases where they were in conflict, or were adjudged by the court to be in conflict, with the act of Congress.

Upon the whole, after the maturest consideration the court have been able to give to the case, we are constrained to hold, that the act of the Legislature of the State is in conflict with the Constitution and law of the United States, and therefore void.

The judgment of the court below is reversed.

PHINEAS O. FOSTER, ROGER A. HEIRNE, AND GEORGE J. BLAKESLEE, OWNERS OF THE STEAMBOAT SWAN, PLAINTIFFS IN ERROR, *v.* GORHAM DAVENPORT AND OTHERS, COMMISSIONERS OF PILOTAGE OF THE BAY AND HARBOR OF MOBILE.

The principle established in the preceding case extends also to a steamboat employed as a lighter and towboat, sometimes towing vessels beyond the outer bar of the bay, and into the gulf to the distance of several miles.

The character of the navigation and business in which this boat was employed cannot be distinguished from that in which the vessels it towed or unloaded were engaged. The lightering or towing was but the prolongation of the voyage of the vessels assisted to their port of destination.

THIS was a writ of error to the Supreme Court of Alabama. The case was similar to the preceding one of Sinnot and others

v. Davenport, except that the steamboat Swan was employed as a lighter and towboat upon waters within the State of Alabama. It was therefore insisted that she was engaged exclusively in the domestic trade and commerce, and consequently could be distinguished from the preceding case. Both were argued together by the same counsel.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Alabama.

The case is, in all respects, like the one just decided, except it is insisted that the steamboat was employed as a lighter and towboat upon waters within the State of Alabama, and therefore engaged exclusively in the domestic trade and commerce of the State.

According to the admitted state of facts, this boat was engaged in lightering goods from and to vessels anchored in the lower bay of Mobile, and the wharves of the city, and in towing vessels anchored there to and from the city, and, in some instances, towing the same beyond the outer bar of the bay, and into the Gulf to the distance of several miles. This boat was duly enrolled and licensed to carry on the coasting trade at the time she was engaged in this business, and of the seizure under the State law.

It also appears from the answer, and which facts are admitted to be true, that the port of Mobile is resorted to and frequented by ships and vessels, of different size in tonnage, engaged in the trade and commerce of the United States with foreign nations and among the several States; that the vessels of small size and tonnage are accustomed to come up to the wharves of the city, and discharge their cargo, but that large vessels frequenting said port cannot come up, on account of the shallowness of the waters in some parts of the bay, and are compelled to anchor at the lower bay, and to discharge and receive their cargo by lighters; and that the steamboat of claimants was engaged in lightering goods to and from said vessels, and in towing vessels to and from the lower bay and the wharves of the city.

It is quite apparent, from the facts admitted in the case, that this steamboat was employed in aid of vessels engaged in the foreign or coastwise trade and commerce of the United States, either in the delivery of their cargoes, or in towing the vessels themselves to the port of Mobile. The character of the navigation and business in which it was employed cannot be distinguished from that in which the vessels it towed or unloaded were engaged. The lightering or towing was but the prolongation of the voyage of the vessels assisted to their port of destination. The case, therefore, is not distinguishable in principle from the one above referred to.

Judgment of the court below reversed.

SIDNEY E. COLLINS, APPELLANT, *v.* DRURY THOMPSON, WILLIAM F. CLEVELAND, AND JAMES CAMPBELL'S WIDOW, HEIRS, AND DEVISEES.

Where the complainant set up in his bill that a deed, power of attorney, and other writings, all which, as alleged, were executed in contemplation of a suit for the recovery of his patrimonial inheritance of which he had been unjustly deprived, were obtained by imposition and fraud, and also that a deed, executed by him in the adjustment of the estate among the parties participating in the litigation to recover it, was obtained by like fraud and imposition, held, that upon the pleadings and proofs, the allegations are not sustained; on the contrary, the transactions in both respects referred to were fair, open, and unexceptionable.

THIS was an appeal from the Circuit Court of the United States for the southern district of Alabama.

It was a bill filed by Collins, to set aside certain agreements, upon the ground that he had been imposed upon and deceived by Thompson and the other defendants in error.

The facts are all stated in the opinion of the court.

The Circuit Court dismissed the bill, and Collins appealed to this court.

It was argued by *Mr. Sewall* for the appellant, and by *Mr. Smith* and *Mr. Benjamin* for the appellees.

The arguments of the counsel upon both sides were almost exclusively directed to the evidence, and how far it sustained the charges of fraud brought by Collins against Thompson and the other appellees. To apply these arguments, it would be necessary to give at least an abstract of the evidence, which would throw no light upon any general questions of law or equity. They are therefore passed over.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the southern district of Alabama.

The bill was filed by Collins, to set aside certain conveyances of a tract of land situate in the city of Mobile, and particularly a deed from him to the defendants, bearing date the 15th February, 1851, on the ground of fraud and imposition in the procurement of said conveyances.

The pleadings and proofs are very voluminous, the pleadings alone covering nearly one hundred, and including the proofs, exceeding five hundred, closely printed octavo pages. The bill is very inartificially drawn, being stuffed with minute and tedious detail of what might have been proper evidence of facts constituting the ground of the complaint, instead of a concise and orderly statement of the facts themselves. This has led to an equally minute and extended statement of the grounds of the defence in the several answers of the defendants.

In looking closely, however, into the case, and into the nature and grounds of the relief sought, and principles upon which it must be sustained, if at all, it will be found that the questions really involved, as well as the material facts upon which their determination depend, are few and simple, and call for no very extended discussion.

The father of Collins, the complainant, died in 1811, seized of an interest in the tract of land in dispute. He left three sons, the complainant being then some two years old. The tract subsequently passed into the possession of one Joshua Kennedy, by collusion between Inerarity, the administrator of Collins the elder, and Kennedy, the latter also afterwards

obtaining a deed of the land from the heirs at law by fraudulent representations.

In 1844, Thompson, one of the defendants in the present suit, residing in the city of Mobile, and having some knowledge of the original title of Collins to the land, and of the means by which the heirs had been deprived of it, visited the complainant, then residing in Texas, and being the only surviving heir, with a view to purchase his title, or to obtain an arrangement with him in respect to it, so that a suit might be instituted for the recovery of the estate. An arrangement was agreed to accordingly, and a conveyance of the land executed by the complainant and his wife to Thompson; also, a power of attorney, authorizing him to institute suits for the recovery of the land—Thompson, at the same time, executing a bond of indemnity to the complainant against all costs and responsibilities, in consequence of the suit. The complainant was to receive $10,000, in the event of a recovery. A suit was subsequently instituted in the name of the complainant against the heirs of Kennedy, in April, 1844, in the Circuit Court of the United States for the southern district of Alabama; was heard upon the pleadings and proofs at the April term of the court, in 1847, and a decree rendered in his favor; which, on an appeal to this court, was affirmed at the December term, 1850. The case, as reported in this court, will be found in the 10th How., p. 174.

The litigation extended over a period of some seven years; and, in the progress of it, besides Thompson, who had made the original arrangement with the complainant, three other persons had become interested, and had contributed their services and money in bringing it to a successful termination.

After the affirmance of the decree in this court, and confirmation of the title in complainant, all the parties concerned met in the city of Mobile, at the office of the solicitors, for the adjustment of their respective claims to the property recovered. Its value had increased, during the progress of the suit, from about $100,000, according to the estimate, to some two or three times that amount. The complainant had originally stipulated for the sum of $10,000. In this adjustment, one-

third of the whole estate was set apart to him, and one-sixth to each of the other four persons. Conveyances according to this division were executed on the 15th February, 1851. The complainant therefore, according to the general estimate, received $100,000, and the other four associates $50,000 each.

Now, the fraud alleged in the bill, and which is mainly relied on for setting aside this adjustment and division of the estate between the parties, is placed upon two grounds: 1. In obtaining the deed of the land, powers of attorney, and other stipulations relating to the title, dated the 13th January, 1844, preparatory to the institution of the suit in which the property was recovered; and 2. In the adjustment and division of the property among the several parties above mentioned, after the recovery had taken place, and which was consummated by the deed of 15th February, 1851.

1. It is insisted, on behalf of the complainant, that, at the time he executed the deed, powers of attorney, and the other writings, in 1844, he was unacquainted with the value of the property or the condition of the title; that Thompson, who procured these instruments, and the authority to commence the suit, was well acquainted with both; that he fraudulently depreciated the value of the property, and exaggerated the difficulties and expense attending the litigation, and thereby deceived the complainant. This is the substance of the charge.

There is, however, a very brief but most conclusive answer to it, upon the pleadings and proofs in the case. It is, that Mr. Justice CAMPBELL, whose firm had been subsequently employed by Thompson to bring the suit against the heirs of Kennedy, declined the retainer, and refused to have anything to do with it, unless the complainant should not only be made sole plaintiff in the suit, but should have a substantial interest in the estate sought to be recovered; should attend as the party in interest in conducting the proceedings, and take part in the preparation for trial; and insisted that the preliminary arrangement made by Thompson, including the deed of the property and agreement for the payment of the $10,000, should be abrogated and given up. All of which was agreed to by Thompson and the other parties concerned; and the

suit was commenced and carried on to a final determination, under this new arrangement. The complainant attended, and participated in the preparation of the case, assisted in procuring and in the examination of the witnesses, and admits, in his bill, that he attended every term of the court at Mobile, while the cause was pending, and until the decree in his favor.

The whole arrangement, therefore, between the parties, in respect to the property, entered into with a view to the institution of the suit, which is complained of, having been given up, and a new one substituted, which was not only unexceptionable, but highly equitable and just, as concerned the complainant, the charge of fraud and imposition depending upon it, even if originally it had any foundation, falls with it. We shall not stop to inquire into the merits or justice of that arrangement, for, having been given up, they are wholly immaterial in any view of the case, as presented upon the evidence before us.

2. The remaining ground of fraud relied on in the bill is, that on the day of the arrival of the complainant at the city of Mobile, from his residence in Texas, and which was his first visit to the city after the judgment in his favor in this court, he was requested to attend at the office of the solicitors, in the evening, and attended accordingly, where he met the defendants, and was then, for the first time, informed that they had been interested in the prosecution of the suit, and had expended much time and money in the litigation, and were therefore expected to participate in the division of the property recovered. That complainant was taken by surprise when the suggestion was made at the meeting, by the solicitor, that, in the division, one-sixth part of the estate should be given to each of the defendants, and including Primrose, and only one-third to himself. That he was unprepared to act with judgment in the matter, having been wholly unadvised of the object of the meeting, or of the persons who were to be present; that no time was given him for reflection or counsel; that he was ignorant of the value of the property, and incapable of acting understandingly upon the subject, and had no information as to the amount he was thus suddenly called on to give away.

That a deed was immediately prepared by the solicitor, to carry into effect the division as suggested, and was executed; and that this meeting was arranged by preconcert, and after consultation between the defendants and others, for the purpose of entrapping and deceiving the complainant. The deed referred to is that of 15th February, 1851, which is sought to be set aside.

This is the second ground of fraud substantially as charged in the bill; and it will be necessary to look into the answers and proofs in the case, with a view to see if it is sustained.

The answer of Thompson, which is responsive to this particular charge, is a denial of every material fact and circumstance upon which the allegation of fraud rests. It states, that one or two days after the arrival of the complainant at Mobile, he requested him (the respondent) to go with him to the office of the solicitor that evening; that he had made an appointment with the solicitor to meet the respondent, and other persons interested in the suit, there, in order to come to an understanding and adjustment of their respective interests. The matters of the adjustment formed the subject of their conversation during the afternoon, and down to the time of the meeting. That the respondent explained to him the understanding he had with his associates, the other defendants, the services they had rendered in the suit, and the advances of money made therein; that, after all the parties had assembled at the office, the subject was again talked over at length, and, in the course of the conversation, the solicitor was referred to, and desired to suggest what, in his judgment, would be a reasonable adjustment and division of the property. Whereupon, he suggested a division into six parts—two parts to the complainant, and one to Thompson and each of his three associates; that this appeared to be generally acquiesced in, and it was proposed by some one that the papers should be drawn and executed. But the solicitor objected, and advised them to postpone the execution, and reflect upon the matter, and when they had come to a determination among themselves, it would be time enough to make out the papers; that the complainant expressed great pleasure and satisfaction at the divis-

ion; other of the parties were not satisfied. But, in a few days, all met at the office of Primrose, one of the parties in interest, when the deed of the 15th of February, 1851, was voluntarily executed, carrying into effect the division.

The answer of Cleveland, another of the defendants, is equally explicit. He states that the subject of the division was talked over at the office of the solicitor; that all expressed satisfaction at the division suggested, except Primrose, who objected to the allowance of two shares to the complainant, he insisting that the time and labor of others had chiefly contributed to the success of the suit, and that complainant had originally expressed a willingness to be content with a small sum; that the solicitor repelled the idea, and said, that although others had been chiefly instrumental in carrying the case through, the title was in the complainant, and he ought to have the largest share; that the solicitor advised the parties to consider the matter, and, if he could aid them, to call on him; that the deed carrying into effect the division was not executed till several days, and respondent thinks a week, after this, at the office of Primrose.

James Campbell, another of the defendants, states that, after the meeting at the office, the subject of the interests of the parties was talked over; that upon the division suggested by the solicitor all concurred, except Primrose, who represented his claims higher than those of complainant; that he had rendered greater services, and was entitled to a greater share. He depreciated complainant's title to the estate, insisting that he alone could have made nothing out of it, and had always said he would be satisfied with some negroes and cattle; that the solicitor replied to him, that without complainant's title there could have been no recovery; and that, whatever others had done, still the title was in the complainant, and that he, the solicitor, had undertaken the suit with the distinct understanding and agreement that complainant was to have a substantial interest in the recovery. The respondent denies that the deed was drawn or executed the evening of the meeting, nor until several days afterwards.

These several answers are directly responsive to the charges

in the bill, and are to be taken as true, unless overcome by the proofs. Instead of impeaching, the proofs are all in support of them.

Primrose, a witness on the part of the complainant, and who was one of the parties in interest, and present at this meeting, confirms the facts as above stated. In his answer to 43d interrogatory, he says, in substance, that, after conversation at the meeting relating to the subject before them, all seemed willing to leave the division to the solicitor, who thereupon suggested one-third to the complainant, and one-sixth to each of the others; that he (the witness) objected, as giving too great a share to the complainant, and that he made some remarks about the condition of the title, when he and the others undertook the suit; that complainant at that time had said he would be satisfied with a comparatively small sum, and that the solicitor replied to him, that the title to the property was in the complainant, besides making other observations which he (the witness) did not recollect.

This witness further says, in answer to the 43d cross interrogatory, speaking of the division, "All but myself did acquiesce. So far as I could judge, the complainant was satisfied, and I was disappointed." "Judge Campbell maintained Collins's right to two shares against me. The parties talked some of the matters over freely and considerably. It consumed a winter's evening, or greater part of it." "I do know Collins was pleased, and considered the settlement fair, just, and liberal towards him."

Judge Campbell, the solicitor, has also been a witness in the case. He states that, after some reference to the subject at the meeting, and interchange of views, one of the parties stated that he was willing to abide by his opinion as to the share he should be entitled to, and others indicated a wish that he would make some suggestions as to the proper adjustment. In answer to which, he suggested a division of the property into six parts, and that two should be assigned to the complainant; that Primrose expressed dissatisfaction, insisting the part to be assigned the complainant was too large; that his title was good for nothing, and that the success in the

suit was owing to the ability with which it was prosecuted; that complainant did not expect so large a share; that he had said all he wanted was a few negroes and some cattle.

The witness further states, that he took pains to answer these objections; and, after some further conversation, the parties left his office; that he told them when they left to take into consideration what had been said, and that if he could be of any service to them, to call at his office again; that no agreement was arrived at that evening, and no papers drawn up of any agreement between the parties; that the deed of February, 1851, was not prepared by him till several days after this, and that he had not learned of its execution till the week after its preparation.

It is useless to pursue the inquiry further, as the proofs in the case are all one way, and show that there is no foundation whatever, not even colorable, for the charge of fraud set forth in the bill.

Besides the entire want of proof to sustain it, the evidence shows that possession of the property was taken by the parties jointly, after the settlement, in the summer of 1851. Extensive and valuable improvements were made in the course of the years 1852–'53, under the direction of the complainant and others. The sales in 1853 had amounted to $92,000, as stated in the bill.

The property continued under the joint management of the parties for the period of some three years, without complaint or dissatisfaction on the part of Collins; when suddenly, without any apparent reason or changed condition of affairs between him and his associates, he seems to have taken up the delusion that he had been circumvented, and deceived into an inequitable settlement of the estate among the parties, in February, 1851, and for the first time set up a claim to the whole of it.

It is suggested in the bill, that the large sales made of the property in 1852–'53 afforded the complainant the first evidence of the great value of the estate; and it appears, from other portions of the case, that the increased and increasing value of the property had the effect to unsettle the views and

opinions upon which he had acted in the settlement with his associates in February, 1851, and led to a strong desire to recall and review them.

But this suggested ignorance of the great value of the property at the time of the settlement is against all the proof in the case. His bill, filed against the heirs of Kennedy in April, 1844, for the recovery of this property, contains the following allegation: "Your orator charges that the said property was worth $20,000 and upwards in 1820, $75,000 in 1830, and is probably worth $200,000 at this time."

The great value of the property, compared with the consideration paid by Kennedy, was a very material fact in the case. Besides, the complainant had spent much of the time pending that litigation in the city of Mobile, in which the property was situate, and must have been familiar with its value, present and prospective. He was then in the prime of life, and possessed of more than ordinary intelligence in business matters, as is apparent from his correspondence, to be found in the record.

Having succeeded in the recovery, and obtained possession of the estate, he seems to have forgotten the obligations he was under to his associates. Their exertions and means had been mainly instrumental in raising him from poverty to affluence. They had advised him of his claim or title to the property, collected the necessary evidence to establish it, employed the counsel, and even furnished him (Collins) with the means of support, and to enable him to co-operate in the prosecution of the suit pending the litigation. The suit was severely contested, and was of some seven years' duration.

Still stronger evidence that, after his success, he was ready to forget his obligations to those mainly contributing to it, is the fact that his solicitor has not even escaped his insinuations of bad faith in his connection with the suit, though it was disclaimed on the argument by his counsel; thus contradicting all his opinions and feelings, strongly and repeatedly expressed pending the suit, and long after its termination and the settlement between the parties. The solicitor had no interest in the property or in its distribution. His fee was not

dependent upon it. He was, therefore, wholly disinterested in the matter, and well situated to act as the friend of all parties in the settlement.

As we have already stated, before the commencement of the suit, he refused to be connected with it, unless the complainant should be permitted to have a substantial interest in the estate, and repudiated the arrangement by which he was to receive only $10,000. After the recovery, and in the settlement among the parties, he stood firmly by this original understanding, and insisted that he should have a double share. So far as appears from the evidence, it is entirely owing to the sense of justice and firmness of Judge Campbell (the solicitor) that the complainant is now in the possession and enjoyment of some $100,000 of his patrimonial inheritance, instead of the $10,000 for which he himself had stipulated.

The decree of the court below is affirmed.

JOSEPH KIMBRO, PLAINTIFF IN ERROR, *v.* CUTHBERT BULLITT, THOMAS D. MILLER, AND LLOYD D. ADDISON, PARTNERS IN TRADE UNDER THE NAME AND STYLE OF BULLITT, MILLER, & CO.

Where bills of exchange were drawn by the principal acting partner of a firm in the name of the firm, all the partners were responsible.

Whenever there are written articles of agreement between the partners, their power and authority, *inter se*, are to be ascertained and regulated by the terms and conditions of the written stipulations. But, independently of any such stipulations, each partner possesses an equal and general power and authority, in behalf of the firm, to transact any business within the scope and objects of the partnership, and in the course of its trade and business.

Where partnerships are formed for the mere purpose of farming, one partner does not possess the right, without the consent of his associates, to draw or accept bills of exchange, for the reason that such a practice is not usual, nor is it necessary for carrying on the farming business.

In the present case, the jury found that this was a trading firm, and their verdict is conclusive.

The right of the acceptors, who had paid the money, to recover from the drawers, cannot be affected by the fact that one of the drawers had applied the money to an unlawful purpose.

THIS case was brought up by writ of error from the Circuit Court of the United States for the middle district of Tennessee.

The suit was brought upon three bills of exchange, which were accepted and paid by Bullitt, Miller, & Co., the drawees, for the accommodation of the drawers, Dement, Kimbro, & Sons, of which firm Joseph Kimbro was a partner. This action was brought by Bullitt, Miller, & Co., against Joseph Kimbro alone. The place of business of the firm of Dement, Kimbro, & Sons, was in Mississippi. Kimbro resided in Tennessee, and therefore was sued there.

The defence set up in the court below rested on two grounds, viz:

1. That Dement, the principal acting partner of the firm of Dement, Kimbro, & Sons, had no power to draw the bills sued on.

2. That the bills were drawn for the purpose of raising money to be laid out in the purchase of slaves to be carried into Mississippi for sale; which slaves were so carried in and sold, contrary to laws of Mississippi.

On the trial, the judge charged the jury in the following words:

"The court charge the jury that Dement, the principal acting partner of the firm of Dement, Kimbro, & Sons, had power to draw the bills given in evidence, according to the proof adduced to them, if true; that if the bills were accepted and paid at maturity by the plaintiffs for said firm, the defendant, Joseph Kimbro, was responsible, and it mattered nothing to the plaintiffs how the proceeds of the bills were disposed of, as this was a fact the plaintiffs could not know, and were not bound to prove."

This ruling was excepted to, upon which the case was brought up to this court.

It was argued by *Mr. Benjamin* for the defendants in error, no counsel appearing for the plaintiff in error.

Mr. Benjamin said:

1. The charge that Dement had power to draw the bills was correctly given, and is sustained by the proof.

The witness, Ready, deposed that he knew the firm of Dement, Kimbro, & Sons, in or near Lexington, Holmes county, Mississippi; that Joseph Kimbro was a member of the firm; that the firm commenced business on the 1st January, 1853, and continued till the death of Dement, one of the partners, on the 3d October, 1853; that the business of the firm was farming, steam saw-mill, and general trading, and that Dement was the principal business partner.

The witness, West, confirmed the depositions of Ready, and added, that "Dement was the principal financier of the firm of Dement, Kimbro, & Sons, did the principal trading, borrowed money, and paid it back, &c., in the name of the firm."

The partnership articles, as introduced by defendant, provide for a copartnership between Dement, the defendant, Joseph Kimbro, and the two sons of the latter, "for the purpose of farming, and also of running a steam saw-mill—the parties of each part to furnish one-third of the capital stock of the partnership, or the said party of the second part to furnish two-thirds of said capital stock, on behalf of himself and his two sons, parties of the third part; and the said parties are to furnish negroes or hands, stock, provisions for man and beast, and all necessary utensils, in the same proportion, and are to pay and defray the expenses of said copartnership, and share its profits in the same proportion; * * * and the said parties of the third part are to superintend—one of them the said farm, and the other the said mill; and the said party of the first part is to render them such needful assistance as he can, without any extra charge therefor; and at the expiration of said two years, after paying the debts of said copartnership, the profits are to be equally divided between said parties of the first, second, and third parts, &c."

Botters, a witness for defendant, testified that "said firm, so far as I know, has never been held out by any of the Kimbros as having any more extensive powers than those conferred by said articles—(Joseph Kimbro, senior, the defendant, left here for Tennessee either a day or two before or a day or

two after said articles were signed, and did not return until next fall;) nor did ever said Dement do so with the knowledge of defendant, so far as I know."

"Planting and mill partnerships in this country are not numerous, and it is no easy matter to say what powers are by usage exercised by the several partners, without the express consent of their copartners in such partnerships; but among the few partnerships of the kind that have come to my knowledge, where money has been needed, and the several partners cannot be consulted, the managing one raises the money on his own credit, and charges the same to the partnership."

On the foregoing testimony, it is plain that even *inter se* there was such a trading partnership as authorized the drawing of bills by one partner in the name of the firm; although the farming business might not authorize the exercise of such a power, running a saw-mill for two years necessarily required the purchase of the requisite stock of wood, and its re-sale as boards, planks, scantling, &c. The business of running a steam saw-mill is neither more nor less than a manufacturing business, requiring the purchase of raw material and sale of the manufactured article; all such partnerships are trading partnerships, in which the power to draw bills of exchange in the partnership name is vested in each partner.

In mining partnerships, and farming partnerships, it has been held that such powers are not vested in the partners; and the reason is, that their business is simply to sell the produce of the real estate, to make profits out of the soil by gathering its fruits; but wherever the business imports in its nature the necessity of buying and selling, the partnership is in its essence a trading partnership.

The general doctrine is admirably summed up in the opinion of Chief Justice Marshall, in the case of a manufacturing partnership.

Winship *v.* Bank of the U. S., 5 Peters, 529.

So it was held that one partner could bind the firm by a promissory note, where the partnership was for carrying on the business of farming and coopering.

McGregor *v.* Cleveland, 5 Wendell, 475.

And although there be no partnership in real estate, the parties being tenants in common, yet if they are common tenants of timber land, and do a lumber business, they are trading partners in the timber cut from the land.

Baker *v.* Wheeler, 8 Wendell, 505.

Coles *v.* Coles, 15 Johns. R., 160.

Partners in a steam saw-mill are bound by the note of the partnership given by some of the partners for partnership purposes.

Johnston *v.* Dutton, 27 Alabama, 245.

And even where the partnership is limited, a note by one of the partners, in the name of the firm, is *prima facie* for the firm's account.

Holmes *v.* Porter, 39 Maine, (4 Heath,) 157.

See, also, Story on Partnership, sec. 102.

And it makes no difference as to the power of a partner to bind the firm, that the trade was a particular and limited trade.

Chitty on Bills, 10th Am. ed., p. 44.

2. But, independently of the question as to the powers of the partners in controversies *inter se*, as regards the present ease, where the holders of the bills are third persons, ignorant of the special partnership agreement, the partnership is bound, because it was actually engaged in general trading, and Dement, who signed the bills, was the ostensible principal business partner. It was in the light of a general trading partnership that this firm exhibited itself to the public; it adopted by its articles a partnership style or firm of "Dement, Kimbro, & Sons," without any indication of a restriction in its business; the fact of its carrying on a general trading business was proven by Ready and West, and the charge was, that under this proof, if true, Dement's signature of the bills in the firm name bound the firm. It was quite immaterial whether or not there existed a secret contract limiting his powers.

Story on Partnership, secs. 111, 126, 130.

Collyer on Partnership, sec. 386.

Gow on Partnership, pp. 52 to 55.

3 Kent's Commentaries, pp. 40 to 45.

Winship *v.* Bank U. S., 5 Peters, 529.

Cargill *v.* Cosby, 15 Miss., 425.

Nicholls *v.* Cheairs, 4 Sneed, (Tenn.,) 229.

Frost *v.* Hanford, 1 E. D. Smith, 540.

And in the above case of Cargill *v.* Cosby, the test of the power to draw bills and notes in the name of the firm is stated to be, whether the business was to "buy and sell." It is plain that the business of a steam saw-mill cannot be conducted without buying and selling.

3. Independently of the legal presumption that the bills drawn in the partnership name were for partnership account, Ready's testimony shows that Dement, the deceased partner, was at his house at about the date of the bills, with certain negroes; "spoke of them as firm negroes, and employed Nesbit to take them in charge and sell them, and keep McAfee from having anything to do with them, or the funds arising from the sale of them; his object being to save Joseph Kimbro from loss, and to meet the liability to Bullitt, Miller, & Co., and to Bolton, Dickens, & Co., incurred in the purchase of these negroes by the firm of Dement, Kimbro, & Co., in connection with Morgan McAfee and William M. Joyne."

The partnership articles show that negroes were necessary for their business, and that the parties promised to furnish them for carrying it on.

4. The only remaining point to be considered is the legality of the second charge of the judge, "that if the bills were accepted and paid at maturity by the plaintiffs for said firm, the defendant, Joseph Kimbro, was responsible, and it mattered nothing to the plaintiffs how the proceeds of the bills were disposed of, as this was a fact the plaintiffs could not know, and were not bound to prove."

It may be proper to premise that it is perfectly immaterial in the present case whether this charge was well founded in law or not, because the plantiffs' replication to the defendant's fourth plea joined issue on the fact whether or not the bills were drawn and accepted for the purpose of raising money to purchase slaves for importation into Mississippi for sale contrary to law; and there is not a particle of evidence to support the plea, the only evidence on the point being that of Ready,

(above referred to,) which establishes the purchase in Vicksburg.

But in point of law the instruction was clearly right.

The idea that money loaned or advanced cannot be recovered because the borrower applies it to an unlawful purpose was never countenanced by any jurist.

It is true that *ex turpi causa non oritur actio*. But what is the contract now before the court? A contract for advancing money. There is nothing illegal in that. If the money was to be applied to an unlawful purpose, the illegality was in the application, not in the borrowing. The contract for purchasing the slaves might be in contravention of law; and if so, would not be enforced in a court of justice; but, on the ground now assumed by plaintiffs in error, it would be incumbent on the court to refuse to maintain an action for the price of goods sold, if the purchaser could prove that the vendor intended to raise money by the sale, to be applied to an unlawful purpose. The proposition will not bear an instant's examination. The whole doctrine on the subject was scrutinized and the true principles governing it settled by this court in 1826, and the law is now too well established to require any further citation of authorities.

See Armstrong *v.* Toler, 11 Wheat., 258.

Mr. Justice CLIFFORD delivered the opinion of the court.

This case comes before the court upon a writ of error to the Circuit Court of the United States for the middle district of Tennessee. It was an action of assumpsit brought by the present defendants against the plaintiff in error, to recover the amount of three several bills of exchange, particularly described in the declaration. As exhibited in the transcript, the several bills of exchange bear date at Lexington, in the State of Mississippi, on the second day of April, 1853, and purport respectively to have been drawn and addressed to the original plaintiffs by one Morgan McAfee, and by Dement, Kimbro, & Sons. They were each for the sum of two thousand dollars, and were severally made payable to the order of the first-named drawer, by whom also they were duly endorsed. Two of them

were likewise endorsed with the firm name of the other drawers. At the time the bills of exchange were executed, the original defendant was a member of the firm of Dement, Kimbro, & Sons; and it was conceded, in the pleadings and at the trial, that the bills of exchange were drawn and negotiated by the senior partner of that firm. All the members of that partnership, except the defendant, were citizens of the State of Mississippi at the time the suit was commenced, and were residing out of the jurisdiction of the court; and for that reason, as alleged in the declaration, the other partners were not sued in this action. In the court below, the plaintiffs claimed to recover against the defendant, upon the ground that the firm, of which he was a member, were the drawers of the bills of exchange, and that they, the plaintiffs, had paid the amount, or the principal portion of the same, out of their own funds, as acceptors, for the accommodation of the drawers. Without attempting to give any very definite analysis of the several pleas filed by the defendant, it will be sufficient for the purposes of this investigation to state that he set up two distinct grounds of defence in answer to the claim of the plaintiffs:

1. To the merits of the claim he pleaded the general issue, and denied specially that he ever drew the bills of exchange described in the declaration, or that he ever authorized any one to draw them in his name, or in the name of his firm.

2. For a further defence, he also alleged, in his fourth plea to the amended declaration, that the bills of exchange were drawn and endorsed by Dement, and accepted by the plaintiffs, for the purpose of raising money to be laid out in the purchase of slaves, to be imported from some other State or Territory of the United States, for sale, into the State of Mississippi, which slaves he alleged to be afterwards purchased with the money and imported into the State, and there sold, according to the original intent, contrary to the form of the statute of that State in such case made and provided. To that plea the plaintiffs replied, traversing the allegations of fact, and tendering an issue, which was duly joined. Some of the pleas resulted in issues of law, all of which were ruled in favor of the

plaintiffs, and the defendants acquiesced in the rulings of the court.

Evidence was then introduced on both sides upon the issues involving the merits of the claim, and the court instructed the jury that Dement, the principal acting partner of the firm, had power to draw the bills given in evidence according to the proof adduced to them, if true; that if the bills were accepted and paid at maturity by the plaintiffs for the firm, the defendant was responsible, and it mattered nothing to the plaintiffs how the proceeds of the bills were disposed of, as that was a fact the plaintiffs could not know, and were not bound to prove.

Under the charge of the court, the jury returned their verdict in favor of the plaintiffs for the amount claimed, deducting certain admitted credits, according to the account exhibited in the transcript, and the defendant excepted to the instructions of the court. It is obvious, on the first reading of the instruction, that it contains two distinct propositions, and no doubt is entertained that both were intended to be controverted by the exceptions. In the first place, it affirms that the evidence adduced, if found to be true, was sufficient to show that the acting partner of the firm, of which the defendant was a member, had power to draw the bills of exchange described in the declaration. According to the proofs introduced by the plaintiffs, the firm commenced business at Lexington, in the State of Mississippi, in January, 1853, and the partnership was continued, without interruption, until the third day of October, of the same year, when it was terminated by the death of the senior partner. They also proved, by two witnesses, that the firm was engaged during that period in farming, carrying on a steam saw-mill, and in general trading. Both of these witnesses testified that the senior partner, who drew the bills of exchange in question, was the active business partner of the firm; and one of them added, that he did the principal trading, and borrowed money, and paid it back in the name of the firm.

Their partnership agreement was introduced by the defendant. It bears date on the fifth day of January, 1853; and the

partnership was formed, as recited in the instrument, to continue for the term of two years, for the purpose of farming and of carrying on a steam saw-mill. By its terms, one-third of the capital stock was to be furnished by the senior partner, one-third by the defendant, and the remainder by his two sons. Those five persons constituted the firm, under the name and style before mentioned. And it was further stipulated that negroes or hands, stock, provisions, and all necessary utensils, should be furnished by the respective parties, according to their interest in the capital stock, and that they should defray the expenses of the copartnership and share its profits in the same proportions. They also designated the farm to be carried on, and stipulated that the steam saw-mill should be located at such place as a majority of the partners in interest should determine.

After the partnership agreement was executed by the parties, it was deposited with a third person; and it appeared from his deposition, taken by the defendant, that it remained in his possession from that period to the time of his examination. In the same deposition, the witness testified that the firm, so far as he knew, had never been held out by the defendant as having any more extensive powers than those conferred by the partnership agreement.

Some attempt was made by the defendant to prove that it was the usage, in partnerships of this description, when money was wanted to carry on the business, and the several partners could not be consulted, for the managing partner to raise it on his own credit, and charge it to the partnership; but the proof was not sufficient to show any such general usage.

Such was the substance of the evidence on which the charge of the court was based, and we think it was of a character to justify that part of the instruction under consideration. Our reasons for that conclusion will now be briefly stated.

That one of several partners composing a trading firm has power to draw bills of exchange, unless restricted from so doing by the terms of the copartnership agreement, is a proposition which, it is presumed, no one will dispute. Whenever there are written articles of agreement between the partners,

their power and authority, *inter se*, are to be ascertained and regulated by the terms and conditions of the written stipulations. But, independently of any such stipulations, each partner possesses an equal and general power and authority, in behalf of the firm, to transact any business within the scope and objects of the partnership, and in the course of its trade and business.

Acts performed by one of the partners, in respect to the partnership concerns, and in the usual course of its business, differ in nothing, so far as their legal consequences are concerned, from those transactions in which they all concur; and for the reason, that, by the commercial law, each partner of a trading firm is presumed to be intrusted by his copartners with a general authority in all the partnership affairs. Accordingly, it was held, in Hawkin *v.* Bourne, (8 Mee. and Wels., 710,) that one partner, by virtue of the relation he bears to the firm, is constituted a general agent for another, as to all matters within the scope of the partnership dealings, and has conferred upon him, by virtue of that relation, all authorities necessary for carrying on the partnership, and all such as are usually exercised in the business in which they are engaged. Any restriction which, by agreement among the partners, is attempted to be imposed upon the authority which one partner possesses, as a general agent for the other, is operative only between the partners themselves, and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such restrictions have been made.

Contracts made by one of several partners, in respect to matters not falling within the ordinary business, objects, and scope of the partnership, are not binding on the other partners, and create no liability to third persons, who have knowledge that the partner making the contract is acting in violation of his duties and obligations to the firm of which he is a member. But whenever credit is given to the firm, within the scope and objects of the partnership, and in the course of its trade and business, whether the partnership be of a general or limited nature, it will bind all the partners, notwithstanding any secret stipulations or reservations between themselves,

which are unknown to those who give the credit. Harrison *v.* Jackson, 7 Term., 207; Pinkney *v.* Hall, 1 Salk., 126; Lane *v.* Williams, 2 Vern., 277; Swan *v.* Steele, 7 East., 210; Byles on Bills, p. 31; 3 Kent Com., p. 40; Story on Part., sec. 105; Collyer on Part., sec. 401.

Apply these principles to the facts disclosed in evidence, and it is clear that the power of the acting partner was ample to authorize him to draw the bills of exchange in the name of the firm, unless it can be shown that the firm of which he was a member was not one falling within the general rules of law defining and regulating the rights and obligations of partners engaged in the transactions and business of trade.

All partnerships, says Chancellor Kent, are more or less limited; and there is none that embraces, at the same time, every branch of business. Such limitations are generally to be found in the terms and stipulations of the articles of co-partnership; but they may arise from general usage, or, to a certain extent, from the character of the business, and the nature of the objects to be accomplished.

Partnerships are sometimes formed by those who are interested in real estate, for the mere purpose of farming; and in respect to that class of business arrangements, it has been held, that one of the several partners does not possess, by virtue of that relation merely, the right, without the consent of his associates, to draw or accept bills of exchange, for the reason that such a practice is not usual, nor is it necessary for carrying on the farming business. Collyer on Part., (ed. 1848,) sec. 402; Greensdale *v.* Dower, 7 Barn. and Cres., 635; Dickerson *v.* Valpy, 10 Barn. and Cres., p. 138, per Littledale, J.

In the case last named, it was held that a certain mining company fell within the same exception; and, on the facts disclosed, no doubt the question was well decided. But the mere circumstance that the business consists in making profits out of real estate, as in working a stone quarry, will not necessarily take the case out of the operation of the general rule. Thicknesse *v.* Brownilow, 2 Cromp. and Jerv., 425.

Farming partnerships, when strictly confined to that purpose, are held to be within the exceptions to the general rule, upon the ground, as assumed by the counsel for the plaintiffs, that their principal object is to make profits out of the soil, by gathering its fruits, and that the partners are in no proper sense engaged in trade; but 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. McGregor *v.* Cleaveland, 5 Wen., 475; Winship *v.* Bank of United States, 5 Pet., 529; Baker *v.* Wheeler, 8 Wen., 505; Coles *v.* Coles, 15 Johns. R., 160; Johnston *v.* Dutton, 27 Alabama Rep., 245; Hedley *v.* Bainbridge, 3 Q. B., 321.

Another answer, however, may be given to the objection to this part of the instruction, which is entirely conclusive against it. According to the evidence, farming was not the sole business of the partners composing this firm. They were also engaged in running a steam saw-mill, for manufacturing purposes; and common observation will warrant the remark, that those who engage in that business always want capital to carry it on, and frequently find it necessary to ask for credit. Like those engaged in other branches of manufactures, they buy and sell, and have occasion to remit money and collect it from distant places.

Two witnesses also testified at the trial that this firm was engaged in general trading; and there was no evidence introduced by the defendant to contradict their statements. Whether the witnesses were entitled to credit, and whether, in point of fact, this firm was a trading firm, were questions which were properly submitted to the jury. By the verdict, both questions were found in favor of the plaintiff, and the finding of the jury is conclusive.

2. One other point only remains to be considered, which arises out of the second proposition contained in the charge of the court. It was to the effect, that if the bills of exchange were accepted and paid at maturity by the plaintiffs for the

firm, then the defendant was responsible, and it mattered nothing to the plaintiffs how the proceeds were disposed of.

No evidence was offered by the defendant in support of the issue raised by his fourth plea to the amended declaration, and there was none in the case tending to show that the proceeds had been applied to any illegal object, or in any manner misappropriated. Such being the fact, it is obvious that this part of the instruction became entirely immaterial; which, of itself, is a sufficient answer to the objection.

But another answer may be given to the objection, which perhaps will be more satisfactory; and that is, we think it was clearly correct. It will be observed, that this part of the charge was based upon the theory that the bills of exchange were drawn by the firm of which the defendant was a member; and properly so, for the reason that the question of authority to draw them had been disposed of in the preceding part of the charge.

In considering this objection, then, it must be assumed that the bills were drawn by the firm, and that they were duly accepted and paid by the plaintiffs at maturity, on account of the firm; and if so, it is not perceived how their right to recover the amount can be affected by the fact that one of the drawers applied the money to an unlawful purpose. Where a contract grows immediately out of and is connected with the illegal or immoral act of the party claiming the benefit of it, courts of justice will not lend their aid to enforce it. Armstrong *v.* Toler, 11 Wheat., 258.

But the illegal act, if any, in this case, was performed by one of the drawers of the bills, and not by the acceptors. Suppose one of a firm should borrow money of a third person, in the name of the partnership, and apply it to an unlawful purpose, it surely could not defeat the right of the lender to recover on the contract.

Regarding this point as too clear to be the subject of dispute, we forbear to pursue the discussion.

After a careful examination of the exceptions, we think they cannot be sustained. The judgment of the Circuit Court is therefore affirmed, with costs.

HENRY O. CLARK, IRA JUSTIN, JUN., AND A. HYATT SMITH, PLAINTIFFS IN ERROR, *v.* HENRY C. BOWEN, THEODORE MCNAMEE, SAMUEL P. HOLMES, AND HENRY L. STONE, DEFENDANTS.

An arrangement was made between creditor and debtor houses, that the latter should execute an assignment, and confess judgment, and that the former should give a receipt in full, and agree that the notes of the debtor house should be cancelled.

The assignment was made, the judgment confessed, and the receipt given.

A solvent partner of the debtor house was absent, and neither consented to the assignment nor to the confession of judgment, and upon his motion the judgment was vacated as to him, as being confessed without authority.

The judgment was then vacated as to all the partners, and the assigned property taken out of the hands of the trustee by a prior claim. Whereupon the creditor house brought suit upon the notes which had not been destroyed.

The whole arrangement to secure the debt being in effect annulled, the original indebtedness stood revived, and judgment was properly rendered upon the notes.

THIS case was brought up by writ of error from the District Court of the United States for the district of Wisconsin.

The facts were these:

In 1854, the defendants in error were merchants in New York, trading under the name of Bowen & McNamee, and the plaintiffs in error, merchants in Wisconsin, trading under the name of H. O. Clark & Co.

In July, 1854, H. O. Clark & Co. had notes outstanding, due to the firm of Bowen & McNamee, to the amount of $7,950.75. Being embarrassed, an arrangement was made between them and the agent of Bowen & McNamee, to the following effect, viz:

1. That they would make an assignment for the benefit of their creditors.

2. That they would confess a judgment in favor of Bowen & McNamee in the Circuit Court for Rock county, (State court.)

3. That the agent should give them a receipt in full, and agree that the notes should be cancelled.

All these things were done. The assignment was made, the judgment entered, and the receipt given.

Whilst these transactions were going on, Smith was absent.

On the 17th of August, 1854, the assigned property was taken out of the hands of the trustee, in virtue of a mortgage prior in date to the assignment just mentioned. Smith, finding that the weight of the judgment would fall upon his private property, applied to the court of Rock county to have the judgment vacated as to him, upon the ground that it had been entered without sufficient authority. This application was successful, and the court vacated the judgment as to him.

A bill was filed in the District Court of the United States by Bowen & McNamee, in conjunction with some other creditors, to enforce the assignment made for their benefit. No further notice need here be taken of this bill than to say, that it was dismissed without prejudice.

After the judgment was vacated as to Smith, Bowen & McNamee applied to the court to vacate the judgment as to Clark and Justin also. This was granted, and the judgment vacated entirely.

The assignment for the benefit of Bowen & McNamee being thus ineffectual, and the judgment vacated, they considered that the entire arrangement with H. O. Clark & Co. had become null and void; and in 1856 they commenced a suit in the District Court of the United States, upon the promissory notes of H. O. Clark & Co., the possession of which they had retained. Several questions were raised upon the trial, which it is not material to notice; the principal one being an exception to the charge of the court, which was in substance as follows, viz:

1. That the notes were merged in the judgment as long as the judgment stood.

2. That the court of Rock county had power to vacate all the judgments.

3. That when they were thus vacated, the original debt was revived, and the receipt by the agent was not a bar to the suit.

Under this instruction, the jury found a verdict for the plaintiffs.

The case was submitted on printed arguments by *Mr. Doolittle* for the plaintiffs in error, and *Mr. Lynde* for the defendants.

The counsel for the plaintiffs in error directed his attention chiefly to the point that the notes were cancelled by the arrangement which had been made between the parties, and consequently could not be afterwards sued on. This position was illustrated in various ways, the principal one of which was the following:

Taking the note of one partner for a liability of the firm is a valid discharge of the firm, when the creditor agrees that the original liability shall be considered paid, and cancels or delivers up, or agrees to deliver up or cancel, the evidences of the firm liability.

This is the ordinary rule upon these facts, other than the particular agreement. The intention of parties to this end is presumed.

1 Smith's Leading Cases, Note to Cumber *v.* Wane, 391 to 398.

If this is the law on the giving the note of one partner, *a fortiori* must the giving a sealed warrant of attorney to confess, and the actual confession of judgment, binding upon two of three members of a firm, and taking also an assignment of property to a trustee for the benefit of the condition, be a discharge. Such is the case at bar.

Mr. Lynde's fourth point was as follows:

The exception to the judge's charge may be embraced in a single point. That the court entering the judgment had vacated it, and therefore the promissory notes still in possession of the plaintiffs uncancelled were still valid, and plaintiffs were entitled to recover upon them.

Is it not a common occurrence in all courts to vacate judg-

ments for cause, upon application from either party, and proceed to trial *de novo* upon the original cause of action?

Does not this court reverse judgments entered in the courts below, and send cases back for new trial upon the original cause of action?

Whether the State court erred in vacating the judgment, this court will not inquire; it is enough that the judgment was vacated by the court in which it was entered.

A receipt may be contradicted or explained.

Graves *v.* Key, 3 Barn. and Adol., 318.

Harden *v.* Gordon, 2 Mason, 561.

Chunn *v.* McCarson, 2 Dw. Eq. R., 73.

Fuller *v.* Crittenden, 9 Conn. R., 401.

1 Greenleaf's Evidence, sec. 305.

1 Cowen and Hill's Notes to Phil. Ev., 381.

2 Cowen and Hill's Notes to Phil. Ev., 581.

Mr. Justice CATRON delivered the opinion of the court.

We deem it to be a matter not open to controversy in this suit, that the State court of Rock county properly vacated its own judgment, as respected Clark and Justin, after Smith, the solvent partner, had been released from it—because Clark had no power to bind Smith by the confession; and secondly, because the goods that were assigned to a trustee to secure the judgment had been taken from the assignee, by a previous mortgage of them.

The following admission is found in the bill of exceptions, and is conclusive of the merits of this controversy:

"It is conceded by defendants, that the judgment in the Circuit Court was confessed at the time of the execution of the assignment, and that the assignment was to secure the judgment, and the judgment and assignment were the mode adopted to secure the plaintiffs' debt; and that Clark executed the assignment and judgment for Smith."

The whole arrangement to secure the debt being in effect annulled, the orignal indebtedness stood revived, and was properly enforced by the judgment of the Circuit Court—which we order shall be affirmed.

THE UNITED STATES, APPELLANTS, *v.* RAFAEL GARCIA.

Where there was an an order from the Governor allowing a claimant to search for land in California, and the claimant subsequently petitioned the Governor for a grant, who referred the petition to the alcalde by a marginal order, and the alcalde reported that the land did not belong to any private individual, this does not amount to a vested interest in the land, binding on the Government.

THIS was an appeal from the District Court of the United States for the northern district of California.

The case is stated in the opinion of the court.

It was argued by *Mr. Stanton* and *Mr. Black* (Attorney General) for the United States, and by *Mr. Benham* for the appellee.

The Attorney General, after stating the case, said that the board of land commissioners rejected the claim unanimously. Judge Hoffman delivered an opinion concurring with the board, but Judge McAllister decided in favor of the claimant, expressing "considerable doubt" of its legal justice. The United States have appealed. We ask the court to reverse the decree of confirmation, and reject the claim, upon the ground that there is absolutely no title whatever, nor anything that even by courtesy could be called a show of title. A Governor of the Department in 1844 gave the claimant a passport, so that he might go out and hunt for nine leagues of land, and, if he should happen to find any, gives him authority to take possession of it until a title could be made out. The claimant now says that he did happen to find exactly nine leagues of land, but he did not report to the Governor who gave him the roving commission under which he was travelling when he made the discovery. He waited nearly two years, until another Governor came into office, and then he did not proceed according to law by presenting a petition, and doing what the regulations of 1828 require. Nor did he ask for any definite action. The order of the Governor was as vague as the petition. It was simply an order that the

alcalde of San Rafael might report. The alcalde made report, and in that report falsely stated that the land had been previously granted to the claimant by Micheltorena, and added, somewhat paradoxically, that it did not belong to any private individual, on account of its distance from the frontier. Slight evidence of occupancy is added to this, and there rests the case.

Not a single provision contained in the act of 1824, or in the regulations of 1828, has been complied with or followed in all this business. It bears no sort of resemblance to the proceeding which those laws require to be instituted and carried on before an individual can be vested with a title to a portion of the public domain. It was wholly unlike the measures and acts and records which were usual in such cases. This is not a title derived from Mexico according to the laws or according to the customs of that Government. It is not a grant at all. It does not pretend to be a grant. It is folly to call Micheltorena's passport a grant of land; and Pico signed nothing but an order upon the alcalde to report upon the matter. The claim under such a title as this is so preposterous that it is impossible to argue against it with any sort of seriousness. It never was regarded as a title by the Mexican Government. There was no expediente on file. The papers are all produced from the private custody of the claimant himself. There is no trace of the proceeding to be found anywhere upon record. The genuineness of the papers is extremely doubtful. The proof would be regarded as defective, if the witnesses were men of good character; but the testimony comes from William A. Richardson and Manuel Castro, both of whom have been made utterly infamous by being frequently detected in the commission of wilful and corrupt perjuries.

If anything were wanting to expose this claim to further contempt, it might be found in Micheltorena's proclamation of December 16, 1844, wherein he states exactly how he was employed on the 15th of November, the day upon which his passport to Garcia is dated. It makes it, to say the least, extremely improbable that he could on that day have done

what he describes, and been at the same time in Monterey issuing such papers as this to Garcia, and transacting business in the way that Richardson describes.

The seal affixed to Micheltorena's letter is a manifest forgery.

Mr. Benham replied for the appellee:

In this case, a brief for the appellee was filed two years ago, addressed to the views of the law agents of the Government as then known. Novel and startling views having since been offered by Mr. Attorney General in his brief in this case, as in others, it is deemed necessary to reply to them.

In doing so, we shall quote Mr. Attorney General's remarks in the argument accompanying his brief *seriatim*, subjoining to each quotation such comments as may seem appropriate.

"We ask the court to reverse the decree of confirmation, and reject the claim, upon the ground that there is absolutely no title whatever, nor anything that, even by courtesy, could be called a show of title. A Governor of the Department, in 1844, gave the claimant a passport, so that he might go out and hunt for nine leagues of land, and, if he should happen to find any, gives him authority to take possession of it until a title could be made out."

We maintain there is title, legal perhaps, certainly equitable. We care not to debate as to its dignity, since, for all purposes connected with this *quasi* litigation with the Government, an equitable title is as good as a legal title. We think a promise of title is imported at least in the authority to select, occupy with property, (cattle,) and hold possession of a tract, while the procedure (to obtain a *titulo*) was being had on the presentation of the requisite *diseno;* and that this promise, performance of the conditions of the decree and of the law being shown, entitles the claimant to a confirmation. He has held this land for sixteen years—save some parts from which he has been forcibly ejected.

"The claimant now says that he did happen to find exactly nine leagues of land, but he did not report to the Governor who gave him the roving commission under which he was travelling when he made the discovery. He waited nearly

two years, until another Governor came into office, and then he did not proceed according to law by presenting a petition, and doing what the regulations of 1828 require."

The delay should not provoke remark. There was no hurry. He was occupying the land during the two years, which was all the Government wanted. He had no reason to anticipate the change of flags.

He did present a petition in substantial conformity with the regulations, and he did ask for definite action. If his petition to Pico was deficient, it is to be presumed that the one addressed to Micheltorena was satisfactory, since that officer acted favorably upon it. His request for appropriate action was sufficient. He informed Pico that Micheltorena had authorized his selection, &c., and required the *diseno;* that he had selected, &c.; offered the *diseno*, and prayed for such action as should be most proper.

"Nor did he ask for any definite action. The order of the Governor was as vague as the petition. It was simply an order that the alcalde of San Rafael might report. The alcalde made report, and in that report falsely stated that the land had been previously granted to the claimant by Micheltorena, and added, somewhat paradoxically, that it did not belong to any private individual, on account of its distance from the frontier."

The order was relative, and so—amply sufficient. It required a pertinent report. Such a one was given. That report certified that Garcia had been for some time in occupation of the land; the transaction which he thought was a grant on Micheltorena's part; that the land was vacant; and assigned as his reason for saying so, that it lay in a section of country where he might well know, from its remoteness, there was no grant, except Richardson's, (which was Garcia's starting point,) and those of Juarez and Vallejo.

"Slight evidence of occupancy is added to this, and there rests the case."

The occupancy was judicially ascertained by Pacheco in his report to Pico. Richardson, and Rosa, and Vallejo, prove its character.

It was ample. Garcia had a house on the land, cultivated it, and had a large herd of cattle on it; had laborers on it, and this continuously.

He resided alternately there and on another ranch.

"Not a single provision contained in the act of 1824, or in the regulations of 1828, has been complied with or followed in all this business."

On the contrary, every provision but obtaining the *título* and the approval of the Departmental Assembly was complied with. There was a petition, with a *diseno;* there were cultivation and improvement; there was at least an implied order or promise to issue the *título.*

"It bears no sort of resemblance to the proceeding which those laws require to be instituted and carried on before an individual can be vested with a title to a portion of the public domain."

Those laws do not imperatively require any particular proceedings.

"It was wholly unlike the measures, and acts, and records, which were usual in such cases. This is not a title derived from Mexico, according to the laws or according to the customs of that Government."

The proceeding was substantially the same as the one most usual; the difference was in favor of the Government. Usually the grant was upon conditions subsequent; here they were to be performed in advance of the *título.* Custom and usage were well followed. The proceeding had not arrived at the stage of record.

"It is not a grant at all. It does not pretend to be a grant. It is folly to call Micheltorena's passport a grant of land; and Pico signed nothing but an order upon the alcalde to report upon the matter. The claim, under such a title as this, is so preposterous that it is impossible to argue against it with any sort of seriousness."

It is plain the paper is not a mere passport. It gives authority beyond the permission to proceed to the northern frontier. It authorizes the selection and occupation of a tract of land, pending the usual proceedings to get a *título,* and by

exacting the *diseno*, and speaking of such proceedings, impliedly promises at the least to give a *titulo*.

"It never was regarded as a title by the Mexican Government."

There is no warrant for this remark. On the contrary, one of the Mexican officials pronounced the decree of Micheltorena a grant—a conclusion it is to be wondered Mr. Attorney General forgot, since it provoked him, in a former part of his brief, into pronouncing it a false statement, as if it had been an allegation of fact.

"There was no expediente on file. The papers are all produced from the private custody of the claimant himself."

They had not yet been returned to the authorities after Pacheco's report. The report was dated April 29th, 1846, and the Government expired July 7th, 1846, having been much disturbed in the interval. The distance between San Rafael, where Pacheco lived, and Los Angeles, where Pico was, is from seven hundred or eight hundred to a thousand miles.

"There is no trace of the proceeding to be found anywhere upon record."

As was said before, the proceedings had not arrived at the stage of record.

"The genuineness of the papers is extremely doubtful."

The genuineness of the papers is established; the witnesses are not impeached.

"If anything were wanting to expose this claim to further contempt, it might be found in Micheltorena's proclamation of December 16, 1844, wherein he states exactly how he was employed on the 15th of November, the day upon which his passport to Garcia is dated. It makes it, to say the least, extremely improbable that he could on that day have done what he describes, and been at the same time in Monterey issuing such papers as this to Garcia, and transacting business in the way that Richardson describes."

This is a mistake. The proclamation does not show he was absent from Monterey on the 15th of November, or employed in any other business.

"The seal affixed to Micheltorena's letter is a manifest forgery."

There is no proof of this. Mr. Attorney General's repertory of photographic pictures affords no evidence for this court. If he wished the benefit of evidence of this kind, he should have introduced it in the court below. No practice can be more reprehensible than to offer and comment upon evidence *dehors* the record, and especially upon an issue not raised below.

Mr. Justice CATRON delivered the opinion of the court.

The question in this case is, whether the land claimed was private property when we acquired California by treaty, or whether it then was part of the public domain of Mexico, and now belongs to the public lands of the United States.

1. If it was private property, it must have become so by the grant of a vested interest, that was good in equity; made by the granting power in the Territory of California, being authorized to exercise the sovereign power, as no other authority could divest the public title.

2. If the land in dispute was acquired by the United States, as public property, then the courts of justice have no jurisdiction of the subject matter, and cannot interfere. This is a postulate, not open to controversy. United States *v.* Forbes, 15 Peters, 182.

That the Mexican authorities, exercising the granting power in California, conferred no title on Garcia, we think satisfactorily appears, for the reasons set forth in the opinion of Judge Hoffman, delivered in the District Court, and found in the records, the most material parts of which opinion we adopt. The district judge says:

"In support of his claim, the appellant exhibits an order of Michelterona, dated November 15, 1844, which is as follows: 'According to your memorial of the 14th instant, you ask for the grant of a passport to penetrate into the points of the coast on the northern line of this country, with the object of locating a tract of land of the extent of eight to nine leagues, since that which you now occupy with your personal property is so limited. By this order, you are empowered to appear before the

military commanding authority of that frontier, in order that, after an examination, you may proceed to your research after the tract of land you ask for, as a recompense for the services rendered by you to the nation.

"'If you should happen to select any tract of land, you are empowered to occupy it with your said property, and to take possession of it while the usual procedure is being prosecuted, presenting the requisite sketch.

"'God and liberty. MANUEL MICHELTORENA.

"'*Monterey, November* 15, 1844.

"'*To Don Rafael Garcia, at his rancho.*'

"Availing himself of the permission thus granted, the claimant appears to have selected a tract of land, and to have occupied and improved it to some extent. No steps, however, were taken by him to obtain a title until March 4th, 1846, when Garcia addressed a petition to Gov. Pico, in which, after referring to the order of Micheltorena, he solicits a grant of the land. Gov. Pio Pico, by a marginal order, dated April 7th, 1846, referred the petition to the alcalde of San Rafael, for the usual *informe.* On the 29th of April, 1846, the alcalde reported that the land did not belong to any private individual. The foregoing constitutes all the evidence of title produced by the claimant. It is not pretended that any grant was ever issued for the land, or that any further action whatever was taken by Pio Pico on receiving the alcalde's *informe.* Whether he determined not to grant the land, or whether he omitted to do so in consequence of the distracted condition of public affairs, we are ignorant. One fact is clear: no grant was obtained by the claimant.

"A mere petition to search for land, such as that given to the present claimant, finds no place in the Mexican system.

"The application of Garcia to Micheltorena was for a passport to enable him to search for land. In granting this, and also the permission to put his cattle upon the tract he might select, Micheltorena in no respect bound himself or his successors to issue a final title. Such seems to have been the view of Pio Pico and the claimant himself, for a petition, accompanied by the usual diseno, is formally presented to

that officer, and by him referred for information, as in other cases.

"If this claim is to be confirmed, every provisional license or permission temporarily to occupy land must be held to constitute an equitable title, provided the claimant has availed himself of the permission—a ruling which would astonish no one more than the old inhabitants of the country, by whom the importance of obtaining a 'title' from the Governor was well understood.

"For aught we know, Pio Pico, when the petition was subsequently presented, found it inexpedient to grant the land; and if the claimant, under a mere permission to occupy it with his cattle, has built a house upon it, and for two years omitted any effort to procure a title, he must attribute the loss of the land to his own neglect."

The board of commissioners unanimously rejected the claim, from whose decision Garcia, the claimant, appealed to the District Court. There the judgment of the board was reversed, on a division of opinion, and a decree entered, confirming the claim, probably with a view of transmitting the cause to this court for final determination.

For the reasons above stated, it is ordered that the decree of the District Court be reversed. And the court below is directed to dismiss the petition; for which purpose, the cause is remanded.

CHARLES MCMICKEN'S EXECUTORS, VIZ: WILLIAM CROSSMAN, FREEMAN G. CAREY, AND WILLIAM M. F. HEWSON, *v.* FRANKLIN PERIN.

Where a bill of review was filed, alleging that the decree was obtained by fraud, which allegations were denied in the answer, and it appeared by the evidence that the complainant had lost the suit by his own neglect, the bill of review was properly dismissed by the court below.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Louisiana.

The case was twice before this court, and is reported in 18 Howard, 507, and 20 Howard, 133.

The facts of the present case are stated in the opinion of the court.

It was submitted on printed briefs by *Mr. Benjamin* for the appellants, and by *Mr. Day* and *Mr. Perin* for the appellee.

Mr. Benjamin said:

The appellant has died since taking his appeal, and the executors who represent him in this cause have not deemed themselves authorized to abandon the appeal, but have instructed the undersigned to submit it for the decision of the court.

The undersigned counsel therefore respectfully submits the cause for decision, but, on examination of the record, does not deem it his duty to attempt by argument to show the existence of any error in the decree appealed from, confident that if such exist, it will be corrected by the decision of this court.

The arguments on behalf of the appellee need not be reported.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the eastern district of Louisiana.

The bill filed by McMicken in the court below is in the nature of a bill of review, praying relief from a decree obtained against him by Perin in a previous suit by means of fraud and imposition.

The suit by Perin charged McMicken with holding, in trust for his use, a valuable sugar plantation, situate in the parish of East Baton Rouge, on the Mississippi river, in the State of Louisiana; and sought a discharge of the trust and a conveyance of the title to the complainant.

The bill of review sets forth as the ground of fraud in the decree, that after the commencement of the former suit and service of the subpœna on McMicken, in an interview with

Perin on the subject of the suit, he agreed to discontinue it, and prosecute the same no further; upon which understanding the defendant acted, and discharged the solicitor retained to defend it, and omitted altogether any defence; and that in violation of the agreement, and in fraud of the rights of the defendant, he, Perin, proceeded with the suit in the absence and without the knowledge of the defendant, obtaining the decree in question by default, declaring the trust, and directing a conveyance of the plantation.

The bill of review further sets forth that the advances made by the complainant in the purchase of the property, and the liabilities incurred by way of raising encumbrances on the same in securing the title, far exceeded the sum stated by Perin in his bill, and which he proposed to reimburse and satisfy, and of all which he had full knowledge, but which he fraudulently suppressed and excluded from the decree, which the complainant is justly entitled to have allowed upon setting aside the purchase and declaring the trust for the benefit of Perin.

The defendant, in his answer to the bill of review, denies specifically the fraud charged therein against him; denies that he agreed to give up the suit, and not further prosecute the same, or that he gave any assurances to McMicken to that effect, or which were calculated to mislead or induce him to withdraw from the defence, or that any such understanding existed between the parties; but, on the contrary, since the filing of his bill he has, at all times, insisted upon his rights as set forth therein, and upon the prosecution of his claim to the property.

The defendant also denies that the omission to set forth in his bill any other sums than those allowed in the report of the master, and which entered into the decree, were with a view to an ex parte proceeding in the suit as charged by McMicken, and denies all fraud or concealment in respect to these accounts.

The answer of the defendant is directly responsive to the charges in the bill, and relates to facts within his knowledge, and, upon well-settled principles of pleading, must be taken

as presenting the true state of the case, unless overcome by the proofs. The complainant, in view of this rule, has examined witnesses in support of the allegations, but they have wholly failed to sustain them.

The bill of Perin against McMicken to enforce the trust was filed in February, 1851. The subpœna was served personally in November, 1852. McMicken resided in the State of Ohio, and the service in the suit could be made only in the State of Louisiana. The decree pro confesso was entered in April, 1853, and the final decree in June, 1854. The suit seems not to have been hurried with any unusual speed to its final determination.

In February, 1855, a petition was presented to the court containing, substantially, the facts set forth afterwards in the bill of review, on behalf of McMicken, to set aside the decree, and to permit him to come in and defend, which, after hearing, was denied. Whereupon an appeal was taken to this court from the decree in the suit, and also from the order refusing to set aside the decree, and which were affirmed in December term, 1855, (18 How., 507; 20 ib., 133.)

The present bill was filed for a review of the decree and order thus affirmed by this court in January, 1857. The case was heard on pleadings and proofs, and a decree entered dismissing the bill in November of the same year, and is now before us on appeal.

The bill was dismissed upon the ground that the excuse set up by the complainant, to wit, the fraud and imposition of Perin, for not appearing and defending the former suit, was fully and completely denied in the answer, and wholly unsupported by the proofs. The failure, therefore, of the defendant to appear and defend, and his rights in that suit, for aught that was shown, was attributable to his own neglect and inattention.

The allegations upon which relief in the bill rested, and upon which alone a rehearing could be granted in the case, consistent with the established practice of a court of chancery, were unsustained.

This is familiar doctrine, and is decisive of the case.

The decree of the court below affirmed.

THE UNITED STATES *v.* THE WIDOW, HEIRS, AND EXECUTORS, OF WILLIAM E. P. HARTNELL, DECEASED.

The law of Mexico, passed in 1824, directs that it shall not be permitted to unite in one hand, as property, more than one league of irrigable land, four leagues of farming land, and six for stock raising.

Therefore, where a person had obtained a grant of five leagues in Lower California, and another grant of eleven leagues in Upper California, and the Departmental Assembly held the law to be, that the Governor could not unite in the same hand more than eleven leagues, although it might be in different tracts, the grant in Upper California must be restricted to six leagues.

It was necessary to its being definitively voted, that the grant of the Governor should have the concurrence of the Departmental Assembly; and as they reduced it, taking off five leagues, this was the state of the title, as respected quantity, when the treaty with Mexico was made.

THIS was an appeal from the District Court of the United States for the northern district of California.

The facts are stated in the opinion of the court.

It was argued by *Mr. Stanton* for the United States, and by *Mr. Benham* for the appellees.

Mr. Benham made the following points:

I. The court will not go behind the grant for the Cosumnes to entertain the question how much land Hartnell had received, because the recitals of the grant show that the law was satisfied. The grant is a judgment upon all questions of law and fact involved in the transaction which it consummated. The Mexicans always considered the granting of lands an adjudication; they spoke of them, when granted, habitually as *terrenos adjudicados.*

II. But if the court do entertain the question, we say:

1. The maximum restriction found in the twelfth section of the colonization law of 1824 has only the effect of forbidding the granting of more than eleven leagues in one grant. Any other construction is discountenanced by the policy and objects of that law; it could make no difference how many grants or how much land one man had, if he occupied and cultivated them.

2. The maximum restriction did not curtail Micheltorena's power. That power was extraordinary, and extended beyond what the law of 1824 gave; it applied expressly to colonization, and was coextensive with that of Santa Anna, which was *de facto* if not *de jure* dictatorial.

If Santa Anna's power was not dictatorial, he at least thought so, and Micheltorena thought so, and Micheltorena thought himself clothed with it, and exercised it to dispense with the maximum restriction. Hartnell thought so too, and gave the consideration of the grant, occupation and improvement. When the official held out that he possessed the power to grant, this court has confirmed, though he had no such power.

3. The estate was only voidable at the worst. It cannot be avoided in this proceeding. Every right or title unimpaired at date of cession, is protected.

Act 3d March, 1851, secs. 8, 11.

4. The estate is not voidable now in any proceeding. The law by which it could have been avoided is abrogated. It was political in its nature, and was abrogated upon the cession.

5. The grant must be confirmed for all the land. It is a patent. It can only be contradicted by matter of record. There is no matter of record which has that effect. The non-approval by the Departmental Assembly, as has been shown, though it may be regarded as matter of record, is not effectual to contradict it, because that act is not competent to divest the estate.

The other patent, (for Todos Santos y San Antonio,) which disclosed the fact that Hartnell had already received a large quantity of land, cannot be entertained as evidence for that purpose. It is *dehors* the patent for the Cosumnes land. If our patent for Cosumnes granted more than eleven leagues, then the illegality might be considered; but being legal on its face, it cannot be invalidated but by judgment in denouncement or office found. Our allegation that we have had more land has no effect, for the question is not involved in the case.

4 Bibb, p. 330.

7 B. Monroe, p. 81.

6. The grant must be confirmed, because the court cannot know whether the grant for Todos Santos y San Antonio will be confirmed or not. The decree of the District Court dismissed so much of the appeal as affected Todos Santos y San Antonio, as has been stated; and if prosecuted, it had to be done in the southern district of California. Whether any appeal has been taken from the land commission's decree relative to that grant does not appear, nor can appear, as no new evidence can be taken here.

7. The maximum restriction did not affect the validity of the grant. On the contrary, the grant was good in every part. No invalidity could attach to the grant as affecting any particular portion of the land, until some proceeding, diminishing the quantity, and segregating the portion withdrawn from the residue, was had.

8. The maximum restriction did not apply to Mexican citizens.

Mr. Justice CATRON delivered the opinion of the court.

Hartnell got a grant from Governor Alvarado, dated June 28, 1841, for a body of land lying in Lower California. The quantity is not specified in the grant, the out-boundaries only being designated.

In November, 1844, he obtained another grant for eleven square leagues, lying in Upper California. Both claims were duly set forth in a petition seeking confirmation, before the board of land commissioners, and they were confirmed, with modifications—the lower grant to the extent of five leagues, and the upper for six leagues.

From this decree the parties appealed, and brought their cause to the District Court, held at San Francisco. That court, sitting in the upper district, had no jurisdiction to re-examine the judgment of the board, as respected the five leagues confirmed in the district of Lower California; and as to that tract, the appeal was dismissed, and therefore that title stands confirmed.

There being cross appeals, the question arises here, whether the upper grant should be confirmed for six leagues or for

eleven—the grant of the Governor calling for the latter quantity.

The District Court adjudged six leagues as the proper quantity; and on this single point the cause comes before us—both parties being satisfied with the decree below in all other respects.

The narrow question is, had the Governor of California power, in 1844, to grant gratuitously, for the purposes of tillage, inhabitancy, and pasturage, more than eleven leagues of land to any one person? Section 12 of the law of 1824 provides, that it shall not be permitted to *unite* in one hand, as property, more than one league of irrigable land, four leagues of farming land, not irrigable, and six for stock raising.

Both titles of Hartnell were brought before the Departmental Assembly. That body held the law to be, that the Governor could not "unite in the same hand" more than eleven leagues, although it might be in different tracts; and so reported to him.

The public *domain* was the property of the Mexican nation, and those who were enabled to displace that title, separate portions of it from the public lands, and vest such portions into individual proprietors by perfected titles, could only do so in the exercise of sovereign power, because the public title was a sovereign right; and agents who assumed to exercise this authority must show that they represented the nation. The Governors of California do not show that they did represent the nation, so as to *conclusively* bind it; to have this effect, the Governor's grant must have the concurrence of the Departmental deputation. It follows, that the Assembly was the controlling power, and could reform or *nullify* the Governor's grant; and having reformed it to the extent of five leagues in the case before us, the claimant came in under the treaty of peace with Mexico, having no interest in these five leagues. 8 How., 303, 304.

We have no doubt that the Departmental Assembly, the board of commissioners, and the District Court, construed the law of 1824 (section 12) correctly, and order the decree below to be affirmed in all its parts.

THE EXECUTORS AND HEIRS OF AUGUSTIN DE YTURBIDE, DECEASED, APPELLANTS, *v.* THE UNITED STATES.

The 12th section of the act of 31st of August, 1852, providing for an appeal from the board of land commissioners in California to the District Court, directs that notice of an intention to appeal shall be filed within six months; and on failure to file such notice, the appeal shall be regarded as dismissed.

This language is mandatory on the court, and admits of no discretion. In case of such failure, the appeal must be dismissed.

This case distinguished from those in which a court can relax its own rules.

THIS was an appeal from the District Court of the United States for the northern district of California.

The facts of the case are stated in the opinion of the court.

It was argued by *Mr. Blair* for the appellants, and by *Mr. Stanton* for the United States.

Mr. Blair thus noticed the point upon which the case turned:

1. The District Court dismissed the appeal, on the ground that its own order, allowing the notice of appeal to be filed *nunc pro tunc*, was void.

I contend that this order was not invalid. The language of the statute, that "the appeal shall be considered as dismissed" in case the notice is not filed as required, is directory merely. It prescribes a rule as to the time of filing a paper in the progress of a cause; and such rules are directory merely, and are never construed to prohibit the filing of the papers after the time limited, and before the adverse party has taken advantage of the omission.

O'Hara *v.* Nieury, 1 Sand. Sup. Ct., 655.
Cook *v.* Forrest, 18 Ill., 581.
Wood *v.* Fobes, 5 Cal., 62.
1 Barb., 478.
3 Rich., 60.
9 Alabama, 399.
1 Brevard, 203.

The suit was instituted, and notice given of its pendency to the United States, by filing the transcript from the record of the board of commissioners.

United States *v.* Ritchie, 17 Howard, 334.

And in this case the United States was in default on this very point, it not appearing that the Attorney General has filed the notice in time.

The court, being thus possessed of a cause which it was required to dispose of on the principles of equity, was authorized to permit a proceeding required in the subsequent progress of the cause to be taken *nunc pro tunc* for good cause, and in aid of the ends of justice. That proceeding was altogether formal, and occasioned no surprise or injury to the adverse party; and it would be against the whole spirit of the act, which required the courts to deal with the rights of the claimants according to the principles of equity, as well as against the ordinary rules of practice, to hold that the order in relation to it was void.

Mr. Stanton contended that the act of Congress was peremptory, and admitted of no discretion in the court below.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the District Court of the United States for the northern district of California. A grant of twenty leagues square of land, equal to four hundred square leagues, was made by the supreme Government of Mexico to President Yturbide, to be located in Texas, on 25th February, 1822, "in recompense for his high merit, in having achieved the independence of his country."

In 1835, the Congress of Mexico authorized his heirs to locate the land in New Mexico, or in Upper or Lower California. On the 20th of February, 1841, it was decreed by the President that the land should be located in Upper California; and on the 5th of June, orders were given by the President to the Governor of California to assign the land selected by Salvador de Yturbide, one of the heirs, in fulfilment of the grant, and the order was duly received by Pio Pico; but

when Salvador was near Mazatlan, en route for California, to locate and take possession of the land, he found that port in rebellion, and was obliged to return to Mexico.

The claimants took no further proceedings till after the close of the war with the United States, and Congress had passed laws to carry into effect the treaty stipulations. They proceeded then to locate the claim on the tract described on the map, and presented their petition to the board of commissioners, asking for the confirmation of the grant. The board rejected the claim, on the ground that it had not been located prior to the change of Government.

An appeal was taken to the District Court, under the act of 1852; but the counsel of appellants, being detained from home by sickness, did not file the notice, directed by the act to be given within six months. Before any motion was made to dismiss the cause, they moved the court for leave to file the notice, *nunc pro tunc*, and proved, to the satisfaction of the court, that the omission to file the notice was wholly accidental; and the court thereupon allowed the motion, and ordered the notice to be filed *nunc pro tunc*. But, on the hearing of the cause, the court decided that, under the statute of 1852, a failure to file the notice within six months precluded any further prosecution of an appeal, under any circumstances whatever, and therefore dismissed the appeal.

The District Court, it is said, dismissed the appeal, on the ground that its own order, allowing the notice of appeal to be filed *nunc pro tunc*, was void.

As the above statement is clear and concise, it was copied from the plaintiff's brief.

The counsel insists, that the allowance of the appeal, after the time limited, was not void; that the language of the statute, that "the appeal shall be considered as dismissed, in case the notice shall not be filed as required," is directory merely.

It must be admitted, that, as to the matter of filing papers and the entry of rules under the practice of the court, such modifications may be made as may facilitate the progress of the court and the convenience of parties; and, indeed, the court may, under peculiar circumstances, avoid an act of in-

justice by the suspension of its rules; but this can only be done where the discretion of the court may fairly be exercised.

Where an entry is required by statute, on a condition expressed, the court is bound by the statute. The language of the *act*, that "the appeal shall be considered as dismissed" where the notice is not filed as required, would seem to admit of no doubt. "If the appeal shall be considered as dismissed," for want of notice, how can the court say it shall not be so considered?

If there be no saving in a statute, the court cannot add one on equitable grounds. The 12th section of the act of 31st August, 1852, provides that, in every case in which the board of commissioners shall render a final decision, it shall be their duty to have two certified transcripts of their proceedings and decisions, and of the papers and evidence on which the same were founded, made out, one of which transcripts shall be filed with the clerk, shall *ipso facto* operate as an appeal for the party against whom the decision shall be rendered; and if such decision shall be against the private claimant, it shall be his duty to file a notice with the clerk of the court, within six months thereafter, of his intention to prosecute the appeal; and if the decision shall be against the United States, it shall be the duty of the Attorney General of the United States, within six months after receiving the said transcript, to cause to be filed with the clerk aforesaid a notice that the appeal will be prosecuted by the United States; and on the failure of either party to file such notice with the clerk, the appeal shall be regarded as dismissed.

This seems to be mandatory on the court, and authorizes the exercise of no discretion.

THE UNITED STATES, APPELLANTS, *v.* THE HEIRS OF FRANCISCO DE HARO, DECEASED.

Where property in California has been in the undisturbed possession of the claimant and his heirs for sixteen years, without any other person claiming or

exercising a possession or right of possession, and it appears that the grant was originally made by Governor Alvarado during his term of office, the claim will be confirmed.

THIS was an appeal from the District Court of the United States for the northern district of California.

The facts of the case and state of the title are fully set forth in the opinion of the court.

It was argued by *Mr. Stanton* for the United States, and by *Mr. Phillips* for the appellees.

The principal question in the case was respecting the identity of the houses or the land granted with those claimed in the petition. *Mr. Phillips* contended that there could be no stronger proof of this, than that possession had been continuous during the whole time since the date of the grant.

Mr. Justice McLEAN delivered the opinion of the court.

The petition of the heirs of Francisco de Haro represents:

That on the 30th July, 1843, the father of your petitioner made and presented his petition in writing to Alvarado, Governor of California, soliciting for himself the grant of a lot of land in the mission of Dolores, to which he had previously obtained a provisional grant of Jose Ramon de Estrada.

That on the 16th of August, 1843, said Francisco obtained a formal grant of said Alvarado to the lot so petitioned for, and remained in possession thereof up to the time of his decease; and that, from that time up to this day, your petitioners have been and still are in the quiet and undisputed possession of said land.

That said land is situated in the mission Dolores, and in the block known and laid down on the official map of San Francisco as block No. 37, and forms the northeast of Centre and Dolores streets, containing fifty Spanish varas square—which grant has properly been recorded in the archives of California—and that the original documents are herewith submitted to the inspection of your honorable board.

Francisco Sanchez was sworn, as to the genuineness of the grant, and he says: I never saw the paper before, but I have no doubt it is genuine. I am acquainted with the signatures of Francisco de Haro and Juan B. Alvarado, having often seen them write; and I recognise their signatures, as they appear on said document, as their genuine signatures.

There were some old houses on the land at the time of the grant, which had belonged to the mission. These were repaired by Francisco de Haro, and in 1846 he was living in them. The land had been enclosed since by his son-in-law, Charles Brown. De Haro died there in 1848. The house was repaired by de Haro.

Francisco de Haro, over his own signature, represents: "That being established in the establishment of Dolores, in houses of the name called 'Mayor domos,' opposite the principal house and plaza; and, as I obtained them from the prefect of the 1st district, Don Jose Ramon Estrada, I solicit of your excellency the legitimacy in property, for the expenses that I have to make to repair them, to live therein with my family, in virtue of my services rendered, receiving grace from your excellency, by adding fifty varas eastward of the houses, inasmuch as I beg most humbly, &c."

MONTEREY, *August* 16, 1843.

MOST EXCELLENT SIR: Whereas the citizen Francisco de Haro has rendered interesting services to the nation and to the Departmental Government, and in virtue of his being already in possession of the houses solicited by previous consent of the Government, as it is shown by the concession of the prefect of the district, I have concluded by these presents, in conformity and ratifying said concession jointly with the fifty varas to the eastward of said houses, as solicited.

The judge of San Francisco will have it so understood, for the cases that may occur upon informations in relation to the new town of Dolores. ALVARADO.

This claim was at first held not to be valid, and was consequently rejected by the commissioners. From this decision there was an appeal to the District Court. On this appeal a

witness, Candelario Valencia, was sworn, who says he is forty-eight years of age, and resides in the mission of Dolores, San Francisco county, California. The witness first knew Francisco de Haro about thirty years since. He is now dead; he died in 1847 or 1848, at the mission of Dolores, and in the building now occupied by Louis Pruso, which is on the north-east of Centre and Dolores streets. The lot on which this house is situated is a fifty-vara lot.

To the question, who are the heirs of Francisco de Haro? the witness answers: At the time of his death he left eight children—one died without issue; the names of those living are as follows; Josefa de Haro, wife of James Dennison—she was formerly wife of Guerrera, now dead; Rosalia de Haro, formerly wife of Mr. Andrews, deceased—now wife of Charles Brown; Natividad, formerly wife of Ignacio Castro, deceased, and now of Paul Tissot; Prudencia, unmarried; Candelaria, unmarried; Charlotta, wife of Fish. Dennison, brother of James; and Alonzo, not yet of age. Francisco de Haro lived in the house ten years. It was formerly part of the establishment of the mission, and was occupied by the mayor domos; it fronts upon the plaza of the mission, and also is opposite the principal house of said mission. Since the death of Francisco de Haro, it has been occupied, and is still, by the tenants of his heirs. Dolores and Centre streets have always existed, since the mission was established, but had not their present names; in fact, they had no names. This lot in question had the same position that it now has; a surveyor, without any difficulty, could locate said lot.

The witness says that he has lived at the mission Dolores for the last sixteen years, and has seen all that he has testified to.

The final decree of the Circuit Court before both the judges was as follows:

This cause came on to be heard upon the transcript of the proceedings in the board of the United States land commissioners, &c., and upon the proof taken in this court upon the appeal from the decision of the said board, taken therefrom by the complainant; and upon hearing counsel for appellants and

respondent, and due deliberation being thereupon had, &c., it is ordered, adjudged, and decreed, that the decision and decree of the said board be, and the same hereby is, reversed.

And it is further ordered, adjudged, and decreed, that the claim of the said appellants to the land claimed by them is valid, and that the same be, and hereby is, confirmed to them.

The land whereof confirmation is made is that certain fifty-vara lot, situated in the mission Dolores, on the northeast corner of what are known as Centre and Dolores streets, on which lot there is a house which formerly formed a part of the establishment of the mission Dolores, occupied by the mayor domos thereof—said lot fronting on the plaza, opposite to the principal house of said mission, and which lot was in the occupancy of Francisco de Haro for some years previous to his death, and has been recently in the possession of one Louis Pruso, as tenant of the claimant, together with and adding fifty varas to the eastward and immediately adjoining said houses.

Subsequently, a notice was served on the district attorney, that the counsel for the complainants will move the court, on the 14th of September, 1857, on that day, or as soon thereafter as counsel can be heard, that the decree entered in this cause be reformed, by adding to the description of the property confirmed by the said decree, "together with the parcel of land, fifty varas square, to the eastward thereof. San Francisco, September 10th, 1857."

Afterwards, on motion of the district attorney of the United States, "it is ordered that the decree heretofore rendered at this term in the above case be set aside, and that the cause stand for reargument at the next term of this court."

And the final entry, upon filing and reading the affidavit of B. S. Brooks, and upon inspection of a traced copy of the original grant of title, whereof confirmation was heretofore made, certified in due form from the office of the surveyor general, from which it manifestly appears to the court that the said grant was originally made and dated by Governor

Alvarado during his term of office, and that the date which it now bears is an evident alteration against the interests of the claimants, and therefore not to be imputed to them; and upon filing a notice of motion and due proof of service thereof upon the district attorney of the United States, and counsel having been heard for both parties, on motion of Mr. Williams, of counsel for the claimants, it is ordered that the order heretofore made in this cause, setting aside and vacating the decree heretofore made confirming the claim, be, and the same is hereby, vacated, set aside, and annulled, and said decree revived and reinstated.

From this decree there was an appeal to the Supreme Court of the United States by the Government.

"It appears that an undisturbed possession of the property claimed has been in the possession of Francisco de Haro and his heirs sixteen years, and it does not appear that any one has claimed or exercised a possession or right of possession over the premises. The copy of the original grant of title, whereof confirmation was heretofore made, certified in due form from the office of the surveyor general, from which it manifestly appears to the court that the said grant was originally made and dated by Governor Alvarado during his term of office, and the date which it now bears is an evident alteration against the interests of the claimants, and therefore not to be imputed to them." This, being the language of the court, imparts verity to the grant, and would seem to settle all doubt on the subject.

There were some old houses on the land at the time of the grant, which belonged to the mission, but it would seem no longer belong to it.

Upon the whole, we cannot doubt, from the title papers, and especially from the sixteen years' possession which has been enjoyed by De Haro and his heirs—using the property as their own, claiming it under the grant—that the title should be confirmed; and it is hereby confirmed.

THE UNITED STATES, PLAINTIFFS IN ERROR, *v.* JOHN J. WALKER. THE UNITED STATES, PLAINTIFFS IN ERROR, *v.* ARTHUR F. HOPKINS. THE UNITED STATES, PLAINTIFFS IN ERROR, *v.* RICHARD LEE FEARN.

The act of Congress, passed on the 7th of May, 1822, (3 Stat. at L., 695,) enumerated the ports of Boston, New York, Philadelphia, Baltimore, Charleston, Savannah, and New Orleans, in which the collector was allowed to receive more than three thousand dollars a year. In the non-enumerated ports, the maximum rate of annual compensation or salary allowed to the office was three thousand dollars.

Mobile was one of the non-enumerated ports, and consequently the salary of the collector at Mobile was not to exceed three thousand dollars, by that act.

This act was not repealed by any of the numerous acts, called additional compensation acts, which were passed from time to time between 1833 and 1841, until one of these temporary acts, viz: the act of 1838, (5 Stat. at L., 265,) was continued in force until otherwise directed by law by the 7th section of the act for the relief of Chastelain and Ponvert, and for other purposes, passed on the 21st of July, 1840. (6 Stat. at L., 815.)

The history and purport given of the several statutes respecting the compensation of collectors, with the reasons which led to the passage of the act of 1841.

Nor was it repealed by the act of 3d March, 1841. (5 Stat. at L., 432.) There is no repugnancy between the acts. Repeal by implication, upon the ground that the subsequent provision upon the same subject is repugnant to the prior law, is not favored in any case; but where such repeal would operate to reopen accounts at the Treasury Department long since settled and closed, the supposed repugnancy ought to be clear and controlling before it can be held to have that effect.

By the true construction of this act of 1841, every collector is required to include in his quarter-yearly accounts all sums received by him for rent and storage of goods, wares, and merchandise, stored in the public stores, for which rent is paid beyond the rent paid by him; and if, from such accounting, the aggregate sums received from that source exceed two thousand dollars, he is directed and required to pay the excess into the Treasury as part and parcel of the public money. When the sums so received from that source in any year do not in the aggregate exceed two thousand dollars, he may retain the whole to his own use; and in no case is he obliged to pay into the Treasury anything but the excess, beyond the two thousand dollars.

Collectors of the non-enumerated ports may receive, as an annual compensation for their services, the sum of three thousand dollars from the sources of emolument recognised and prescribed by the act of 7th May, 1822, provided their respective offices yield that amount from these sources, after deducting the necessary expenses incident to the office, and not otherwise; and in ad-

dition thereto, they are also entitled to whatever sum or sums they may receive for rent and storage, provided the amount does not exceed two thousand dollars; but the excess, beyond that sum, they are expressly required to pay into the Treasury as part and parcel of the public money.

THESE three cases were brought up by writ of error from the Circuit Court of the United States for the southern district of Alabama.

They were suits brought by the United States upon a collector's bond; that against Walker being a suit against the collector himself, as collector of customs for the port of Mobile, and the other two being suits against his sureties. They were therefore identical in principle, and were argued and decided together.

The facts of the case, together with the instructions given and refused by the court below, are all set forth in the opinion of the court.

It was argued by *Mr. J. Mason Campbell*, upon a brief submitted by himself and *Mr. Black*, (Attorney General,) for the United States, and submitted on printed arguments by *Mr. Smith* for the defendants in error, and by *Mr. Stanberry*, who intervened as representing the late collector at Cincinnati, whose case was identical with that of the collector at Mobile.

A detailed report of the arguments of counsel upon both sides, relative to the many statutes involved in this question, would not be interesting to the profession generally, and it is therefore omitted. It may be proper, however, to state the general propositions upon each side.

Upon the part of the United States, it was contended that the only question was as to the true construction of the act of 1841 and its effect upon the act of 1822.

1. The purpose of the act of 1841 was plainly not to increase, but to limit, the compensation of collectors. All over two thousand dollars per annum received from the sources specified in the commencement of the 5th section was to be part and parcel of the public money, and paid over as such,

and no collector was to retain for himself, by the latter part of the section, under any pretence, more than $6,000 per annum, including every possible item of charge or claim. Congress might have aggregated into one all the sources from which collectors could derive compensation, and then limited the amount to be enjoyed from the whole, but it has not done so. It has segregated certain items by the act of 1841, and taken from the collector all but $2,000 per annum of this partial aggregate; and when, in the sentence following, it prohibits more than $6,000 being annually enjoyed under any pretence, no other interpretation will hold than that which makes the sources of compensation, outside of the partial aggregate, separately contribute, if they can, the residue of the amount. The construction put on the act of 1841 by the court below would have been correct, if the section had consisted only of the latter part of it, and its fault consists in ignoring and virtually repealing all that precedes.

2. The true construction of the act of 1841 being ascertained, its operation on the act of 1822 appears at once.

By the 9th section of that act, (3 Stat. at Large, 694,) the maximum compensation of collectors at Boston, New York, Philadelphia, Baltimore, Charleston, Savannah, and New Orleans, is fixed at $4,000 per annum, and by the 10th section of all other collectors at $3,000 per annum, payable, as this court ruled in Hoyt's case, out of the fees and commissions allowed by the act of 1802.

10 Howard, 135.

The mention therefore in the act of 1841 of a maximum of $6,000 from all sources is explained by the fact, that while it limited a maximum of $2,000 as regarded certain particulars, the act of 1822, in regard to the sources of emolument with which it dealt, had already prescribed a maximum of $4,000 for the collectors of the seven ports enumerated in it. But no construction can possibly stand which makes the denial of more than $6,000 per annum to the collectors of ports of the first class, amount to an increase of the compensation of those officers in other ports. The act of 1822 still operates in putting a limit to the collectors' compensation as regards the items

which it contemplated, and fixes that limit to $4,000 per annum for the collectors of the seven ports mentioned in it, and to $3,000 per annum for all other collectors, including the collector of Mobile, while the act of 1841 limits all of whatever class to a maximum of $2,000 per annum, from the items specified by it.

The conclusion to which *Mr. Smith* came, after examining the statutes upon the subject, was the following, viz:

The error of appellant, it is submitted, arises from overlooking the fact, that the several annual acts, made permanent by that of 1840, established a maximum of four thousand dollars for all ports, applicable to then existing sources of income; and hence the error was committed, that the limit of six thousand dollars in the act of 1841 was erroneously supposed to refer to the maximum of four thousand dollars in the act of 1822. The two thousand dollars limited from particular sources, by the act of 1841, added to the limit of four thousand dollars in the act of 1840, makes the six thousand grand limit of the act of 1840. It is impossible to give any operation to the limit of 1840, or of 1841, except upon the construction of the statutes maintained for appellee; for, except upon such construction, the limit of four thousand dollars was as inoperative without, as with, the several annual acts, (made permanent by that of 1840,) and the act of 1841.

The view advanced for appellee is in harmony, too, with the general design of all the statutes on the subject; it meets the growing condition of the country, and establishes a correspondence between labor and responsibility and reward; and pursuing the policy inaugurated in 1822, it adjusts the maximum to the growth of towns and the country, and the spread of commerce; and it finally relieves the question from all the entanglements into which it is drawn by the views of Mr. Attorney General Cushing, in his opinion before referred to, and leaves each and every part and provision of each and every law a field of operation.

If these views are correct, the judgment in the case of the United States *v.* John J. Walker, and the two following cases

against his sureties, must be affirmed, because the record shows: 1. That he did not receive six thousand dollars per annum; and because two thousand dollars of his compensation in no year came from the sources to which this limit applies.

Mr. Justice CLIFFORD delivered the opinion of the court.

This case comes before the court upon a writ of error to the Circuit Court of the United States for the southern district of Alabama. It was an action of debt brought by the United States upon the official bond of the defendant as collector of the customs for the district and inspector of the revenue for the port of Mobile. He gave the bond, with sureties, on the seventh day of September, 1850, conditioned that he had truly and faithfully executed and discharged, and that he would continue truly and faithfully to execute and discharge, all the duties of the office according to law. Neglect and refusal on the part of the defendant to pay to the plaintiffs certain sums of money received by him as such collector before the commencement of the suit, beyond what he was entitled to retain as compensation for discharging the duties of the office, constituted the breaches of the condition of the bond, as assigned in the declaration.

Those balances, as claimed by the plaintiffs, amounted to the sum of thirteen thousand one hundred and eighty-four dollars and forty-two cents; and the charge was, as alleged in the declaration, that the defendant had wholly failed and refused to pay the same. As appears by the transcript, the defendant pleaded the general issue, and that he had fully performed the conditions of the writing obligatory set forth in the declaration.

To maintain the issue on their part, the plaintiffs introduced a certified copy of the bond given by the defendant, and two duly certified copies of transcripts from the Treasury Department, showing that the official accounts of the defendant had been examined and adjusted by the accounting officers of that department. According to those transcripts, the respective balances claimed by the plaintiffs, as the accounts are there

stated, had not been paid by the defendant, and remained due and payable at the time the suit was commenced.

No evidence was adduced by the defendant. He was charged in the account against him, as collector of the customs, with all sums collected from duties on merchandise, tonnage duties, hospital money, and for all sums received for rent and storage of goods, wares, and merchandise, stored in the public storehouses, for which a rent was paid beyond the rents paid by the collector. On the other side, he was credited in the account of official emoluments with the sum of three thousand dollars as the maximum rate of the annual salary or compensation allowed to the collector of that port. Further details of those accounts are omitted, for the reason that the charge for rent and storage in the account of customs, and the credit for salary in the account of official emoluments, are the only two items which come in review at the present time.

Reference to the ninth section of the act of the seventh of May, 1822, will show that Mobile is not one of the seven ports enumerated in that provision, and consequently that the maximum rate of annual compensation or salary allowed to the office under that law was three thousand dollars, as limited by the tenth section, which includes all the ports not enumerated in the previous provision. All of the accounts of the defendant were adjusted at the Treasury Department upon the principle that the act of the seventh of May, 1822, was still in force, and that the maximum rate of compensation belonging to the collector was three thousand dollars, as therein prescribed. It was insisted by the defendant that the provision in question had been repealed by subsequent acts upon the same subject, and that the maximum compensation allowed by law to the office was six thousand dollars.

Assuming that the theory of the defendant was correct, then his accounts had been improperly adjusted, and there was nothing due to the plaintiffs. On the other hand, if the charge for rent and storage in his customs account was properly made, and the maximum rate of compensation belonging to the office was only three thousand dollars, then he was

justly indebted to the plaintiffs for the whole amount of the respective balances as stated in the transcripts.

After argument, the court instructed the jury, among other things, that "the act of 3d March, 1841, was the last and controlling law as to the amount of compensation which collectors are allowed annually to retain; and that, under that enactment, the collector of this port was entitled to a compensation of six thousand dollars per annum, provided the same was yielded from the office from commissions for duties and fees for storage, and fees and emoluments, and any other commissions and salaries now allowed and limited by law, or so much from those sources, not exceeding six thousand dollars, as the office yielded."

That instruction affirmed the right of the defendant, under the act of the third of March, 1841, to a compensation of six thousand dollars per annum, or so much thereof, not exceeding that sum, as the office yielded from commissions of every description, fees and emoluments, including rents and storage, and salaries, as allowed and limited by law. Beyond question, it assumed that the tenth section of the act of the seventh of May, 1822, was repealed. Prayers for instruction were then presented by the district attorney, who was counsel for the plaintiffs. He requested the court to instruct the jury to the effect that the provisions of the act of the seventh of May, 1822, respecting the maximum compensation allowed to collectors of the customs, were not repealed by the act of the third of March, 1841, or by any other act, but that the same were in full force; 2. That the only effect the act of the third of March, 1841, had upon the former act, in so far as the same applied to a case like the present, was to create a new and additional source of emolument to such collectors, allowing them to retain not exceeding two thousand dollars for rent and storage of goods, wares, and merchandise, stored in the public stores, and for which a rent was paid beyond the rents paid by such collectors. Each of these prayers was separately presented, and separately refused by the court.

Another prayer for instruction was then presented by the district attorney. It affirmed, in effect, that it was the duty

of the defendant, as collector, whenever his emoluments in any one year exceeded three thousand dollars, after deducting the necessary expenses incident to the office, to pay the excess into the Treasury, and that the plaintiffs were entitled to recover for all such balances, thus ascertained, as were shown to be due from the evidence. Apply the first and third requested instructions to the facts of the case, and it will be seen that they affirmed the principles adopted by the accounting officers of the Treasury, in restating the accounts of the defendant; and if correct, then the whole amount of the respective balances, as stated in the transcript, was due to the plaintiffs.

Taken together, they assume that the tenth section of the act of the 7th of May, 1822, is in full force, and that the defendant had no right, under the act of the 3d of March, 1841, to retain any portion of the amount received for rent and storage. Those prayers for instructions having been refused, the district attorney then prayed the court to instruct the jury as follows:

"That under those acts, it was the duty of the defendant, as collector of the customs, whenever his emoluments exceeded three thousand dollars in any one year, after deducting the necessary expenses incident to his office, to pay the excess, if any, into the Treasury, and the plaintiffs are entitled to recover the amount of any such surplus or surpluses, if any, as may be shown by the evidence; but, in ascertaining the amount of the defendant's emoluments as such collector, the jury must exclude all moneys derived by him from fines, penalties, and forfeitures, and also all moneys derived by him from rent and storage of goods, wares, and merchandise, which may have been stored in the public storehouses, and for which a rent was paid beyond the rents paid by him as collector, unless the proceeds of such rents and storage exceed two thousand dollars; in which event, the excess over and above that sum must be taken into account by them, in computing the value of the annual emoluments."

That prayer was also refused by the court. To understand its precise effect, it is necessary that it should be read in connection with the first and second prayers, which had previ-

ously been presented and refused. When considered together, those three prayers disclose the second theory of the plaintiffs, as assumed at the trial.

Like the one assumed in the third prayer, it affirmed that the tenth section of the act of the 7th of May, 1822, was unrepealed, but conceded that the defendant had a right to retain to his own use the moneys received for rent and storage, to an amount not exceeding two thousand dollars. Under the instruction of the court, the jury returned their verdict for the defendant; and the plaintiffs excepted to the charge, and to the several refusals of the court to give the requested instructions. Three questions are presented in the case for decision, which will be briefly and separately considered:

1. Whether the tenth section of the act of the 7th of May, 1822, is repealed by any subsequent act; and if not, then,

2. What is the true construction of the act of the 3d of March, 1841, so far as the same applies to the present case?

3. Whether, by the true construction of the two acts, the defendants had a right to retain to his own use the moneys received from rent and storage, to an amount not exceeding two thousand dollars.

1. It is insisted by the defendant that the maximum prescribed by the tenth section of the act of the 7th of May, 1822, is repealed, and that, under the law regulating his compensation, the legal capacity of the office he held was six thousand dollars, subject to the condition that two thousand dollars only could be received from rent and storage. Six thousand dollars, he maintains, is the maximum under the law of the 3d of March, 1841, applicable to every collector, and that the compensation of each, within that limit, and subject to the beforenamed condition, is regulated solely by the amount of labor performed.

To show that the tenth section of the act of the 7th of May, 1822, is repealed, his counsel, at the argument, referred to various acts of Congress, passed subsequently to the tariff act of the 14th of July, 1832, entitled "An act to alter and amend the several acts imposing duties on imports."

They are as follows: 1833, 4 Stat., 629; 1834, 4 Stat., 698;

1835, 4 Stat., 771; 1836, 5 Stat., 113; 1837, 5 Stat., 175; 1838, 5 Stat., 264; 1840, 6 Stat., 815, private act; 1841, 5 Stat., 431, sec. 2.

By the first of those acts, usually called additional compensation acts, the Secretary of the Treasury was authorized, among other things, to pay to the collectors, out of any money in the Treasury not otherwise appropriated, such sums as would give those officers respectively the same compensation in that year, according to the importations of the year, as they would have been entitled to receive, if the tariff act of the preceding year had not gone into effect. That provision, with certain additions and modifications, which will presently be noticed, was annually re-enacted to the year 1840, when it was made permanent. For the most part, it was inserted in some one of the annual appropriation acts, and was designed to accomplish the precise object which its language describes, and nothing more.

Compensation to collectors, from the organization of the Government to the present time, has been derived chiefly from certain enumerated fees, commissions, and allowances, to which has been added a prescribed sum, called salary, and which is much less than the compensation to which the officer is entitled. Provision for such fees, commissions, and allowances, was first made by the act of the 31st of July, 1789, which also allowed to collectors certain proportions of fines, penalties, and forfeitures. 1 Stat., 64.

More permanent provision, however, was made by the act of the 18th of February, 1793, by the act to regulate the collection of duties on imports and tonnage, passed on the 2d of March, 1799, and by the compensation act passed on the same day. 1 Stat., 316, 627, 786.

By these several acts, certain enumerated fees and commissions are made payable to collectors. They are also entitled to certain proportions of fines, penalties, and forfeitures. Accurate accounts were required to be kept by them of all fees and official emoluments by them received, and of all expenses for rent, fuel, stationery, and clerk hire, which they were required annually to transmit to the Comptroller of the Treas-

ury; but they were allowed to retain to their own use the whole amount of emolument derived from that source, without any limitation. Maximum rate of compensation was first prescribed by the act of the 13th of April, 1802. That limit was five thousand dollars, and it was applicable to all collectors.

By that act, it was provided, that whenever the annual emoluments of any collector, after deducting the expenses incident to the office, amounted to more than five thousand dollars, the surplus should be accounted for and paid into the Treasury. 2 Stat., 172.

Further regulations, as to fees, commissions, other emoluments, and salaries, were made by the act of the 7th of May, 1822, as therein prescribed.

One of those regulations was, that whenever the emoluments of any collector, for seven enumerated ports, after deducting the necessary expenses incident to the office, should exceed four thousand dollars, the excess should be paid into the Treasury, for the use of the United States. By the tenth section, it was also provided, that whenever the emoluments of any other collector of the customs should exceed three thousand dollars, after deducting such expenses, the excess should be paid into the Treasury, for the same purpose. They were also required to account to the Treasury for all emoluments and for all expenses incident to their offices, and those accounts were to be rendered upon oath. Neither of the two last-mentioned acts extended to fines, penalties, and forfeitures. 3 Stat., 695. Under that act, three thousand dollars was the maximum which could be allowed to the office held by the defendant; and it is conceded by his counsel that it remained in full force to the time when the additional compensation acts before mentioned were passed. Large additions had been made to the free list by the tariff act of the 14th of July, 1832, and the rate of duties on imports so far reduced that the sources of emolument to collectors would not yield sufficient to give them an adequate compensation. To supply that deficiency, those additional compensation acts were passed. Much reliance is placed by the counsel of the defendant upon

the last proviso, which appears in nearly the same form in several of the acts. Take, for example, the one in the act of the 7th of July, 1838, which is the act that was subsequently made permanent. It provides that no collector shall receive more than four thousand dollars. That sum is the maximum rate of compensation allowed to collectors of the enumerated ports in the act of the 7th of May, 1822; and inasmuch as the limit of three thousand dollars, therein prescribed as applicable to the non-enumerated ports, was not reproduced in the new provision, it is insisted it was repealed, so that every collector, whether of the enumerated or non-enumerated ports, may now claim to receive an annual compensation of six thousand dollars from the sources of emolument recognised by that act, provided his office yields that amount, after deducting the necessary expenses incident to the office. To that proposition we cannot assent. On the contrary, when we look at the language of the new provision, in connection with that of the prior law, and consider the mischief that existed, the remedy provided, and the true reason of the remedy, we are necessarily led to a different conclusion. Commercial ports, where the revenue is collected, were divided by the prior law, so far as respects the compensation of collectors, into two classes, enumerated and non-enumerated. Collectors of the seven enumerated ports might receive an annual compensation of four thousand dollars, provided their respective offices produced that amount, after deducting the necessary expenses incident to the offices, from all the sources of emolument recognised and prescribed by the existing laws.

On the same principles, and subject to the same conditions, the collectors of the non-enumerated ports might receive an annual compensation of three thousand dollars. No one could receive more than that sum, and his lawful claim might be much less.

Ten years' experience under that law, prior to the passage of the tariff act of the 14th of July, 1832, had witnessed but few complaints respecting the classification of the ports, or the standard of compensation to collectors of customs, and had called for no important alteration in the laws upon that sub-

ject. Throughout that period, the rates of duties on imports were high, and nearly every article of consumption imported from other countries was taxed. Change of policy in that behalf, as carried out in the legislation of the succeeding year, affected the emoluments of collectors, and reduced the amount of net income from the sources of their emolument below the standard of a reasonable compensation. To remedy that mischief, and restore their compensation to what it would have been if no change had taken place, was the purpose for which those additional compensation acts were passed. They had the effect to change the basis of computation, so as to augment the estimated net income from the authorized sources of emolument to what it would have been if the tariff act had not passed; but they were not intended to make any change, either in the sources from which the emoluments were derived, or the maximum rate of compensation. Mention was made of the largest maximum prescribed in the prior law, not with any view to repeal or modify the other, which was applicable to the non-enumerated ports, but to exclude the conclusion that it was the intention of the provision to increase the compensation of the collectors of the principal ports beyond what it would have been if the free list had not been augmented, and there had been no diminution in the rates of duties on imports.

Suppose there was nothing in the language of the act to qualify the provision, and nothing in the history of the legislation upon the subject to aid in the exposition; still we would not think it so clearly inconsistent with the prior law as to operate as a repeal. Repeal by implication, upon the ground that the subsequent provision upon the same subject is repugnant to the prior law, is not favored in any case; but where such repeal would operate to reopen accounts at the Treasury Department long since settled and closed, the supposed repugnancy ought to be clear and controlling before it can be held to have that effect. Such was the doctrine substantially laid down by this court in Wood *v.* United States, 16 Pet., 363; and we have no hesitation in reaffirming it as applicable to the present case. Aldridge et al. *v.* Williams, 3 How., 23; U.

S. *v.* Packages of Dry Goods, 17 How., p. 93; 2 Dwarris on Stat., 533.

All of these additional compensation acts are *in pari materia* with the several acts prescribing the sources of emolument, and the whole must be construed together. When they are so considered, there is no such repugnancy as is supposed by the defendant. Collectors, as before, were still required to render an account; and the new provision expressly provides that no officer shall receive under that law a greater annual salary or compensation than was paid to him for the year the before-mentioned tariff act was passed.

2. Having disposed of the proposition chiefly relied on by the defendant, we come now to consider the second question presented for decision. That question cannot be understood without referring to the previous legislation upon the subject, and the practice that had grown up under it. Importers were allowed by the act of the fourteenth of July, 1832, to place certain goods in the public stores, under bond, at their own risk, without paying the duties. Duties on goods so stored were required to be paid one half in three months, and the other half in six months; but while the goods remained in the public stores, they were subject to customary storage and charges, and to the payment of interest at the rate of six per cent. Goods thus deposited might be withdrawn at any time in whole or in part by paying the duties on what were so recalled, together with customary storage and charges and the interest. Public stores were accordingly rented; and as the business increased, the storage received by the collector from the importers exceeded the amount paid to the owner of the stores, and there was no law requiring collectors to account for the excess, which was retained by the collectors to their own use, and went to swell the amount of their compensation.

To correct that supposed abuse, the act of the third of March, 1841, was passed. By that act, every collector was required to render a quarter-yearly account in addition to the account previously directed by law. That additional account, as prescribed in the act, was to include all sums collected or received from fines, penalties, or forfeitures, or for seizure of

goods, wares, and merchandise, or upon compromises made upon seizures, or on account of suits instituted for frauds against the revenue, or for rent and storage of goods, wares, and merchandise, which were stored in the public stores, and for which a rent was paid beyond the rents paid by the collector. As originally framed, the provision required the collector, in case the sums received by him from all those sources exceeded two thousand dollars, to pay the excess into the Treasury as part and parcel of the public money. After it was introduced, however, it was so amended and changed in its passage, that while it still directs the account to be rendered, it requires no part of the money derived from those sources to be paid into the Treasury, except what is received for rent and storage as aforesaid, and for "fees and emoluments." Every collector was required to account for fees and emoluments by previous laws; and as the account to be rendered under this act is expressly declared to be one "in addition to the account now required," there is nothing left for that part of the section directing the payment of the excess into the Treasury to operate upon, except the sums received for rent and storage.

By the true construction of the act, therefore, every collector is required to include in his quarter-yearly account, as directed in the first part of the section, all sums received by him for rent and storage of goods, wares, and merchandise, stored in the public stores, for which rent is paid beyond the rents paid by him as collector; and if, from such accounting, the aggregate sums received from that source exceed two thousand dollars, he is directed and required to pay the excess into the Treasury, as part and parcel of the public money. When the sums so received from that source in any year do not in the aggregate exceed two thousand dollars, he may retain the whole to his own use; and in no case is he obliged to pay into the Treasury anything but the excess beyond the two thousand dollars.

It is insisted, in one of the printed arguments filed in this case, that the act now under consideration has the effect to repeal the maximum prescribed in the prior act, and that every collector, under this act, is entitled to six thousand dollars as

an annual compensation, provided the office yields that sum from all the sources of emolument, including rent and storage. Collectors of the enumerated ports undoubtedly may receive four thousand dollars from the sources of emolument recognised in the act of the seventh of May, 1822, and they may also receive two thousand dollars from rents and storage. Those two sums are equal to the new maximum rate created by the act under consideration, which provides that no collector, under any pretence whatever, shall receive, hold, or retain, more than six thousand dollars per year, including all commissions for duties and all fees for storage, or fees, or emoluments, or any other commissions or salaries which are now allowed and directed by law. But it is quite clear that there is nothing in the act having the slightest tendency to show that the prior act is repealed, so far as it is applicable to the collectors of the non-enumerated ports. No new maximum is fixed to their compensation, and there is not a word in the new provision inconsistent with the tenth section of the prior act.

To suppose that the new maximum applies to the collectors of the non-enumerated ports, would be to impute an absurdity to the act, for the reason, that under no possible state of things can such collectors lawfully retain, hold, or receive, more than five thousand dollars as their annual salary or compensation, from all the sources of emolument recognised and prescribed by the two acts. It may be five thousand dollars, or it may be much less than three thousand dollars, according to the state of the importations and the amount received from rent and storage.

3. It only remains to apply the principles already ascertained, in order to determine the third question presented for decision. Collectors of the non-enumerated ports may receive, as an annual compensation for their services, the sum of three thousand dollars from the sources of emolument recognised and prescribed by the act of the seventh of May, 1822, provided their respective offices yield that amount from those sources, after deducting the necessary expenses incident to the office, and not otherwise; and in addition thereto, they are also entitled to whatever sum or sums they may receive for rent and

storage, provided the amount does not exceed two thousand dollars; but the excess beyond that sum they are expressly required to pay into the Treasury, as part and parcel of the public money.

Charges against the defendant for rent and storage must be settled in accordance with these principles. It follows, that the instruction given by the presiding justice was erroneous; and we also think that the first, second, and fourth prayers for instruction ought to have been given to the jury.

Suits were also instituted against the sureties of the defendant. Judgment was entered in the court below for the respective defendants in those suits, and the causes were removed into this court by writs of error, sued out by the plaintiffs. Those causes were submitted at the same time with the one just decided. They depend upon the same principles, and must be disposed of in the same way.

The judgment of the Circuit Court is therefore reversed in each of the three cases, and the respective cases are remanded, with directions to issue new venires.

THE UNITED STATES, APPELLANTS, *v.* THE WIDOW AND HEIRS OF MARCUS WEST, DECEASED.

Where a grant of land in California was genuine, and issued by the proper authority, a fraudulent attempt to alter it by erasures and interlineations for the purpose of enlarging the quantity, made after California had been ceded to the United States, will not vitiate the original grant.

The book called Jimeno's Index is not an authoritative proof of grants enumerated in it, or as a conclusive exclusion of grants not so registered, but may be referred to as an auxiliary memorandum made by Jimeno officially while he was secretary.

THIS was an appeal from the District Court of the United States for the northern district of California.

The case is stated in the opinion of the court.

It was argued by *Mr. Stanton*, upon a brief filed by the At-

torney General, for the United States, and by *Mr. Benham* for the appellees.

The principal question was, whether the alteration in the grant vitiated it altogether. Upon this point, the Attorney General said:

I have already said that I think there was a grant issued by Jimeno in 1840, which at the time it issued was honest and genuine. If no claim had been made for more than the league and a half comprehended within the boundaries of that grant, the case would have been a clear one in favor of the claimants. But I insist that a provisional or equitable grant, which may be converted into a legal title upon the contingency of an approval by the Departmental Assembly, and the performance of other conditions, must be regarded as wholly abandoned when the conditions were not complied with, and another and a different claim set up under a forged title.

To this argument, *Mr. Benham* replied:

The claimants derive title by succession. The grant of the 2d of November is admitted to be genuine. It must be confirmed, to the extent of one league and a half. Its alteration did not divest the rights which vested under it. It is immaterial who made the alteration; although, as a matter of fact, it was not made by the claimants, or with their knowledge or consent.

There is another grant in the archives, which vested the land (the league and a half) in West.

Lewis *v.* Payn, 8 Cowen, pages 75, 76.

Jackson *v.* Gould, 7 Wendell, p. 364.

Hatch *v.* Hatch, 9 Mass., top pages 293, 297, 298.

Doe *v.* Hirst, 3 Starkie's Rep., p. 60.

Hennick *v.* Malin, 22 Wendell, p. 391.

3 Preston's Abstracts, 103.

2 H. Blackstone, 263.

Buller's N. P., 267.

The position of Mr. Attorney General, that the alteration of the grant is an abandonment of title, which will prevent

confirmation by this court, is not tenable. It cannot be held there was any abandonment when the claimants continued, as they have always done, to occupy the land.

All the conditions imposed by the Jimeno grant were complied with.

Mr. Justice WAYNE delivered the opinion of the court.

All of the documents upon which the defendants rely for a confirmation of their right to the land in dispute, are to be found on file in the archives among the expedientes of the first class. Concerning the genuineness of those which show that a grant for a league and a half was originally made to Marcus West, there can be no denial. They were admitted by the Attorney General to be genuine; but he resists the confirmation of that title, upon the ground that fraudulent attempts were subsequently made to enlarge the quantity intended to be granted, by erasures and interlineations.

West first petitioned for the land, without stating the quantity. In a few days afterwards, General Vallejo certified that the land asked for was vacant, and that it was not within twenty leagues of the boundary of California, nor within ten leagues of the sea shore. On the 30th of October, 1840, a report was made to the Governor, that the petitioner had the qualifications for receiving a grant, and that the land might be granted.

Jimeno was then acting as Governor ad interim. He declared West to be entitled to the land, to the extent of a league and a half, describing particularly its boundaries; and he made an entry of his executive action in the case, in what is termed Jimeno's Index.

We do not regard that catalogue of grants as authoritative proof of grants enumerated in it, or as a conclusive exclusion of grants not so registered by Jimeno, which may be alleged to have been made whilst California was a part of the Mexican Republic, though they may bear date within the time to which that index relates. But in this case, it may be referred to as an auxiliary memorandum made by Jimeno himself of his action upon the petition of West.

West died before the claim was acted upon by the United States commissioners.

We have only to observe, that the fraudulent attempts to enlarge the grant were made after California had been ceded to the United States; and though the proof of it is undeniable, and was an attempt to defraud the United States, that cannot take away from the wife and children of West their claim to the grant, which was made to him before California had been transferred by treaty.

We affirm the decree of the court below, confirming the grant to West for a league and a half.

LOUIS L. REFELD, A. B. K. THETFORD, AND TERRENCE FARRELLY, EXECUTORS, MARY F. NOTREBE, WIDOW, AND EDWARD C. MORTON AND HIS WIFE, MARY F. MORTON, HEIRS OF FREDERICK NOTREBE, DECEASED, APPELLANTS, *v.* WILLIAM W. WOODFOLK.

The Real Estate Bank of Arkansas was established on a loan by the State of Arkansas of its bonds, which the bank sold to form its capital. The stockholders gave their bonds and mortgaged their lands to the extent of their subscriptions. Notrebe subscribed for three hundred shares, and mortgaged his land for thirty thousand dollars.

Notrebe sold the land with a covenant of warranty, and then died. The purchaser paid all the money, and the widow and heir at law of Notrebe offered to convey the land by a deed, with a covenant of warranty of title.

The Circuit Court, sitting as a court of equity, decreed that the executors should remove the encumbrance whenever it could be done, and in the mean time they should deposit with the clerk of the court bonds of the State of Arkansas to an amount sufficient to pay Notrebe's subscription, with interest, in case the bank should prove a total loss.

This decree was erroneous.

The purchaser must rely upon his remedy at law under the covenant of warranty. He can either take the deed offered by the widow and heir at law, or retain the original agreement.

The cases examined upon the point, how far a court of chancery will interfere in such a case.

THIS was an appeal from the Circuit Court of the United States for the district of Arkansas.

The case is fully stated in the opinion of the court.

It was submitted upon printed arguments by *Mr. Pike* for the appellants, and *Mr. Meigs* for the appellee.

The arguments upon both sides took a wide range, and included many points which would have been applicable, if a suit had been brought at law upon the covenant of warranty, such as that there could be no recovery, except for nominal damages, until the vendee was evicted. With respect to the interposition of a court of equity in a case situated like the present, *Mr. Pike* said:

The chief question in this case is a perfectly simple one. Woodfolk proposed to purchase certain land of Notrebe; he was informed that it was mortgaged to the Real Estate Bank, which was insolvent. The mortgage was of record; and the charter of the bank, showing the liability under the mortgage, was a public law of the land. It was totally uncertain what would be the ultimate liability under the mortgage. It was meant to cover the share of Notrebe and Cummins in any deficit of the assets of the bank. Whether there would be any deficit or not was not known. Notrebe told Woodfolk all he knew about it; that the bank attorney thought there would not. All the sources and means of information on that subject were as open to Woodfolk as Notrebe; and knowing, or having the means of knowing, all that anybody could know, he purchased the land at the low price of $10.50 per acre, and took a bond from Notrebe, to make him "a good and sufficient conveyance in fee simple, with covenant of warranty."

Can he, after occupying the land several years, and paying up the purchase money, when it is still as uncertain as ever, what, if any, will be the ultimate liability under the stock mortgage, claim at the hands of a court of equity that it shall compel Notrebe's heirs to indemnify him against such contingent liability? Or will it not be held that he made a chancing bargain, an aleatory contract, getting the land at the price he did on account of the contingent encumbrance upon it, and

taking the risk of that encumbrance? That is the whole question.

(*Mr. Pike* then proceeded to argue that the words of the covenant did not bind Notrebe to make a conveyance with a covenant against encumbrances.)

The *quia timet* jurisdiction of the court of equity is one which the court has often exercised; but it will be extremely tender in so doing, because it materially varies the agreement of the parties at the time of the transaction.

Flight *v.* Cook, 2 Ves. Sen., 620.

And the doctrine seems to be well settled, that where a deed has been executed, and the only covenants in it are for quiet enjoyment or of warranty, and so long as there has been no eviction, actual or constructive, equity will, as a general rule, refuse to entertain a bill for relief, either by way of enjoining the purchase money, or, *a fortiori*, by rescinding the contract; and, although it has been at times intimated that the presence of a covenant for seizin may in some cases fortify the position of the purchaser, it does not appear that the cases generally draw much distinction between the different covenants for title.

Rawle on Cov. for Title, 679, and the many cases cited.

If this contract is still executory, then in that case, as a general rule, the purchaser is entitled to a good title, free of encumbrances. He cannot be forced specifically to perform, unless such title can be made. If sued for the purchase money, he may enjoin its collection, or compel the removal of encumbrances. That is the general rule. But the question here is, what relief has he in equity, if, making the bargain, knowing of an encumbrance, he pays up the purchase money without requiring it to be removed, and when it is of the nature of the one here complained of?

It is not a question here, whether he could be compelled to perform his contract. He has performed it; he is in possession; has used the land and enjoyed its issues now for nearly ten years. He does not offer to give it up. He protests against doing so. If he had all the covenants he could possibly demand, there has been no breach of any of them that

would entitle him to damages; and therefore he would be entitled to recover only nominal damages at law, and would have no relief in equity; that is too clear to be denied. Rawle, 680. How can he be entitled to any more relief, because he has not yet taken a deed? He has the same covenants he would have in a deed, and they are as effectual to protect him. The difference between a contract executory and one executed by deed is, that in case of the latter, if he had no covenants, he would have no remedy; and if he had them, he must look to them. In the former case, he might resist a demand of performance, and object to taking the property or to paying the price; but when he has paid, and is in possession, it makes no difference whether the contract is executed or executory. Having chosen to perform, all he is entitled to is his conveyance. If he could defend at law against payment of the purchase money, wholly or in part, he might have relief in equity; but he cannot be sued for what he has paid.

In Anon, 2 Freem., 106, a case was cited "where a purchaser brought his bill to be relieved where encumbrances were concealed; but was dismissed; for he ought to have provided against it by covenants; but it was said by Rawlinson, that if the purchaser had in that case had his money in his hand, this court would have helped him, but not after he had paid his money."

Again: We have sought in vain for a case where a bill, asking indemnity alone, has been sustained, or even heard of, filed by a purchaser when that indemnity was sought against an encumbrance by mortgage, well known to the purchaser at and before the time of purchase, and where he had fully paid the purchase money without requiring indemnity or complaining of the encumbrance.

It is a mere attempt "to amend the plaintiff's security in equity; to give him a better remedy for his money in chancery than he had provided for himself by the condition of the bond which he took." There was no fraud in Notrebe; he told Woodfolk all that he himself knew about the encumbrance. Woodfolk made the purchase and took the bond with his eyes open. That he has come to think the encum-

brance more serious than he imagined, is no reason why a court of equity should mend or increase his security; that is not its province. The heir of Notrebe is in no default; being a minor, she could not convey. The bill is a plain attempt to get the court of chancery to mend Woodfolk's bargain, and we see no better ground to assign for the application, than "that chancery ought to suffer no man to have an ill bargain."

A bill filed for compensation singly cannot be maintained.

Newham *v.* May, 13 Price, 749.

The jurisdiction of equity in cases of compensation is only incidental and ancillary to that of giving relief by enforcing the performance of contracts for the sale of real property. Id.

The court will give it when title to a part of the property fails, and it decrees that the purchaser shall accept, or he agrees to accept, that to which there is good title.

Besant *v.* Richards, 1 Taml., 509.

Pratt *v.* Law, 9 Cranch, 458, &c.

And there is certainly no ground on which to decree an indemnity against an encumbrance that was known to the purchaser when he made his contract, and to protect himself against which, he asked no provision to be put into the contract. The court will not insert that provision, when he himself did not think it worth his while to do so. He made his contract as he pleased, and must be content with it. If he had not known of the encumbrance, the case would be very different.

Mr. Meigs said that the present bill was filed to have a specific performance of Notrebe's covenant to make the complainant a good and sufficient conveyance in fee simple, if Notrebe's heirs can perform it, and if they cannot, that what title they have may be divested out of them, and vested in complainant, with indemnity against the mortgage.

Mr. Meigs then cited a number of cases in illustration of these principles, and then proceeded to consider the interference of a court of equity.

It is familiar law, that the general principles of the contract of sale, both in this country and in England, recognise and

enforce, while it is still executory, as in this case, the right of the purchaser to a title clear of defects and encumbrances.

Rawle on Covenants, 566.

Burwell *v.* Jackson, supra.

But, practically, how is this to be done, in a case circumstanced as the one in hand? Before the payment of the purchase money, we have seen that it can be done by an abatement of the purchase money to an amount equal to the cost of removing the encumbrance. And the vendor must discharge an encumbrance, not disclosed to the vendee, whether he has or has not agreed to covenant against encumbrances, before he can compel the payment of the purchase money.

Sugden, chap. 12, sec. 2, par. 2.

Although the purchase money has been paid, and the conveyance is executed, yet if the defect do not appear on the face of the title deeds, and the vendor was aware of the defect, and concealed it from the purchaser, or suppressed the instrument by which the encumbrance was created, or on the face of which it appeared, he is, in every such case, guilty of a fraud; and the purchaser may either bring his action on the case, or file his bill in equity.

Sugden, chap. 12, sec. 2, par. 17.

In Sergeant Maynard's case, he was denied relief, because he had parted with his money, and taken a bond for repayment of it, on a certain condition.

2 Freeman's Rep., 2.

In our case, Woodfolk took a bond to make him a good and sufficient conveyance in fee, and then paid the purchase money. And afterwards he discovers that the land is encumbered for more than its entire value, the encumbrance having been represented to him as of no validity or force, and its true nature sedulously concealed, and the deed not even shown.

Now, in these circumstances, he is entitled, unquestionably, to a conveyance of the fee simple that shall be effectual. Will the court content itself by simply decreeing that a deed shall be made, formally conveying the fee, but leaving the land under the burden of the encumbrance; or divesting what title there is in Notrebe's heir, and vesting it in Woodfolk?

If the court be of opinion that Woodfolk is entitled to "an operative conveyance, one that carries with it a good and sufficient title to the land conveyed," as Kent said in Clute *v.* Robinson, 2 Johns. R., 612, already cited, there seems to be no practical way of effecting this, but by compelling Notrebe's heir and representatives to extinguish the mortgage, or to buy so many State bonds as shall be equal to the stock bond.

It is plain that the heir of Notrebe cannot make a good and sufficient conveyance in fee simple, without, in some way, releasing the estate from the mortgage; and it is equally plain that there is no way of releasing the estate from the mortgage but by paying a sum of the State bonds equal to the stock. And Woodfolk might insist upon this; but if he is willing to take such title as can be decreed out of the heir, with an indemnity against the mortgage, that is a relief which is within the power of a court of chancery. The subject will be found pretty fully discussed in Sugden on Vendors and Purchasers, chap. 10, sec. 2. And the weight of the cases there stated and commented on cannot certainly be regarded as weakened in the least by what is reported to have been said by Lord Eldon in Balmorno *v.* Lumley, 1 Ves. and Beam., 225, cited by Sugden in chap. 7, sec. 2, par. 36. The case, when examined, cannot possibly have the slightest weight, seeing that it is reported in so crude a manner as to leave us wholly in the dark as to its circumstances.

The indemnity which the heir of Notrebe seems bound to make will be, as already suggested, the substitution of another estate instead of the land sold to Woodfolk, to be held by a trustee, to save him harmless against the mortgage. When we ask this, we only ask that Notrebe's heir shall assume the burden of Notrebe's debt, and relieve the complainant against liability for it—a liability which, in his opinion, is not merely visionary, but is extremely likely to embarrass and harass him in 1861, only a year hence.

See Halsey *v.* Grant, 13 Vesey, 73.

Horniblow *v.* Shirley, 13 Ves., 81.

Cassamajor *v.* Strode, Wilson's Ch. R., 428.

Warren *v.* Bateman, 1 Flannegan and Kelly, 443.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellee (Woodfolk) filed this bill in the Circuit Court against the executors and heirs of Frederick Notrebe, deceased, and the trustees of the Real Estate Bank of Arkansas.

He represents that, in 1845, he concluded an agreement with Notrebe for the purchase of fourteen hundred and seventy-eight acres of unimproved land in Arkansas, for fifteen thousand five hundred and eighteen dollars, a portion payable in cash, and the remainder in instalments, secured by his notes and bond. Notrebe and his wife obligated themselves, when the payment should be completed, to convey to him the land in fee simple, "by a good and sufficient deed, with general warranty of title, duly executed, according to law."

The appellee has established a plantation upon the land, and has greatly improved its value. He completed the payment in 1850, when the executor of Notrebe offered a deed executed by his widow and heir-at-law, in which there was a covenant of warranty, in fulfilment of the agreement of his testator. The appellee declined to accept this, because the land had been mortgaged to the Real Estate Bank of Arkansas, in 1837, by Notrebe, to secure the payment of his note for thirty thousand dollars, payable in October, 1861, with five per cent. interest annually, which Notrebe had given for three hundred shares of the stock of that bank. The appellee charges that the existence of this mortgage was concealed from him until after the conclusion of his agreement, and that afterwards he was deceived by misrepresentations of the condition of the title, until he had paid the whole of the purchase money. He prays that the title be examined, and that the defendants be required to remove the encumbrance, or to give him effectual indemnity against it, and that the distribution of the estate of Notrebe be restrained until this be done.

The defendants answered the bill, and have successfully repelled the imputations of fraud and misrepresentation, but admit the existence of the mortgage, and fail to impair its validity.

The Circuit Court, upon the pleadings and proofs, declare

that the "entire transaction" between Notrebe and the appellee "was bona fide and free from fraud," and that the latter had notice of the mortgage as a subsisting and operative encumbrance upon the land before he concluded his contract; but that Notrebe had agreed to convey the land free of encumbrance and with warranty of title, and that the vendee is entitled to the performance of that contract; but that the debt of the decedent, not being at maturity, and of a character not to be ascertained before that time, all that could be done would be to provide an indemnity against the peril it created.

The court proceed to require of the executors to remove the encumbrance whenever it can be done, and then to convey the land by a deed with warranty, and with the relinquishment of dower by the widow; and, meanwhile, that they should deposit with the clerk of the court bonds of the State of Arkansas, for the amount of Notrebe's note and the interest, ($61,500,) to be held and appropriated under the order of the court as indemnity, or that the executors might, in part or for the whole, convey to the clerk unencumbered real estate of the same value, for the same object and under the same conditions.

The Real Estate Bank was established on a loan by the State of Arkansas of its bonds, which the bank sold to form *its* capital. The principal and interest of these bonds were to be paid by the bank; and its means of doing so were afforded by the securities obtained from the loan of its capital and profits of business, and the bonds and mortgages of the stockholders, to the extent of their subscription of stock. Each stockholder having given a bond and mortgage to the bank corresponding to the pro rata amount of the State bonds issued to the bank, as compared with the stock, and which were pledged for the payment of the State bonds, the sum to be paid by any shareholder on this debt depends upon the degree of the insolvency of the bank. In case of the loss of its entire capital, the stockholder becomes liable to pay his entire debt.

The pleadings and proofs in this case show that the bank has suffered a loss of a portion of its capital, but no data are afforded to ascertain the amount of the loss. The decree of

the Circuit Court assumes that the loss may be total; and the indemnity awarded was determined as if the fact would correspond with the possibility. This appeal was made to test the validity of this decree.

A court of chancery regards the transfer of real property in a contract of sale and the payment of the price as correlative obligations. The one is the consideration of the other; and the one failing, leaves the other without a cause. In Ogilvie *v.* Foljambe, (3 Mer., 53,) Sir William Grant says: "The right to a good title is a right not growing out of the agreement of the parties, but which is given by law. The purchaser insists on having a good title, not because it is stipulated for by agreement, but on the general right of a purchaser to require it."

Upon this principle, a vendor is allowed a lien or privilege for the price of the property against the vendee and his assigns; and the vendee is permitted to appropriate the purchase money, to exonerate his estate from a lien or encumbrance, and in some cases to compensate for original defects in the estate, as respect its quantity, quality, or extent of vendor's interest therein.

The cases cited on the part of the appellee support this doctrine, and confirm the argument that he was entitled, under his contract, (having no reference to extrinsic circumstances,) to the fee simple estate, without diminution. Galloway *v.* Findley, 12 Pet., 264; Burwell *v.* Jackson, 5 Seld., 535; Cullum *v.* Bank of Ala., 4. Ala. R., 21.

But such circumstances may very materially modify the situation of the parties, and indispose that court to interfere between them, even in cases within the jurisdiction of the court. If the contract has been executed by the delivery of possession and the payment of the price, the grounds of interference are limited by the covenants of the deed, or to cases of fraud and misrepresentation. "The cases will show," say this court, "that a purchaser in the undisturbed possession of the land will not be relieved against the payment of the purchase money on the mere ground of defect of title, there being no fraud or misrepresentation; and that in such a case he must

seek his remedy at law, on the covenants in his deed; that if there is no fraud and no covenants to secure the title, he is without remedy, as the vendor, selling in good faith, is not responsible for the goodness of his title beyond the extent of the covenants in his deed. Patton *v.* Taylor, 7 How., 132.

This rule, experience has shown, reconciles the claims of convenience with the duties of good faith. The purchaser is stimulated to employ vigilance and care in reference to the things as to which they will secure him from injustice, while it affords no shelter for bad faith on either part.

The intermediate cases—those in which the parties have advanced in the completion of their contract, and are still willing to abide by it, and there arises a real inability or a well-founded apprehension of danger, in that stage of their proceedings, to the completion of the contract—have created much embarrassment. Some of these cases have been settled upon terms of compensation, in which the court of chancery has exercised a doubtful jurisdiction, in modifying the conditions of the contract according to the supervening circumstances. White *v.* Cuddon, 8 Cl. and Fin., 766; Thomas *v.* Dering, 1 Keen, 729; Dart, Vend. and P., 499, et seq.

We have met with no case in which a vendee, in possession under a contract of purchase or a deed with covenants, has been permitted to reclaim the purchase money already paid, to be held as a security for the completion or protection of his title. The Roman law permitted the vendee to retain the purchase money in his hands, as security against an impending danger to the title; but denied a suit for restitution, after payment, for that cause. "We must not," says Troplong, "hastily break up a contract which the vendor may at last be able to fulfil. There is no analogy between the case in which the purchaser is allowed to retain the price as security, and that in which he would force the vendee to restore it for that purpose. Between the right of retention and that of restitution of the price, there is the distance between the statu quo and rescission. Trop. de Vente, No. 614; Dalloz Juris., gen. tit. de Vente, sec. 1170.

The decree of the Circuit Court does not direct the restitu-

tion of the purchase money to the vendee, nor its application by the vendor to assure the attainment of the object of the contract; but it sequestrates property of the vendor of four times the amount, to be held or disposed of by the court in its discretion, to assure the accomplishment of that object. In the case of Milligan *v.* Cooke, 16 Vesey, 1—14, Lord Eldon made an order that the purchaser should be compensated for the difference in the value between the title contracted for and that exhibited; and if that difference could not be ascertained, the master was directed to settle the security to be given by the defendant as indemnity to the purchaser against disturbance or eviction; and a similar order was made in Walker *v.* Barnes, 3 Mad., 247. But there were conditions in the contract that authorized the order.

In Balmorno *v.* Lumley, 1 V. and B., 224, and Paton *v.* Brebner, 1 Bligh. P. C., 42, the cases in which such a relief could be granted appear to be limited to that class. In the latter case Lord Eldon said: "This suit is in substance or effect (allowing for dissimilarities between English and Scotch proceedings) in the nature of a suit in a court of equity in England for the specific performance of a contract. In such a suit, if it turns out that the defendant cannot make a title to that which he has agreed to convey, the court will not compel him to convey less, with indemnity against the risk of eviction. The purchaser is left to seek his remedy at law, in damages for the breach of the agreement."

In Aylett *v.* Ashton, 1 M. and C., 309, the master of the rolls, upon the authority of the cases cited, said: "Parties no doubt may contract for a covenant of indemnity; but if they do not, the court cannot compel a party to execute a convey ance and to give an indemnity." To the same effect is Ridg way *v.* Gray, 1 Mac. and G., 109.

The appellee does not seek to rescind this contract; nor does he disclose any imminent peril of disturbance or eviction, as the effect of the existence of the mortgage. The record shows that the widow and heir of Notrebe, whose covenant of warranty has been offered to the appellee, are either of them able to respond to the damages that would be awarded upon

the breach of that covenant. The appellee had notice of this encumbrance when he made and performed his agreement of purchase, and did not stipulate for any additional indemnity to that resulting from the covenant of warranty. We must therefore conclude that he was willing to abide the settlement of the affairs of the Real Estate Bank, and to rely upon the protection afforded by the covenants in his deed. We have no reason to suppose that the vendor would have consented to deposit in the hands of a stranger four times the value of the property he sold, as a security for the fulfilment of his contract; nor can we superadd this to the other obligations he has assumed.

Our opinion is, that the decree of the District Court is erroneous, and must be reversed.

The deeds tendered seem to be in conformity with the stipulation of the vendor in the agreement. The vendee may elect to take these, or he may retain the agreement. In either case, his bill will be dismissed with costs; and for this purpose the cause is remanded.

EBER B. WARD, SURVIVOR, &c., OWNER OF THE STEAMBOAT DETROIT, APPELLANT, *v.* CHARLES THOMPSON.

Where certain parties joined together to carry on an adventure in trade for their mutual benefit—one contributing a vessel, and the other his skill, labor, experience, &c.—and there was to be a communion of profits on a fixed ratio, it was a contract over which a court of admiralty had no jurisdiction.

THIS was an appeal from the Circuit Court of the United States, sitting in admiralty, for the district of Michigan.

It was a libel filed by Eber B. Ward against Charles Thompson, in the District Court of the United States, in a cause of contract, civil and maritime. The ground of the libel was the agreement which will presently be reported. The District Court dismissed the libel, which decree was affirmed by the Circuit Court upon an appeal. The libellant brought the case up to this court.

The case was submitted on printed arguments by *Mr. New-*

berry for the appellant, and *Mr. Hand* and *Mr. Lothrop* for appellee. These arguments embraced the whole merits of the contest between the parties; but as the only point considered in the decision in this court relates to the construction of the following contract, they need not be further noticed:

"Memorandum of an agreement between E. B. & S. Ward, of Detroit, Michigan, of the first part, and Charles Thompson, of Canada West, of the second part, witnesseth: That the said party of the first part agree to allow the party of the second part to run the steamer Detroit between the Sault Ste. Marie and Penetanguishene during the remainder of the sailing season of 1852, and all the year A. D. 1853, in a line with and under the general control and management of the party of the second part, who is to appoint all the officers and crew of said steamer, except the clerk or purser, who is to be under the control of the parties of the first part, and subject to their direction. Said steamer is to be paid for the transportation of the Government mails, and for all freights and passengers, the same rates as have heretofore been charged by steamers on the route aforesaid.

"The receipts of the said steamer are to be applied as follows:

"First. All expenses for crew, fuel, repairs, and supplies, are to be paid.

"Secondly. The cost of insuring said steamer, to the amount of twelve thousand dollars, to be paid by E. B. & S. Ward.

"Thirdly. E. B. & S. Ward are to be paid, out of the first net earnings of said steamer, six thousand dollars.

"Fourthly. All the remaining balance, after paying the above, is to be equally divided between E. B. & S. Ward and Charles Thompson aforesaid. The clerk of said boat will be required to make reports as often as once in two weeks of the receipts and expenditures of said steamer, and furnish the said Thompson and Wards each a copy. The said Thompson is to be paid three hundred dollars per year, out of the earnings of said boat, for his services as agent for said steamer.

Should the said steamer be damaged by any accident, or require repairs, such expenses are to be paid for by said steamer out of her own earnings, the same as for supplies. It is further agreed and understood that the said Charles Thompson is to protect, defend, and guaranty said steamer against any and all infringements of the revenue law of the United States or Great Britain. The said steamer is to be returned and delivered unto the said parties of the first part on the first day of December, 1853, at Detroit, in the same condition (ordinary wear and tear excepted) as she is now in. Should the said steamer be lost before she shall have earned the above sum of six thousand dollars, to be paid to the said E. B. & S. Ward, said Thompson is not to be held liable to pay any part thereof, but the said Thompson shall be held responsible for the negligence, misconduct, or wilful mismanagement, of the said steamer, by the officers under his control and management. In case of any partial loss, for which insurance would be paid, such insurance, when collected, shall be applied to the repairs aforesaid. The said Thompson agrees to furnish good merchantable wood for said steamer, during the time she may be running in his service, at $1 per cord; the best of hard wood, if full four feet long, to be $1.12½ per cord.

"(Signed) E. B. WARD. [L. S.]
"(Signed) S. WARD. [L. S.]
"(Signed) CHARLES THOMPSON. [L. S.]

"Signed, sealed, and delivered, this 10th day of June, A. D. 1852.

"Witness, (Signed) ALEXANDER M. MCGREGOR.

"Memorandum. The Detroit is to be delivered as soon as she returns from Buffalo, on her present trip.

"(Signed) E. B. WARD."

Mr. Justice GRIER delivered the opinion of the court.

The articles of agreement containing the contract, which is the subject matter of this suit, are denominated in the libel a charter-party of the steamboat Detroit to respondent. The answer denies that he had chartered the vessel, and alleges that the writing declared on is a contract of partnership, and

not a charter-party. The Circuit Court agreed with the respondent as to the construction of the contract, and consequently dismissed the bill.

A court of admiralty takes cognizance of certain questions between part owners, as to the possession and employment of the ship, but will not assume jurisdiction in matters of account between them. (Orleans *v.* Phœbus, 11 Peters, 175.) It is not disputed that a contract of partnership in the earnings of a ship comes within the same category. If the party desires an account, his remedy is in a court of chancery. If his complaint be for a breach of some independent covenant, he should seek his remedy in a court of common law.

A charter-party is defined to be "a contract by which a ship, or some principal part thereof, is let to a merchant, for the conveyance of goods on a determined voyage to one or more places."

A contract of partnership is where parties join together their money, goods, labor, or skill, for the purposes of trade or gain, and where there is a community of profits.

The only characteristics of a charter-party to be found in this contract are, that the subject of it is a ship, and that libellants are owners. There is no letting or hiring of the ship to the respondent for a given voyage, to be employed by him for his own profit. On the contrary, the Wards contributed a steamboat, to be put into a line for freight and passengers, which has also a contract for carrying the mail. Thompson contributes the good will of an established line, together with his care, skill, and experience. He is to have the general management of the business, and the selection of the officers and crew; but the clerk, or receiving and disbursing agent, is to be appointed by the Wards, and to be under their control.

The receipts of the steamer are to be applied—

1st. To pay expenses.

2d. Insurance.

3d. Six thousand dollars to Ward.

4th. Three hundred to Thompson.

5th. The balance of the profits to be equally divided.

Here we have everything necessary to constitute a partnership:

1st. The parties have *joined* together to carry on a certain adventure or trade, for their mutual profit—one contributing the vessel, the other his skill, labor, and experience, &c.

2d. There is a communion of profits, on a fixed ratio.

Of such a contract, a court of admiralty has no jurisdiction.

The decree of the Circuit Court is therefore affirmed, with costs.

PIERRE A. BERTHOLD AND OTHERS, PLAINTIFFS IN ERROR, *v.* JAMES MCDONALD AND MARY MCREE.

Where the decision of the Supreme Court of a State was against the validity of a title to land derived from a confirmation by the board of commissioners sitting under the act of March 3, 1807, this court has jurisdiction, under the 25th section of the judiciary act, to review that decision.

Where the controversy was between two claimants to land, both of whom held equitable titles only under confirmation by the board of commissioners above mentioned, the court had a right to go behind the *prima facie* title resulting from the confirmation, and to instruct the jury as to such facts as would tend to establish the superior equity of one of the claimants.

THIS case was brought up from the Supreme Court of the State of Missouri by a writ of error issued under the 25th section of the judiciary act.

It was an action of ejectment brought by Berthold and others against the defendants in error, to recover the possession of a tract of land near St. Louis, containing eighty arpens, equivalent to sixty-eight acres. The action was originally brought in the St. Louis land court. Under the Spanish Government, there was a common field near to the town of St. Louis, called the common field of the Prairie des Noyers. In this common field were two lots, owned respectively by two negresses, one of whom was named Florence Flore, and the other named Jeannette, or Jeannette Flore. Berthold and the other plaintiffs in error claimed under Florence Flore, and McDonald and Mary McRee under Jeannette. Both claims were confirmed in the manner stated in the opinion of the

court. The court before which the case was originally tried left it to the jury to find which of these negresses was the original confirmee of the land in question, and the Supreme Court of Missouri affirmed the correctness of this instruction. The verdict and judgment were for the defendants, and the plaintiffs below brought the case to this court by a writ of error issued under the 25th section of the judiciary act.

The Supreme Court of Missouri was of opinion that the finding of the facts embodied in the instructions given by the court clearly establishes the superiority of the equity of the defendants, and that the plaintiffs seemed to rely solely on the dry technical point, that their confirmation was prior in point of time to that of the defendants—a view of the case in which that court did not acquiesce.

The case was submitted in this court on a printed argument by *Mr. Washburne* for the plaintiffs in error, and argued by *Mr. Blair* and *Mr. Gamble* for the defendants.

The points made by the respective counsel were as follows, viz: by *Mr. Washburne* for plaintiffs in error:

First Point. The confirmation to Charles Gratiot on the 19th day of November, 1811, was final and conclusive, so that neither the United States nor any person deriving title from the United States subsequently to that date could rightfully claim the land against such confirmation.

Act of Congress, March 3, 1807, sec. 41; 12 Stor. St., 1060.

Strother *v.* Lucas, 12 Pet., 458.

Chouteau *v.* Eckhart, 2 How., 344.

Le Bois *v.* Bramell, 4 How., 449.

Landes *v.* Brant, 10 How., 370.

Second Point. The claim and confirmation in the name of Jeannette, who was dead at the time, are nullities, and cannot, even if otherwise valid, stand in the way of the confirmation to Gratiot. The court below disposed of this point by a simple reference to a prior decision of the same court, in Mercier *v.* Letcher, 22 Mo. Rep., 66. The case referred to will be

found to be this: Charles Mercier was proprietor of a tract of land, under an imperfect Spanish title. Mercier died in Spanish times, and Courtois married his widow.

Courtois claimed the land in his own name, as representative of Mercier, and filed with the commissioners the evidences of Mercier's title. The commissioners confirmed the land "to Charles Mercier." The court decided that Courtois, who made the claim, took nothing by this confirmation; and that the heirs of Mercier, who made no claim, and who, by the force of the act of Congress, were barred of all right in the land two years before the confirmation, took title from it. Both branches of this decision seem to be very questionable.

Third Point. There are no equities appearing in the case that can defeat a recovery by the plaintiffs in the present action, or deprive them of the right to hold the land under the confirmation to their ancestor.

Mr. Gamble said that the following positions were sustained by the evidence and law of the case:

1. The objection to the confirmation in the name of Jeannette, on the ground that she was dead when the claim was filed, is not sustained by the evidence, and if it had been, is not a valid objection in law.

Mercier *v.* Letcher, 22 Mo. R., 66.

2. In this case, the dispute is between parties holding equitable titles, with the legal title outstanding in the United States, and is to be determined in favor of the party having the superior equity.

Bagnell *v.* Broderick, 13 Pet. R., 449.

Wilcox *v.* Jackson, ib., 516.

3. The facts in evidence show that if the two confirmations cover the same land, the superior equity is in the defendants.

4. The reliance of the plaintiffs upon the fact that their confirmation is one day older than that of the defendants, is not warranted by any decision of this court, or by any principle of law, and arises from a mere misapprehension of the language found in the opinion in Landes *v.* Brant, 10 How., 372. No such case as the present ever has been before this court.

Strother *v.* Lucas, 6 Pet. R., 763.

Strother *v.* Lucas, 12 Pet. R., 410.

Chouteau *v.* Eckhart, 2 Howard, 345.

Le Bois *v.* Bramell, 4 Howard, 449.

Bissell *v.* Penrose, 8 Howard, 330.

None of these decisions apply to this case, where there are two confirmations by the same board on consecutive days.

5. If the two confirmations are equal as recognitions of the two original titles, then they are to be laid out of consideration, and the parties are to litigate upon their original titles.

Carmichael *v.* Buster, 8 Martin R., 727.

Sanchez *v.* Gonzales, 11 Martin R., 212.

In such litigation, the defendants must succeed.

6. The doctrine of relation, as explained and applied in Landes *v.* Brant, refers each of the confirmations to the time of filing the notice, and in this case the notice in the name of Jeannette was filed first, and the confirmation in her name becomes the elder by relation.

7. The confirmation for Gratiot, if it in fact covers the land confirmed in the name of Jeannette, is void for want of jurisdiction in the commissioners, because the land was claimed and possessed by Jeannette, under the Spanish Government.

2 Stat. United States, 440, sec. 2.

Certainly it was void as against her and her representatives claiming the land according to law.

8. The confirmation, when properly located, does not cover the land in controversy.

Until surveyed, it attaches to no land.

West *v.* Cochran, 17 Howard, 416.

It was ordered to be surveyed according to the possession of his grantor.

If so surveyed, it would not touch the land in dispute.

It never has been surveyed with reference to that possession.

The survey given in evidence by the plaintiffs is in open disregard of the order of the commissioners, and is a mere nullity.

If a proper survey were made, it would cover the land of Flore, which the heirs of Gratiot have already obtained.

Mr. Justice CATRON delivered the opinion of the court.

The board of commissioners, sitting at St. Louis to examine claims to lands, according to the act of March 3d, 1807, confirmed to Charles Gratiot, assignee of Jeannette Flore, two arpens in front, by forty back, lying in the Prairie des Noyers, near to St. Louis. This common field lot had been designated by survey, and was well known. The confirmation was made November 19th, 1811.

On the next day, (November 20th, 1811,) the board also confirmed the same land to Jeannette, a free negro woman. Patent certificates issued to Gratiot and Jeannette, respectively, dated the same day, 20th November, 1811. Jeannette died about 1803, leaving as her heir a child named Susan Jeannette, who died about 1840.

Gratiot got a deed for the land from a different person, named Florence Flore, who conveyed in the name of *Jeannette* Flore. This deed was made in 1805, and filed by Gratiot with the recorder, and on which deed his confirmation by the board was founded. Jeannette had occupied the land for many years before her death. Florence Flore had never occupied it; had no claim to it, at any time; and conveyed in ignorance of what land her deed covered, in all probability. Gratiot died in 1817, leaving a widow and children. Neither he nor his heirs pretended to have any claim to the premises until recently, before this suit was brought by the heirs.

McDonald and Mary McRee, the defendants, claim under Jeannette, who got the second confirmation. This suit was instituted in the land court at St. Louis by petition, in 1854, under the new code of procedure of Missouri, which confounds all distinction between law and equity, and combines both remedies in the same action. The petition was answered, and a trial had on the merits, before the court and a jury.

The court, on motion of the defendants, instructed the jury as follows:

"If the jury find, from the evidence, that the tract of land confirmed to Jeannette by the board of commissioners includes the land in controversy, and is the same land which was surveyed for Jeannette by the authority of the Spanish Govern-

ment; that said Jeannette, and those acting for or under her, were the only persons who inhabited, cultivated, or possessed, the said tract, prior to the 20th of December, 1803; that the person who executed the deed in the name of Jeannette Flore, and filed by Charles Gratiot with the recorder of land titles as one of the evidences of his claim, is *not the person* for whom the survey of said tract of land was so made, but another and a different person, and that she cultivated and possessed, prior to the 20th of December, 1803, another and different tract in the same common field, surveyed for her, by authority of the Spanish Government, in the year 1788, embracing no part of the land in controversy, the jury ought to find for the defendants."

This instruction was excepted to, and a verdict was found for the defendants.

The cause was brought to the Supreme Court of Missouri by writ of error, where the judgment of the land court was affirmed; and, to revise this judgment, a writ of error was prosecuted out of this court, under the 25th section of the judiciary act.

As the *title* of Gratiot's heirs was directly drawn in question by the foregoing instruction, and as the decision below, giving the instruction, rejected the title, no doubt can exist in regard to the authority of this court to re-examine the decision of the State courts.

It was so determined, in the case of Lytle et al. against the State of Arkansas and others, decided here at this term.

The titles in controversy are equities only, no patent having issued to either claimant on the certificates granted by the board. (10 How., 374.) With these equities, the courts of Missouri were dealing on parol evidence, reaching behind the confirmation; and the question is, had they the power to do so?

The rule laid down by this court in the case of Garland *v.* Wynn (20 How., 8) is, "that where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the Government, regardless of the rights of others, the latter may come into the ordinary

courts of justice, and litigate the conflicting claims." The board of commissioners was a special tribunal, within the rule.

The principle was applied in the case of Lytle and others against the State of Arkansas and others, cited above.

In these cases, and in several others, the contest was between claimants under occupant laws, giving a preference of entry to actual settlers; and where an applicant obtained the preference, and was allowed to enter the land on producing false affidavits, by which he imposed on the register and receiver, to the prejudice of another's right.

In the instance before us, each of the parties claimed as occupants for ten consecutive years before the 20th of December, 1803. Gratiot and Jeannette both proved that the latter had occupied as required, but Gratiot imposed on the board by his false deed of assignment for the lot obtained by him from Florence Flore, whose name was untruly signed *Jeannette* Flore; and by reason of this imposition, he obtained confirmation and a patent certificate, which his heirs make the foundation of their suit.

Each party here has a good title, as against the United States, the act of 1807 declaring that a confirmation of the board shall be conclusive against the Government.

As both claims were filed in proper time, and the confirmations were had in due time, the equities are equal, and balance each other, so far as they depend on the confirmations alone; and the question is, can the ordinary courts of justice go behind the right established by the record confirming Gratiot's claim? To do this, proof must be heard impeaching his *prima facie* title, and which proof existed when the claim was filed with the recorder and acted on by the board. In other words, could the State courts go behind Gratiot's confirmation, and, on evidence, compare his equity with that of Jeannette, and adjudge who the true owner was?

In the case of Doe *v.* Eslava, (9 How., 421,) this court came to the conclusion, (although it is not distinctly expressed,) that in a contention between double concessions, which balanced each other, proof could be heard, and must of necessity

be heard, to determine the better right between the contending parties.

In the cases of Chouteau *v.* Eckhart and Le Bois *v.* Bramell, it was held that the grant made by the act of 1812, of the village commons of St. Charles and St. Louis, and of village lots, to possessors, gave a title in fee; and that a claimant, under a Spanish concession subsequently confirmed, could not go behind the act of Congress, and overthrow the legal title it conferred; and this, for the plain reason that neither Chouteau nor Le Bois had any title, when the act of 1812 was passed, that could be asserted in a court of justice; and as the political power from which alone they could take title had cut them off, to that power they must look for redress of the injury, if any existed.

To conflicts of title of the foregoing description, the principles asserted in the case of Landes *v.* Brant (10 How., 370) apply.

We have no doubt of the correctness of the decision of the Supreme Court of Missouri in this cause, and order its judgment to be affirmed.

ALEXANDER REY, WILLIAM R. MARSHALL, AND JOSEPH M. MARSHALL, PARTNERS UNDER THE NAME, STYLE, AND FIRM, OF MARSHALL & CO., PLAINTIFFS IN ERROR, *v.* JAMES W. SIMPSON.

Where an endorsement upon a promissory note was made, not by the payee, but by persons who did not appear to be otherwise connected with the note, and the note thus endorsed was handed to the payee before maturity, a motion to strike out of the declaration a recital of these facts, and also an allegation that this endorsement was thus made for the purpose of guarantying the note, was properly overruled.

In Minnesota, where the transaction took place, suitors are enjoined by law, in framing their declarations, to give a statement of the facts constituting their cause of action; which statement is required to be expressed in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

The facts above recited were a part of the facts constituting the cause of action, and therefore properly inserted in the declaration.

Parol proof of the circumstances under which the endorsement was made was admissible, and the weight of authority is in harmony with this principle.

The judgment against these endorsers was properly given, upon the ground that they were original parties to the note.

The declaration was sufficient, under the system of pleading which prevails in Minnesota.

THIS case was brought up by writ of error from the Supreme Court of the Territory of Minnesota.

It was an action brought by Simpson in the District Court of the second judicial district, Ramsey county, in the Territory of Minnesota, upon a promissory note given under the following circumstances:

$3,517.07½. ST. PAUL, *June* 14, 1855.

Six months after date, I promise to pay to the order of James W. Simpson, three thousand five hundred and seventeen dollars and 07½-100, value received.

(Signed) ALEX. REY.

Simpson was the creditor, and it was intended to give him the security of Marshall & Co.; but instead of drawing the note in favor of Marshall & Co., and obtaining their endorsement before handing it to Simpson, the note was drawn as above, and given to Simpson with the endorsement of Marshall & Co. upon it. The whole case turned upon the nature of this note. Under the usual form of proceeding, Simpson would have had to write his name over that of Marshall & Co., and thus present the spectacle of the first endorser suing the second endorser. According to the old system of pleading, there might have been a difficulty; but the system of pleading in Minnesota obviated all difficulty, by enjoining upon suitors, in framing their declarations, to give a statement of the facts constituting their cause of action. Simpson's counsel therefore filed a complaint against the maker and endorsers of the note, joining them in one action, and complaining that they would not pay the note. In this complaint, Marshall & Co. were called endorsers, and the question immediately arose, whether they were endorsers or guarantors. Accordingly, the counsel for the defendants moved to strike out of the complaint all those parts which spoke of Marshall & Co. as en-

dorsers, for the purpose of guarantying the note, and of becoming sureties and security to the plaintiff. But the court overruled the motion. The counsel for the defendants then demurred to the complaint, upon the following grounds, which are inserted because the reporter does not intend to report the arguments of counsel in this court upon this mode of making a promissory note, and this mode of declaring upon it.

The grounds of demurrer were the following, viz:

First. The said complaint does not state facts sufficient to constitute a cause of action against the said defendants, William R. Marshall and Joseph M. Marshall, or either of them, in that—

1. The facts stated in the said complaint show that the contract of the defendants, Marshall, upon the promissory note in said complaint mentioned, was that only of endorsement; and the allegations in the said complaint of the purpose for which the said defendants endorsed the said note, and of the reliance of the plaintiff upon such endorsement as security to him, are incompetent either to vary the said contract, or to change in any respect the legal obligations of the defendants, Marshall.

2. It appears, upon the face of the said complaint, that the plaintiff is the payee of the said note, that the same is payable to the order of the plaintiff, and that the plaintiff has never endorsed nor negotiated the said note.

3. The facts stated in the said complaint show, that the defendants, Marshall, could only have been made liable upon the said promissory note in the character of second endorsers, and in that character only upon the endorsement and the transfer of the note by the plaintiff. The note having matured without endorsement or transfer by the plaintiff, no liability can in any event attach to the defendants, Marshall, upon the same.

Second. There is a defect of parties defendant in said action, in that—

1. The defendants, Marshall, are not proper parties to an action by the plaintiff upon the said note, because, as appears upon the face of the complaint, they are but the endorsers of

a promissory note payable to the order of the plaintiff, and as such endorsers cannot be held by the payee.

2. The facts stated in the said complaint show that the maker of the said promissory note alone is liable to the plaintiff for the payment thereof.

This demurrer was overruled, and, after some other proceedings, the court gave judgment for the plaintiff, when the defendants carried the case to the Supreme Court of the Territory. The points made in that court upon both sides are inserted, because they are substantially those which were made in this court.

Points of plaintiff in error, with authorities relied on:

I. The contract of the defendants (plaintiffs in error) was that of endorsers, and a contract of a different character cannot arise and will not be implied in conflict with the written agreement. The defendants being endorsers, they are endorsers of the plaintiff, and not liable to him.

17 Johns., 326; 17 Wen., 214.
2 Hill, 80; 3 Ibid, 233; 7 Ibid, 416.
19 Wen., 202; 6 Barber, 282.
1 Comstock, 321; 1 Spence N. Y., 256.
1 Green Ia., 331; 13 Lin. and Man., 617.
1 Jones's Pen., 46; Story on Promissory Notes, sec. 134, note.
Story on Bills, 215; 11 Johns., 201.
1 Phillips's Ev., 547; 6 Hill, 219.
1 Johns. Ch. B., 429; 4 Selden, 207.
2 Comstock, 553; 5 Denio, 484.
Rev. Stat. p. 268, secs. 281, 282.

II. The complaint charges the defendants as guarantors, and shows that the contract was cotemporaneous with the inception of the note, and no construction of the authorities will charge them upon such fact otherwise than as original maker.

III. In no view can the defendants upon this complaint be regarded, except as endorsers, because, conceding that the written contract of the parties may be varied by a cotemporaneous parol agreement, facts are not stated in the pleadings from which the court can infer the nature of the contract.

IV. The complaint is double. If any contract besides that of endorsers is stated, it contains in the same count a contract of endorsement and of guaranty. There are distinct causes of action, and should be separately stated.

Vide Rev. Stat., p. 340, sec. 7.

2 Code R., p. 145; 4 H. and R., 226.

5 Ibid, 172; 7 Barbour, 80.

The following points and authorities were relied upon for the defendant in error:

First. The plaintiffs in error, William R. Marshall and Joseph M. Marshall, as parties to the promissory note described in the complaint, became and assumed the legal liability of guarantors and sureties for the payment of the same.

See 14 Johns. Rep., p. 349, Campbell *v.* Butler.

1 Hill's Rep., p. 91, Labran & Ives *v.* Worane.

13 Johns. Rep., p. 175, Nelson *v.* Duboiss.

9 Mass. Rep., p. 313, White *v.* Howland.

11 Mass. Rep., p. 436, Mories *v.* Bird.

2 Comstock Rep., p. 225, Brown *v.* Curtis.

7 Mass. Rep., p. 232, Ulen *v.* Kitridge.

Story on Promissory Notes, secs. 479 and 480, and notes on page 641, 3d ed.

Same, p. 630, secs. 475 and 476, and notes.

Same, secs. 477 and 479, p. 638.

Second. The endorsement of the promissory note by Marshall & Co., at the time of the making and before delivery thereof, was an original undertaking on their part to pay the same, or at least to guaranty the payment thereof.

In support of this point, see the authorities above cited.

Third. The endorsement by Marshall & Co. having been made at the date of the note, and before delivery, for the express purpose of giving credit to the maker, and enabling him to negotiate the same to the payee thereof, renders them primarily liable as original parties to the note.

6 Conn. Rep., p. 315; 7 Conn. Rep., p. 310.

11 Conn. Rep., p. 440; 9 Vermont Rep., p. 345.

12 Vermont Rep., p. 219; 16 Vermont Rep., p. 554.

17 Vermont Rep., p. 285; 1 New Hamp. Rep., p. 385.

2 McCord's Rep., p. 388; 9 Ohio Rep. p. 39.

13 Ohio Rep., p. 328.

Fourth. The time and circumstances when and under which the note was made, endorsed, and delivered, may be properly alleged and proved, to enable the court to apply the law governing the same.

See the authorities before cited, and 4 Watt's Rep., p. 448; 9 Ohio Rep., p. 39; 2 McLean Rep., p. 553.

Fifth. The decision and judgment below is well sustained by the law of the case.

See authorities before cited.

The Supreme Court of the Territory affirmed the judgment of the court below, and the defendants brought the case to this court.

It was argued by *Mr. Stevens*, upon a brief submitted by himself and *Mr. Brisbin*, for the plaintiffs in error, and by *Mr. Bradley* for the defendant.

The arguments turned upon the questions, whether Marshall & Co. were endorsers or guarantors or original parties to the note, and also whether the mode of pleading had been correct.

Mr. Justice CLIFFORD delivered the opinion of the court.

This is a writ of error to the Supreme Court of the Territory of Minnesota.

According to the transcript, the suit was commenced by James W. Simpson, the present defendant, on the twenty-first day of December, 1855, in the District Court of the Territory, for the second judicial district, against the plaintiffs in error, who were the original defendants. It was an action of assumpsit, and was brought upon a certain promissory note for the sum of three thousand five hundred and seventeen dollars and seven and a half cents, bearing date at St. Paul, in that Territory, on the fourteenth day of June, 1855, and was made payable to the order of the plaintiff six months after date, for value received. At the period of the date of the note, as well as at the time the suit was instituted, two of the defendants,

William R. Marshall and Joseph M. Marshall, were partners, doing business under the style and firm of Marshall & Company.

As appears by the declaration, the note was made and signed by the defendant first named in the original suit, at the time and place it bears date.

And the plaintiff further alleges in the declaration, that, after making and signing the note, the same defendant then and there delivered the note to the other two defendants; and that they then and there, by their partnership name, endorsed the same, by writing the name of their firm on the back of the note, and then and there redelivered the same to the first-named defendant, who afterwards, and before the maturity of the note, delivered it so endorsed to the plaintiff. He also alleges that the defendants, William R. Marshall and Joseph M. Marshall, so endorsed the note for the purpose of guarantying the payment of the same, and of becoming sureties and security to him, as the payee thereof, for the amount therein specified; and that he, relying upon their endorsement, took the note, and paid the full consideration thereof to the first-named defendant.

Other matters, such as due presentment, non-payment, and protest, are also alleged in the declaration, which it is unnecessary to notice at the present time, as the questions to be determined arise out of the allegations previously mentioned and described.

Personal service was made on each of the defendants, but the one first named did not appear; and after certain interlocutory proceedings, conforming to the laws of the Territory and the practice of the court, he was defaulted.

On the thirty-first day of December, 1855, the counsel of the other two defendants served notice of a motion to strike out all that part of the declaration which sets forth the purpose for which it is alleged they endorsed the note, and so much of the declaration, also, as alleges that the plaintiff took the note as payee, relying upon the endorsement, and paid to the first-named defendant the full consideration thereof, as before stated. That motion was subsequently heard before

the court; and on the ninth day of February, 1856, was denied and wholly overruled. After the motion was overruled, the defendants, whose firm name is on the back of the note, demurred specially to the declaration.

None of the causes of demurrer need be stated, as they will be sufficiently brought to view in considering the several propositions assumed by the counsel on the one side and the other, in the argument at the bar. Suffice it to say, that the demurrer was overruled; and on the tenth day of July, 1856, judgment was entered for the plaintiff against all of the defendants for the amount of the note, with interest and costs.

On the eighteenth day of September, 1856, the defendants sued out a writ of error, and removed the cause into the Supreme Court of the Territory, where the judgment of the District Court was in all things affirmed; and on the fourth day of February, 1857, a final judgment was entered for the plaintiff, that he recover the amount of the judgment rendered in the District Court, with interest, costs, and ten per cent. damages, amounting in the whole to the sum of four thousand three hundred seventy-one dollars and ninety-seven cents. Whereupon the defendants sued out a writ of error to this court, which was properly docketed at the December term, 1857.

All civil suits in the courts of Minnesota are commenced by complaint; and suitors are enjoined by law, in framing their declarations, to give a statement of the facts constituting the cause of action; which statement is required to be expressed in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

Pursuant to that requirement, and the practice of the courts of the Territory at the time the suit was commenced, the plaintiff in this case set forth the facts already recited as contained in the complaint or declaration.

Facts thus stated in the declaration, pursuant to the directions of the law of the Territory, and which were material to the understanding of the rights of the parties to the controversy, could not properly be suppressed by the court. Irre-

spective, therefore, of the question whether or not the motion of the defendants to strike out that part of the declaration was waived, because not pressed in the Supreme Court of the Territory, no doubt is entertained by this court that the motion was properly overruled by the District Court upon the merits.

Proof of the attending circumstances under which the defendants, William R. Marshall and Joseph M. Marshall, had placed their firm name upon the back of the note, would clearly have been admissible in a trial upon the general issue; and if so, no reason is perceived why it was not proper for the plaintiff, under the peculiar system of pleading which prevailed in the courts of the Territory at the time the suit was commenced, to state those circumstances in the declaration. Beyond question, they were a part of the facts constituting the cause of action; and if so, they were expressly required to be stated by the law of the Territory prescribing the rules of pleading in civil cases. And having been alleged in pursuance to such a requirement, and being material to a proper understanding of the rights of the parties to the suit, it must be considered, by analogy to the rules of pleading at common law, that they are admitted by the demurrer.

By the admitted facts, then, it appears the defendants, William R. Marshall and Joseph M. Marshall, placed their firm name on the back of the note at its inception, and before it had been passed or offered to the plaintiff. They placed their firm name there at the request of the other defendant, knowing that the note had not been endorsed by the payee, and with a view to give credit to the note, for the benefit of the immediate maker, at whose request they became a party to the same.

Whatever diversities of interpretation may be found in the authorities, where either a blank endorsement or a full endorsement is made by a third party on the back of a note, payable to the payee or order, or to the payee or bearer, as to whether he is to be deemed an absolute promissor or maker, or guarantor or endorser, there is one principle upon the subject almost universally admitted by them all, and that is, that the interpretation of the contract ought in every case to be

such as will carry into effect the intention of the parties; and in most instances it is conceded that the intention of the parties may be made out by parol proof of the facts and circumstances which took place at the time of the transaction. Story on Prom. Notes, secs. 58, 59, and 479.

When a promissory note, made payable to a particular person or order, as in this case, is first endorsed by a third person, such third person is held to be an original promissor, guarantor, or endorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place. If he put his name on the back of the note at the time it was made, as surety for the maker, and for his accommodation, to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note. On the other hand, if his endorsement was subsequent to the making of the note, and he put his name there at the request of the maker, pursuant to a contract with the payee for further indulgence or forbearance, he can only be held as a guarantor. But if the note was intended for discount, and he put his name on the back of it with the understanding of all the parties that his endorsement would be inoperative until it was endorsed by the payee, he would then be liable only as a second endorser in the commercial sense, and as such would clearly be entitled to the privileges which belong to such endorsers.

Decided cases are referred to by the counsel of the defendants, which seemingly deny that such parol proof of the attending circumstances of the transaction is admissible in evidence; but the weight of authority is greatly the other way, as is abundantly shown by the cases cited on the other side. Whenever a written contract is presented for construction, and its terms are ambiguous or indefinite, it is always allowable to weigh its language in connection with the surrounding circumstances and the subject matter, and we see no reason, as question of principle, why any different rule should be adopted in a case like the present. Such evidence has always been received in the courts of Massachusetts, as appears from

numerous decisions, and the same rule prevails in most of the other States at the present time. 1 Am. Lea. Cas., (4th ed.,) 322. Repeated decisions to the same effect have been made in the courts of New York, and until within a recent period it appears to have been the settled doctrine in the courts of that State.

Recent decisions, it must be admitted, wear a different aspect; but they have not had the effect to produce a corresponding change in other States, and, in our view, deny the admissibility of parol evidence in cases where it clearly ought to be received. Hawkes *v.* Phillips et al., 7 Grey, 284.

Applying these principles to the present case, it is obvious that the contract of the two defendants whose firm name is upon the back of the note was an original undertaking, running clear of all questions arising out of the statute of frauds. They placed their names there at the inception of the note, not as a collateral undertaking, but as joint promissors with the maker, and are as much affected by the consideration paid by the plaintiff, and as clearly liable in the character of original promissors, as they would have been if they had signed their names under the name of the other defendant upon the inside of the instrument. Numerous decisions in the State courts might be cited in support of the proposition as stated, but we think it unnecessary, as they will be found collated in the elementary works to which reference has already been made, and in many others which treat of this subject.

Another objection to the right of recovery in this case deserves a brief notice. It is insisted by the counsel of the defendants that the complaint or declaration is not sufficient to maintain this suit against these defendants as original promissors. That objection must be considered in connection with the system of pleading which prevailed in the courts of the Territory at the time the suit was commenced. By that system, suitors were only required to state the facts which constituted the cause of action. In this case the plaintiff followed that mode of pleading, and we think he has set forth enough to constitute a substantial compliance with the law of the Territory and the practice of the court where the suit was in-

stituted. He alleges, among other things, that the defendants whose firm name is on the back of the note placed it there for the purpose of becoming sureties and security to him as payee for the amount therein specified. That allegation, to use the language of the statute of Minnesota, is expressed in ordinary and concise language, and in such a manner as to be easily understood, and that is all which is required by the law of the Territory prescribing the rules of pleading in civil cases. Under the system of pleading which prevailed in the courts of the Territory, the objection cannot be sustained.

The judgment of the Supreme Court of the Territory is therefore affirmed with costs.

JOHN P. JETER, PLAINTIFF IN ERROR, *v.* JAMES HEWITT, MELVILLE HERON, AND MARY CONRAD.

Where a mortgage of land and slaves, in Louisiana, was made to the Bank of Louisiana, the property sold in the manner pointed out by the charter of the bank, the purchasers applied to the District Court, (State court,) under a statute of Louisiana, for a monition, citing all persons who objected to the sale to make their objection known; that court decided that the sale was null and void, but the Supreme Court reversed the judgment as to the widow, and those claiming under her; this judgment cuts off all the objections that apply to the manner of conducting the sale, and to the form of the judgment in the court below.

The Supreme Court of the State decided that the courts below had jurisdiction of the case, and that decision is binding upon this court. The whole matter now in controversy has therefore been legally adjudicated by the courts of the State.

THIS case was brought up by writ of error from the Circuit Court of the United States for the eastern district of Louisiana.

It was an action brought by John P. Jeter, a citizen of Louisiana, resident in New Orleans, against James Hewitt and David Heron, citizens of the State of Kentucky, temporarily within the jurisdiction of the Circuit Court for the district of Louisiana.

The nature and history of the case are stated in the opinion of the court. It was submitted to the Circuit Court upon the pleadings, depositions, oral testimony, and arguments of coun-

sel, which found the facts substantially as they are narrated in the opinion of this court, and then dismissed the petition of the plaintiff. A writ of error was sued out, which brought the case up to this court.

It was argued by *Mr. Carlisle*, upon a brief filed by himself and *Mr. Badger*, for the plaintiff in error, and by *Mr. Benjamin* for the defendants.

As the judgment of this court turned upon the point that it was *res judicata*, only the arguments upon that subject will be reported.

The counsel for the plaintiff in error made the following points, amongst others:

VI. The validity of this title set up by the defendants is not *res judicata*, as maintained by counsel in the court below. The monition suit on which this pretension is founded could have no such effect, if the proceedings in the fifth District Court were a nullity. This seems clear upon principle.

5 Monition Act, B. and C.'s Dig., 586.

City Bank *v.* Walden, 1 Ann., 47.

16 Louisiana R., 596.

Besides, the court where the monition suit was prosecuted had no jurisdiction over the original suit, and could have none over that which was merely incidental.

Again: The judgment in the monition suit was not a judgment upon the merits, even against Mrs. Ford, and was not at all against Jeter.

C. C., 2265.

Finally: The decree of homologation, in its terms, seems really to come to nothing, since it only confirms and homologates the sale, "in so far as the same has not been opposed," while the record shows that it was totally opposed.

VII. Jeter is not estopped to claim against the sheriff's sale, or to show the nullity of the proceedings upon which it is based.

In this respect, this case is in striking contrast with Erwin

v. Lowry, in 7 Howard. There, Hector McNeill, under whom Lowry claimed, had actively participated in the proceedings at the sale, had joined in the selection of appraisers, had requested the marshal to offer the land and negroes together, which was done, and all this in the presence of Erwin; and, upon the faith of this conduct, Erwin purchased. In the present case, on the contrary, it is distinctly proven, by two witnesses, that Jeter, "in a loud and audible tone," announced "to the sheriff and the by-standers" that he was the owner of the property, and forbade the sale of it; and this announcement was made before the property was adjudicated to Hewitt & Heron."

"He made his objections known publicly to the crowd." The sheriff answered, that "he would proceed with the sale."

The only facts relied on by the defendants, as creating an estoppel, are, first, that Jeter was present at the sale, and, when the property was first offered, bid for it $70,000, and it was knocked down to him; and secondly, that in 1852 he joined with Mrs. Ford in making a deed for forty arpens of the land, to Hewitt & Heron, for $2,000.

As to the first, his bid was for the protection of his own interest, and to avoid litigation. He had already paid Mrs. Ford $5,000, and he had agreed to pay, not only the debts charged on this property, but all the debts. Such a fact, even if the other party had acted upon it, could create no estoppel.

Hearne *v.* Rogers, 17 Eng. C. L. Rep., 451, 452.

But Hewitt & Heron did not act upon it. The sheriff refused Jeter's draft on Hill, McLean, & Co., of New Orleans, with whom he had arranged for the money, and refused him time to go to New Orleans to produce the money, and "demanded that he should pay in cash the amount of his bid within half an hour, or he would set up the property and sell it again, which he did."

Then it was that Jeter gave notice of his title, and forbade the sale; and Hewitt & Heron purchased under this notice.

As to the deed made in 1852, so far from importing a recognition of the title of Hewitt & Heron, it would rather signify

an admission by them that, at least as to this fragment of forty acres, it required confirmation by a deed from Jeter.

In no view of these facts can they operate an estoppel. The general current of authorities, English and American, establishes the principle that a declaration *in pais* shall not work an estoppel, unless it appears affirmatively that it was intended that the party for or to whom it is made should act on the faith of it, and that he actually did so act, and will be prejudiced by the contrary assertion. If it be necessary to cite authorities for this, they will be found collected in Hare & Wallace's note to Howard & Hudson, (2 Ell. and Bl., 13, Amer. ed.,) and in the principal case. Here there was express warning given.

Upon the question that the merits of the case were not open for review in this court, *Mr. Benjamin* made the following points:

I. This action, plainly, is based on the assumption that the proceedings in the State courts of Louisiana (under which the title of Ford's succession to the property was divested, and the property was sold to defendants) are an absolute nullity.

It is an attempt, indirectly, to bring before the Federal courts jurisdiction of a question which, under the decisions of this court, cannot be examined by them.

Had the courts of Louisiana jurisdiction of the property appertaining to Ford's succession, and have they exercised that jurisdiction by disposing of that property? Manifestly, yes.

How, then, can that disposition of the property be supervised or revised by the Federal courts?

This court has always declined to permit the proceedings of even the inferior State courts to be attached collaterally before it.

Tarver *v.* Tarver, 9 Peters, 174.

Gaines *v.* Chew et al., 2 How., 619, 644.

Fonvergne et al. *v.* City of New Orleans, 18 How., 471.

Hagan *v.* Preston, decided at present term.

In this case, the plaintiff goes to the extravagant length of

calling on the court not to annul the proceedings of an inferior State court as irregular or illegal, but to treat the final decision of the Supreme Court of Louisiana as an absolute nullity.

The form chosen for the action (a simple petitory action or ejectment) is a transparent device used by plaintiff to avoid the necessity of bringing an action to set aside the judgment of the Supreme Court of Louisiana, he being conscious that such action would be utterly untenable.

II. Jeter was a party to the suit determined by the Supreme Court of Louisiana, and it forms *res judicata.*

It is true, he was not a party by name; but the opinion of the Supreme Court is explicit, that Mrs. Ford's action as executrix was for the use of Jeter. Its language is: "We think it inequitable to permit this sale to be questioned by the executrix, whom we consider as merely attempting to aid Jeter, her vendee and agent, in a speculation, at the expense of these bona fide purchasers, under the guise of representing a small minority of the creditors, whom she personally and Jeter are bound to pay."

But, aside from this decision, the record permits no doubt that the suit decided in Louisiana was Jeter's suit. In the sale from Mrs. Ford to him, he exacted a promise that she would furnish him "my letter of substitution to appear for me and in my stead, to appear and act in any court, * * * touching matters or interests in any manner connected with the active or passive properties, goods, or effects, of the aforesaid succession."

She did give him just such a power; and, having sold to him her entire interest in the estate, and obtained his obligation to pay the debts, she withdrew from the whole business, leaving to Jeter, who alone had an interest, permission to use her name, and it was Jeter who brought the suit.

Having once litigated his rights through all the courts of Louisiana, the plaintiff cannot renew the contest in the Federal courts. The *exceptio rei adjudicatæ* is a complete bar to his suit.

III. The monition, proceedings, and judgment on them, are in the nature of proceedings *in rem*, and bind all the world,

even those ignorant of their pendency—*a fortiori*, do they bind one who, like Jeter, was not only conusant, but was active in opposition.

The monition law of Louisiana (Acts 1834, p. 125, Revised Statutes, 1852, p. 425) is a wise and beneficial statute, and should be liberally construed. It was passed for the protection of innocent purchasers at sheriff's sales, and by the fourth section the court that issued the process had jurisdiction.

By the sixth section, the judgment is conclusive evidence that the proceedings of the court on the monition were regular; and by the seventh section, the judgment of the court confirming the sale operated as *res judicata*, and a complete bar against *all persons*, whether of age or minors, whether present or absent; and the judgment is to be considered as "full proof, and conclusive that the sale was duly made in virtue of a judgment or order legally and regularly pronounced on the interests of parties duly represented."

There is nothing in the 8th section which can release the plaintiff from the effect of this estoppel, because "notices of the sale and appraisement were served by the sheriff, by leaving them on the plantation with the overseer, and plaintiff had notice of the sale, and was present at it, and bid for the property."

Besides, plaintiff was in the place and stead of Ford, and had his rights, and no more. But Ford had confessed judgment in the original mortgage, and had thereby waived citation to make defence.

When a mortgage is granted with confession of judgment, executory process issues at once without citation, (Code Practice, 734,) and is in the nature of the *fi. fa.* that is issued on such judgments as are confessed in court.

IV. Jeter's presence at the sale, his bidding, his failure to notify other bidders of any opposition to the sale, form a complete *estoppel en pais*, as well under the principles of equity jurisprudence as by the settled rules of the law of Louisiana.

Harris *v.* Denison, 8 L. R., 543.

Dozer *v.* Squires and al., 13 L. R., 130.

Walker *v.* Allen and al., 19 L. R., 308.

McMasters *v.* Commissioners, &c., 1 Annual, 11.
Muir, Syndic, *v.* Henry and al., 2 Annual, 593.
Moore *v.* Lambeth, 5 Annual, 67.
Bank of Louisiana *v.* Ford, 9 Annual, 299.

V. Both Mrs. Ford and Jeter were parties to a deed, by which, in consideration of $2,000, they ratified the title of the purchasers.

This deed was passed on the 11th April, 1851. It had reference to the property now in dispute. Compare description in deed with testimony of Robert Maurin, the plan H, the testimony of P. O. Ayraud, and T. Ayraud, Chapman's testimony, and the description in the mortgage to Bank of Louisiana, the identity of the tract will be apparent. Besides which, the recitals of the deed admit that the land which surrounds that described by its terms, on each side and in the rear, belongs to defendants.

Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiff commenced this suit to recover a plantation and slaves, with the horses, mules, implements, and other things enumerated in the petition, destined to the use and convenience of the plantation, and for an account of rents and issues for a term of years. He deduces his title from Christopher Ford, who was in possession of the plantation at his death, in 1849, through a conveyance from Louisa W. Ford, the widow, executrix, and instituted heir of her deceased husband, dated in November, 1850.

The defendants show, that in November, 1845, two banking corporations of Louisiana (Bank of Louisiana and New Orleans Canal and Banking Company) sold to Christopher Ford this plantation and twenty-eight slaves, for the price of $40,000, a portion of which was paid in cash, and for the remainder a credit was given, and that Ford mortgaged the property conveyed to him, and sixty-eight other slaves, which he agreed to place on the plantation. On the same day, he obtained from the Bank of Louisiana a loan of money, which was secured by another mortgage on the same property. At

the time of the death of Ford, he was in arrears for the debt and interest that had accrued.

In the mortgage to the Bank of Louisiana, Ford agrees not to alienate, deteriorate, or encumber, the property mortgaged, and confesses judgment for the sum of money to be paid. He renounces the benefit of the laws that require property seized on execution to be sold on credit or after appraisement, and agrees, that if the debt shall not be paid according to the tenor of the mortgage, then the banking company may obtain an order of seizure and sale, and sell the mortgaged premises and slaves by public auction, for cash, after an advertisement of thirty days. He waives his privilege to be sued in any other district than the first judicial district of the State, and agrees that process may issue from the District Court for the first district, or any other court in New Orleans having jurisdiction.

The charter of the bank provides, that upon all mortgages executed under the act, the bank shall have the right to seize the property mortgaged, in whatever hands it may be, in the same manner and with the same facilities that it could be seized in the hands of the mortgagor, notwithstanding any sale or change of the title or possession thereof, by descent or otherwise.

On the 16th December, 1850, after the conveyance of Mrs. Ford to the plaintiff, the Bank of Louisiana instituted a suit upon the second mortgage above mentioned; a writ of seizure and sale issued, and the property was advertised for sale the 1st February, 1851. Jeter was present at the sale that took place on that day, bid for the property the sum of seventy thousand dollars, and it was adjudicated to him at that price. He offered a draft for the amount of the execution, on merchants residing in New Orleans, and asked for time to go for the money; and these being refused, the property was again offered for sale, and purchased by Heron & Hewitt for the price of sixty-six thousand dollars; and thereupon the sheriff executed a deed to the purchasers, conformably to the adjudication.

This sum being insufficient to discharge the encumbrances on the property, proceedings were taken for the seizure and

sale of other slaves, which were sold in September, 1851, and adjudicated to the defendants.

The defendants resist the claim of the plaintiff under these titles. The plantiff objects to them—

1. That Ford, the mortgagor, was dead at the commencement of these proceedings, and that the notice issued to him was nugatory; that his heir and executrix was not notified at all, and did not reside in the parish of Ascension, nor have any title to the plantation at which the notices of the seizure were left; and that the plaintiff is not concluded by his presence at the sale and bid for the property, having forbade the sale before the offer at which the defendants became the purchasers was made.

2. That the sale was irregular and illegal, in respect of the notice of the seizure, the advertisements, appraisement, and refusal to allow the plaintiff time to complete his purchase.

3. That the fifth District Court was not authorized to entertain a suit for a thing in the parish of Ascension; and that, if consent could give jurisdiction, the consent given by Ford in his mortgage was personal, and binding only in respect to his own privilege, and did not affect his heir or her assignee.

The purchasers, Heron & Hewitt, in April, 1852, applied to the District Court of New Orleans, under a statute of Louisiana, for a MONITION, citing all persons who can set up any right to the property adjudicated, in consequence of any informality in the order, decree, or judgment of the court, under which the sale was made, or any irregularity or illegality in the appraisements and advertisements, in time or manner of sale, or for any *other defect whatsoever*, to show cause why the sale so made should not be confirmed and homologated, and, after due proceedings in the premises, that the said sales be confirmed, homologated, and made the final judgment of the court.

The executrix (Louisa W. Ford) appeared to this monition, and made opposition to the homologation of the sale, and disclosed at large the objections above specified, and prayed that the sale be declared null and void, and that the property might be restored to her possession.

To this opposition Heron & Hewitt replied, that they were bona fide purchasers at a public sale by the sheriff of Ascension, under a writ from the court, without any knowledge of neglect, or illegality, or want of jurisdiction; that the opponent had sold her interest in the property, and was estopped to oppose the sale by her acts. They pleaded that the mortgage contained a confession of judgment, and no notice was necessary to any one to obtain a judgment; and assert there is no just cause to deny the homologation of the sales.

The District Court, at the November term, 1852, entered an order describing the property embraced in the sheriff's deed, and reciting the facts relative to the grant of the monition, and the motion for the homologation of the sale, and conclude:

"The court being satisfied, from inspection of the record and evidence adduced, that all the formalities of the law have been complied with; that the advertisements required have been inserted and published for the space of time and in the manner required by law; that the property has been correctly described, and the price at which it was purchased truly stated; and there being but one opposition filed thereto, to wit: by Mrs. Christopher Ford, it is adjudged and decreed that said sheriff's sale be confirmed and homologated according to law, in so far as the same has not been opposed."

The cause was continued in the District Court, upon the opposition proceedings of Mrs. Ford.

In June, 1853, the District Court rendered the judgment upon this opposition, that the sale was null and void, for the reasons pleaded, and condemned the petitioners (Hewitt & Heron) to costs. An appeal was taken to the Supreme Court of Louisiana. That court rendered its judgment in 1854.

The court say: The appellants are bona fide purchasers at a judicial sale of the plantation and slaves, at the instance of a mortgage creditor, at a fair price, which has been paid, and possession taken, and improvements made. That, as executrix, Mrs. Ford had done nothing, except to obtain probate of the will, and as heir she has sold her interest to Jeter in the estate, he covenanting to pay the debts, and that she gave him a power

to sell and administer the estate. That Jeter had failed to comply with his bid at the sheriff's sale, and that then the appellants had become the purchasers, settled with mortgage creditors, and took possession. "Under these circumstances," the court conclude, "we think it inequitable to permit this sale to be questioned by the executrix, whom we consider as merely attempting to aid Jeter, her vendee and agent, in a speculation, at the expense of these bona fide purchasers, under the guise of representing a small minority of the creditors, whom she personally and Jeter are bound to pay. It is obvious, under the facts above stated, that neither of them, Jeter and Mrs. Ford, would be permitted personally to question the sale, on account of the alleged informalities." And thereupon the decree of the District Court was reversed, and the opposition dismissed, reserving to the creditors their right, if any, to sue for a rescission of the sale. Bank of Louisiana *v.* Ford, 9 Ann., 299.

The effect of the judgment confirming and homologating the sale is declared in the statute that authorizes the monition to issue, in favor of purchasers of property "at sheriffs' sales," at those "made by the syndics of insolvents' estates," at those "made by the authority of justice," or of courts, and to enable them "to protect themselves from eviction from the property so purchased," and "from any responsibility to the possessors of the same." It confers upon the order made by the court upon the monition, "the authority of *res judicata*," so as to operate "as a complete bar against all persons, whether of age or minors, whether present or absent, who may thereafter claim the property so sold, in consequence of all illegality or informality in the proceedings, whether before or after judgment;" and the judgment of homologation is to be received and considered "as full and conclusive proof that the sale was duly made according to law, in virtue of a judgment or order legally and regularly pronounced on the interest of the parties duly represented," saving and excepting, "that it shall not render a sale valid made in virtue of a judgment, when the party cast was not duly cited to make defence."

The judgment of the District Court homologating the sale

concluded all parties except Mrs. Ford, who had filed opposition to the order. Subsequently the Supreme Court overruled her opposition, assigning as the reason that the sale was fair, the purchasers bona fide, and the opponent had no interest in the subject of contest. The plaintiff, whether we consider him as acting independently or in connection with Mrs. Ford, and under the "guise of her name" and character, is affected by these orders.

By the very terms of the statute, all the objections that apply to the manner of conducting the sale and to the form of the judgment are cut off by the judgment of homologation.

The only question that the judgment leaves open is, whether the court that rendered the original judgment had jurisdiction of the person. But this question was presented to the District Court and the Supreme Court upon the opposition of Mrs. Ford, in the same manner in which it is presented to this court. The facts of the death of Ford, the probate of his will in the parish of Ascension before the order of seizure, the seizure within three days from the date of the order, the notice directed to Ford, and left at the house of the overseer, in the absence of Mrs. Ford, and after her sale to Jeter, the presence of Jeter at the sale, the adjudication to him of the property upon his bid, and the resale upon his neglect to comply with the terms of the sale, and the purchase by Heron & Hewitt, with the sheriff's deeds to him, were presented to those courts upon the evidence that has been submitted to this court.

The decision of the Supreme Court of Louisiana was, that as executrix, Mrs. Ford did not really and truly represent the interest of the creditors of her husband in her opposition, and that she used that title to protect her own interest and that of Jeter, her agent and vendee—but that they would not be permitted "personally to question the sale, on the score of the alleged irregularities."

The authority of *res judicata* as a medium of proof is acknowledged in the civil code of Louisiana; and its precise effect in the particular case under consideration is ascertained in the statute that allows the proceeding by monition. Under the

system of that State, the maintenance of public order, the repose of society, and the quiet of families, require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. So deeply is this principle implanted in her jurisprudence, that commentators upon it have said, the *res judicata* renders white that which is black, and straight that which is crooked. *Facit excurvo rectum, ex albo nigrum.* No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy.

The jurisdiction of the courts of the United States, in cases like the present, is derived exclusively from the fact that the parties are citizens of different States. The rights of these parties originate in the law of Louisiana, and must be ascertained by a reference to the principles adopted and administered by her constituted authorities. We are not invested with power to review the sentences of her courts, except in a few cases arising under the Constitution and laws of the United States; nor is it our province to augment or diminish their value, or to place any different estimate upon them than they have in the municipal code of the State. They are entitled to the same force and effect here as they have in Louisiana.

The statement of the case of these parties shows conclusively that the whole subject of this controversy has been legally submitted to the tribunals of Louisiana, and that the adjudication was in favor of the defendants.

This was the decision of the Circuit Court of the United States in Louisiana, from whose judgment this writ of error has been taken. It remains for us only to affirm that judgment.

Judgment affirmed.

WILLIAM H. ASPINWALL, JOSEPH W. ALSOP, HENRY CHAUNCEY, CHARLES GOULD, AND SAMUEL L. M. BARBOUR, PLAINTIFFS, *v.* THE BOARD OF COMMISSIONERS OF THE COUNTY OF DAVIESS.

The charter of the Ohio and Mississippi Railroad Company, passed by the Legislature of Indiana in 1848, and a supplement in 1849, authorized the county

commissioners of a county through which the road passed to subscribe for stock and issue bonds, provided a majority of the qualified voters of the county voted, on the 1st of March, 1849, that this should be done.

The election was held on the appointed day, and a majority of the voters voted that the subscription should be made.

But before the subscription was made, the State adopted a new Constitution, which went into effect on the 1st November, 1851. One of the articles prohibited such subscriptions, unless paid for in cash, and prohibited also a county from loaning its credit or borrowing money to pay such subscriptions.

In 1852, the county commissioners of Daviess county subscribed for stock in the railroad company, and issued their bonds for the amount.

The provisions of the railroad charter, authorizing the commissioners to subscribe, conferred a power upon a public corporation or civil institution of Government, which could be modified, changed, enlarged, or restrained, by the legislative authority, the charter not importing a contract, within the meaning of the clause of the Constitution prohibiting a State from passing a law impairing the obligation of contracts.

The mere vote to subscribe did not, of itself, form such a contract with the railroad company as would be protected by the 10th section of the 1st article of the Constitution of the United States. Until the subscription was actually made, the contract was unexecuted.

The bonds were issued in violation of the Constitution of Indiana, and are therefore void.

THIS case came up from the Circuit Court of the United States for the district of Indiana, on a certificate of division in opinion between the judges thereof.

The nature of the case and the certificate of division in opinion are stated in the opinion of the court.

It was argued by *Mr. Vinton* and *Mr. Benjamin* for the plaintiffs, upon which side there was also a brief filed by *Mr. Judah*, and by *Mr. Porter*, upon a brief filed by himself and *Mr. McDonald*, for the defendants.

The points for the plaintiffs were very much illustrated by *Mr. Vinton* and *Mr. Benjamin*, in their arguments. Essentially, however, they are stated in the brief of *Mr. Judah*, from which the following statement of them is taken:

The first question on which the judges differed relates to the nature of the right granted by the act of incorporation, and by the amendment to that act to the railroad company, to

receive county subscriptions. In other words, was it a vested right, beyond the reach of a law or Constitution made afterwards?

There is no provision in the new Constitution of Indiana as to existing rights, either personal or corporate, except the ordinary declarations, "No man's property shall be taken by law, without just compensation."

Art. 1, sec. 21.

And "no law impairing the obligation of contracts shall ever be passed."

Art. 1, sec. 24.

We assume that the property of private corporations is protected by section 21.

By the act of incorporation, a capital of five millions is contemplated; but the company is allowed to organize on the subscription of two hundred thousand dollars, and a payment at the time of subscription is required. By the 12th section, counties are authorized to subscribe for stock, as, by the 6th section, all persons of lawful age and all corporations of the United States may subscribe. Does the power exist anywhere to restrain these rights, against the will of the company? If the company may be deprived of one of these classes of subscribers, it may be deprived of all; and thus its entire capacity may be destroyed, and itself in effect annihilated.

But it is argued that counties are municipal corporations; that municipal corporations are under the control of State legislation; and that those who contract with them contract subject to this control. And we answer, it is true that muncipal corporations are subject to the control of the Legislature. That is the general rule. Is there not, in the nature of things, an exception? If the Legislature creates a municipal corporation, and endows it with other powers—with powers "to contract and be contracted with;" with powers of a private and not of a political nature; with powers including the rights and duties and obligations of private corporations and individuals—does it not create an exception as to such rights, duties, and obligations? In such case, the Legislature may control, may dissolve the corporation, but the rights, the duties, and obliga-

tions, will remain chargeable on its property. And we refer to the opinions of this court in at least two cases.

Mumma *v.* Potomac Co., 8 Peters, 280.

Curran *v.* State of Arkansas, 15 How., 310.

The second question on which the judges differed covers more ground than the first question.

The declaration states and the demurrer admits an election and vote in favor of subscription in March, 1849, before the new Constitution. The question is, whether, by virtue of the act of incorporation and the amendment, and the election, the railroad company acquired such right to the subscription as would be protected by the Constitution of the United States.

We submit that this question only differs from the first question in being, if anything, stronger than the first in favor of the plaintiffs. In the first, a mere right, dependent on a certain discretion, is claimed. In this a right is claimed, so perfected that nothing remained but the discharge of a ministerial duty.

The law is plain: "And if a majority of the votes given shall be in favor of subscription, the county board of said county shall subscribe."

Sec. 2, act Jan. 15, 1849.

There is no discretion. There is only a duty; and this, by the law of Indiana, may be enforced by mandamus. Writs of mandate issue "to compel the performance of an act which the law specially enjoins."

Section 739.

And "obedience to such writs may be enforced by attachment, and fine or imprisonment, or both."

Sec. 745, 2 Rev. Stat., 197, 198.

Hence, when the new Constitution took effect, there was an absolute vested right in the company to $30,000 subscription from the county of Daviess, to be paid in bonds of a certain description; and we submit, that this right is a matter of contract, secured by the Constitution of the United States.

Planters' Bank *v.* Sharp, 6 How., 301.

Slack et al. *v.* Lex. and Maysville Railroad Co., 13 B. Munroe, 1.

And so in 12 Ben. Munroe, 150.

The counsel for the defendants, after stating the case, made the following points:

By the statutes of Indiana, county commissioners are bodies "corporate and politic."

1 R. S. of 1852, p. 225.

The declaration charges them as "a corporation created by the State of Indiana." Touching the matter in controversy, the first act which they performed—that of subscribing the stock—they performed as a corporation, on the 10th September, 1852. And the question is, did the Constitution of 1850 prohibit that act? We say it did. And in support of this view, we suggest the following considerations:

1. The constitutional prohibition is that "no county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription." The spirit and intent of this clause seem very plain. Certainly the design was to prohibit counties from involving their people in debt for corporation stocks. And it is equally certain that any subscription by which such a debt is created is within the prohibition. Nor is it less clear that the prohibition applies to all such debts, whether created directly or indirectly for such stocks. The mischief intended to be guarded against was the burdening of the people with taxes to pay debts contracted for corporation stocks. And the power to impose that burden in any manner is the thing prohibited.

2. Was the stock "paid for at the time of the subscription?"

The existence of this suit is an answer to the question.

The phrase, "paid for at the time," in the Constitution, certainly means more than the making of a promise or obligation to pay. The writer of the declaration in question no doubt intended, in drawing it, to escape the prohibition in the Constitution by averring that "in payment for the said stock" the bonds were executed. But this is a mere evasion. The making of the coupon bonds could not be a payment within the meaning of the Constitution; at most, it was only an engage-

ment to pay. If the Constitution tolerates such a mode of payment as that, its provision is utterly idle. For then every county may run in debt as much as it pleases for corporation stock by the mere trick of saying the stock was "paid for at the time" by making bonds. It is obvious that, upon such a construction, the very evil intended to be guarded against—burdening the county with debt—would still exist in full vigor; and that not only the chief object, but the sole object of the prohibition would be thwarted.

Payment is a technical term, and in strictness implies the discharge of a debt by the delivery of money. Thus, in pleading, if the defence is that we have done what we engaged to do, we allege, in cases of engagements to do something besides paying money, performance, and in cases of money debts, we plead payment. Every lawyer knows the distinction between the pleas of performance and payment. The Supreme Court of Indiana has held that a plea of payment in anything else than money is a bad plea.

Sinard *v.* Patterson, 3 Blackf., 353.

The two words debt and payment always refer to money. Thus we say we pay a debt, and we perform a contract for the delivery of property, or to do work.

The constitutional provision in question requires that the stock subscribed "be paid for at the time of such subscription." Payment must be simultaneous with the subscription. In this case, we contend that payment has not yet been made; but if even in this we were wrong, still it does not appear that the payment alleged in the declaration was made "at the time" of the subscription. The averment is, that "afterwards, to wit: on the day and year aforesaid, in payment for said stock," the bonds were issued.

The "subscription" mentioned in the declaration must, in terms, have been a money subscription, an engagement to pay money for stock. The declaration says, that "in conformity with the said acts, the defendants subscribed for 600 shares," &c., "of the value of $30,000." The subscription, then, was "in conformity with the acts." These acts give the form of

the subscription. It is found in the fifth section of the charter of 1848, thus:

"We, whose names are subscribed hereto, do promise to pay to the president and directors of the Ohio and Mississippi Railroad Company the sum of fifty dollars for every share of stock set opposite to our names, respectively, in such manner, proportions, and times, as shall be determined by said company in pursuance of the charter thereof."

This is the only form of subscription given in the two acts. Section 5 of the charter requires this form to be pursued. Both by the declaration and the charter, it must be supposed to have been pursued in the subscription under consideration. It was undoubtedly an engagement to pay money "in such manner, proportions, and times," as the company should afterwards determine.

Now, as the engagement was to pay in money, the delivery of something else—bonds, for example—could not in any event amount to payment, unless accepted by the company as payment. It would indeed then be an accord and satisfaction, and not a payment. But even supposing that it might be regarded as payment, it certainly could not be so considered unless it was received as such by the company. This is the doctrine of Maze *v.* Miller, 1 Wash. C. C. R., 328.

Now, the declaration has no averment that the company ever received these bonds either as payment or in accord and satisfaction. It therefore does not appear that payment for the stock was made "at the time" of the subscription.

The Supreme Court of Indiana has given a construction to the prohibitory clause in the Indiana Constitution. They say, "This section, by implication, concedes the power to counties to take stock, at all events by permission of the Legislature, in companies chartered to construct works of internal improvements, under the new Constitution, by making cash payment at the time."

The City of Aurora *v.* West, 9 Ind. R., 78.

Cash payment is the meaning of the section.

Even if the stock was paid for at the time, still the transaction was clearly in violation of that part of the Indiana Consti-

tution which declares that no county shall "loan its credit to any incorporated company."

Undoubtedly the issuance of the bonds in question was lending the credit of the county to this railroad company. This was the prime object of the transaction. The bonds were drawn in the usual form to be put into the market. They were put into the market, or the plaintiffs would never have got them; and putting them in market was using the credit of the county which it had loaned to the company.

3. It is said by the plaintiffs that the vote to take stock, given by the people of Daviess county before the Constitution of 1850 took effect, amounts to a contract, the obligation of which is protected by the Federal Constitution against the prohibition in the Constitution of Indiana.

It is understood that the plaintiffs claim, first, that the vote amounted to a "contract" within the 10th section of the 1st article of the Federal Constitution; and, secondly, that the prohibition in the Indiana Constitution is in violation of the company's charter, which permits "the county commissioners of any county through which the railroad passes" to subscribe stock. Let us examine each of these points:

1. Did the vote of the people amount to a "contract," which the Federal Constitution protects? We say, no; for that vote was not a contract at all. "A contract is an agreement upon a sufficient consideration to do or not to do a particular thing." "An agreement" is the binding assent of both parties. This *aggregatio mentium* is indispensable to every contract. In this sense, the people of the county could not by vote enter into an "agreement;" for they are not a body politic, and they cannot be sued. It is the board of commissioners that can agree, not the voters. This contract is not alleged to have been made with the voters, but with the commissioners. Not the voters, but the commissioners, are sued. If the vote amounted to a contract, it was the contract of the voters; and it will be time enough, when these voters are sued, to inquire whether they contracted. It is, for the present, enough to know that the present defendants, the board of commissioners, never contracted till after the Constitution of 1850 took effect.

And if the voters had power to make a contract by a vote to take stock, still their vote could not amount to a contract till the company also agreed. To a contract there must, of course, be the assent of both parties. Now, it does not appear by the record that the railroad company ever assented to this supposed contract till the time of the subscription, which, as we have seen, was long after the constitutional prohibition took effect. As, then, there was no assent by both parties till after the first day of November, 1851, there could have been no contract till after that day. And as the making of the contract after that day was prohibited by the Indiana Constitution, there could not have been, in the case, any contract protected by the Federal Constitution.

The case of the Baltimore and Susquehanna Railroad *v.* Nebit, 10 Howard, 395, is fully in our favor on this point. There the charter provided that the company might take land for the use of the road, upon having the damages to the owner assessed by a jury, and upon tender of such damages to the owner. Damages had been so assessed, and afterwards, and before a tender, the Legislature, by law, set aside the assessment. The question was, did this violate a contract? And it was held that it did not, because, there having been no tender, no acceptance by the corporation, there was no contract. And the reasoning of Mr. Justice Daniel, on p. 399, *supra*, applies with full force to the present case.

Whether there was a subsisting contract at any time before November 1, 1851, may be tested by inquiring whether it could before that time have been enforced against the company. Suppose that before that date, and after the voting, the county commissioners had insisted on their right to subscribe pursuant to the vote, and the company had refused to take the subscription, it is perfectly clear the company would not have been liable for such refusal. The obvious answer to any action for so refusing would have been, that the company had never assented to the proposition presented by the voters to take stock.

2. Is the prohibition in the Indiana Constitution in violation of the company's charter, which provided that county sub-

scriptions of stock might be taken? In other words, since a charter is in some respects and in some sense a contract, is the provision in the charter of the Ohio and Mississippi Railroad Company, allowing counties to subscribe for stock therein, such a contract as is contemplated by the Federal Constitution?

All the provisions of the charter and its amendments touching county subscriptions are above copied into this brief. These provisions gave no vested right of property to the company; they merely bestow on counties the power to subscribe for stock—a power which, by the general laws of Indiana, did not before exist. They merely operate as enabling acts—as acts removing disabilities.

Touching the constitutional prohibition against the passage of laws "impairing the obligation of contracts," Mr. Story says: "That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, is admitted; and it has never been so construed."

Story on the Constitution, sec. 1392.

Undoubtedly, the Indiana Legislature might at any time repeal all laws incorporating counties and county boards, and thus disable them from subscribing for any stock or making any contract. Nor is it to be for a moment tolerated that the Legislature of Indiana, by granting a charter to a railroad company, could have intended to abandon any portion of its legislative power over the counties of the State.

As every charter stands, all natural persons not laboring under disabilities may take stock. But who ever thought that the Legislature may not, after the grant of the charter, by law impose disabilities on some of these natural persons? Suppose that at the time of the passage of a charter, married women were by law capable of contracting by subscribing for stock, can it be said that the Legislature cannot afterwards by law impose on them the usual disability of femes covert? So, we think it clear that the Constitution of Indiana might impose on the counties the disability in question.

In the case of the Richmond, &c., Railroad Company *v.* the

Louisa Railroad Company, 13 Howard, 71, where the Legislature of Virginia, in a charter, gave a pledge not to allow any other railroad to be constructed near the one chartered, and afterwards another railroad was chartered contrary to that pledge, it was held that the first charter was not violated within the meaning of the United States Constitution touching the obligation of contracts. That was certainly a much stronger case than the one now under discussion; and as long as it stands for law, surely the defendant in this case is safe.

The case of Covington and Lexington Railroad Company *v.* Kenton County Court, 12 B. Munroe, 144, is in point on this question. There the charter of the company had authorized the county court, under a certain vote of the people, to subscribe stock. The people had voted for it, but the County Court refused to subscribe, and in the mean time the Legislature repealed the provision of the charter authorizing county subscriptions. This repeal was held no violation of a contract, because, "until an actual subscription of the stock was made, no right to it vested in the company."

Upon the whole, we submit that it is perfectly clear that the question propounded in this case, for the decision of the court, ought to be decided in the affirmative.

Mr. Justice NELSON delivered the opinion of the court.

The case comes up from the Circuit Court of the United States for the district of Indiana.

The suit was brought by the plaintiffs against the board of commissioners of the county of Daviess, to recover two instalments of interest accruing upon certain bonds issued by the board for stock subscribed to the Ohio and Mississippi Railroad Company; and on the hearing the following questions arose, upon which the judges of the court divided in opinion:

1. Whether, by the said act of incorporation of the said railroad company, and the amendment thereto of January 15, 1849, any such right to county subscriptions vested in said company as would exclude the operation of the new Constitu-

tion of Indiana, which took effect on the 1st day of November, 1851.

2. Whether, by virtue of the said acts, and of the said election in the declaration set forth, the Ohio and Mississippi Railroad Company acquired any such right to the subscription of the defendants as would be protected by the Constitution of the United States against the new Constitution of Indiana, which took effect on the 1st day of November, 1851.

The charter of the railroad company, passed February 14, 1848, provides that it should be lawful for the county commissioners through which the road passed to subscribe for stock on behalf of the county, at any time within five years after the opening of the books of subscription, if a majority of the qualified voters of said county, at an annual election, shall vote for the same.

The amended act of January 15, 1849, made the holding of the election in the county peremptory on the first Monday of March (then) next, to determine the question of subscription or not to the stock.

The election was held in pursuance of this law, and a majority of the votes of the county cast in favor of the subscription. This was on the first Monday of March, 1849; and on the 10th September, 1852, the board of commissioners, in pursuance of the acts and of election aforesaid, subscribed for six hundred shares of the stock of the railroad company, of the value of $50 per share, in the whole amounting to $30,000, and in payment of said stock issued thirty bonds, of $1,000 each, duly signed and sealed by the president of the board of commissioners, and attested by the auditor of the county, and delivered the same to the president and directors of the railroad company. By the terms of the obligations, they were made payable at the North River Bank in the city of New York, twenty-five years from date, to the railroad company or bearer, with interest at the rate of six per cent. per annum, payable annually on the 1st March, at the bank aforesaid, upon the presentation and delivery of the proper coupons attached, signed by the auditor of the said county. The plaintiffs are the holders and owners of sixty of these coupons.

The new Constitution of the State of Indiana contains the following provision:

"No county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription; nor shall any county loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any such company." Sec. 6, art. 10, Constitution of Indiana.

This Constitution took effect on the 1st November, 1851. The subscription was not made nor bonds issued by the board of commissioners of the county, as we have seen, until the 10th September, 1852. The question therefore arises, whether the subscription and bonds, thus made and issued after the Constitution went into effect, were not forbidden by the 6th section of the 10th article above cited, and therefore null and void.

The precise question first presented by the court below, upon which the judges divided, is as follows:

Whether, by the said act of incorporation of said railroad company, and the amendment thereto of January 15, 1849, any such right to county subscriptions vested in said company as would exclude the operation of the new Constitution of Indiana, which took effect on the 1st November, 1851.

The question admits, at least by implication, that this sixth section of the Constitution applies to the acts of the board of commissioners, in making the subscription and issuing the bonds; but presents the question, whether, at the time it went into effect, there was not such a right to the subscription and bonds vested in the railroad company as could be upheld, notwithstanding the constitutional prohibition?

This view is sought to be sustained by force of the 10th section of the 1st article of the Constitution of the United States, which provides that no State shall pass any law "impairing the obligation of contracts."

The argument is, that the provisions in the railroad charter and amendment, conferring power upon the board of commissioners of the county, and making it their duty to subscribe for stock, and issue bonds therefor, if a majority of the qual-

ified voters of the county should determine at an election in favor of the same, import a contract with the railroad company on behalf of the State, which is protected by the clause referred to in the Constitution of the United States; and hence the State constitutional prohibition is inoperative to annul the subscription or the bonds. That this right to the subscription and bonds, resting upon a contract in the charter, is unaffected by any subsequent statute or organic law of the State.

Without stopping to inquire whether or not the power conferred upon the board of commissioners in the charter and amendments of the railroad company, in the form and with the conditions therein mentioned, constitutes a contract, the court is of opinion that, in view of the body upon which the power is conferred, and of the nature of the power itself, no such contract existed, if any, as is contemplated by this clause of the Federal Constitution. The power or authority contained in the charter, and out of which the right in question is claimed to arise, is conferred upon the county, a public corporation or civil institution of government, and upon public officers employed in administering its laws; and the power or authority itself concerns this body in its public political capacity.

Chief Justice Marshall observed, in Dartmouth College *v.* Woodward, (4 Wh., 627,) that the word contract, in its broadest sense, would comprehend the political relations between the Government and its citizens; would extend to offices held within a State for State purposes, and to many of those laws concerning civil institutions, which must change with circumstances and be modified by ordinary legislation, which deeply concern the public, and which, to preserve good government, the public judgment must control. But, he observes, the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions adopted for internal government, and that the instrument they have given us is not to be so construed, (p. 629.) And Mr. Justice Washington observed, in the same case, (p. 663,) in respect to public corporations, which exist only for public purposes, such as towns, cities, &c., the Legislature may, under proper limitations,

change, modify, enlarge, or restrain them; securing, however, the property for the use of those for whom, and at whose expense, it was purchased. (See also pages 693, 694.)

It would be difficult to mention a subject of legislation of more public concern, or in a greater degree affecting the good government of the county, than that involved in the present inquiry. The power conferred upon the board of commissioners by the provisions in the charter, among other things, embraced the power of taxation, this being the ultimate resort of paying both the principal and interest of the debt to be incurred in the subscription and issuing of the bonds.

The second question presented, upon which the judges differed, is as follows:

Whether, by virtue of said acts, and of the said election in the declaration set forth, the Ohio and Mississippi Railroad Company acquired any such right to the subscription of the defendants as would be protected by the Constitution of the United States against the new Constitution of Indiana, which took effect the 1st November, 1851.

The acts of 1848 and 1849, already referred to, made it the duty of the board of commissioners to subscribe for the stock, if a majority of the qualified voters at an election determined in favor of the subscription.

The election took place on the first Monday of March, 1849, when a majority of the votes was cast for the subscription. The Constitution of Indiana took effect 1st November, 1851. But the subscription was not made till the 10th September, 1852, and the bonds were issued after this date. It is insisted that the contract of subscription became complete when, at the election, a majority of the votes was cast in its favor, and did not require the form of a subscription on the books for the stock of the railroad company to make it obligatory upon the parties; and which, if true, it is agreed the contract would be protected within the Constitution of the United States, as it would then have been complete before the constitutional prohibition of Indiana. But the court is unable to concur in this view. It holds, that a subscription was necessary to create a contract binding upon the county, on one side, to take the

stock and pay in the bonds; and upon the other, to transfer the stock, and receive the bonds for the same. Until the subscription is made, the contract is unexecuted, and obligatory upon neither party.

We have arrived at the conclusion that both of the questions presented to us by the court below must be answered in the negative with some reluctance, as, for aught that appears in the case, the subscription to the stock by the board of commissioners was made and the bonds issued in good faith to the railroad company, and also sold by it, and purchased by the plaintiff in confidence of their validity; but, after the best consideration the court has been able to give the case, it has been compelled to hold, for the reasons above stated, that the subscription was made, and the bonds issued, in violation of the Constitution of Indiana, and therefore without authority, and void.

We have not been able to find that the courts of Indiana have passed upon this clause of their Constitution, and have, therefore, been obliged to expound it with the best lights before us. We should have felt very much relieved, if a construction had been given to it by the judicial authorities of the State, and have readily followed it.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the district of Indiana, and on the points or questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court:

1. That by the act of incorporation of the Ohio and Mississippi Railroad Company of the 14th February, 1848, and the amendment thereto of January 15th, 1849, no such right to county subscriptions vested in said company as excluded the operation of the new Constitution of Indiana, which took effect on the 1st day of November, 1851.

2. That by the virtue of the said acts, and of the said election in the declaration set forth, the Ohio and Mississippi Railroad Company acquired no such right to the subscription of the defendants as would be protected by the Constitution of the United States against the new Constitution of Indiana, which took effect on the 1st day of November, 1851. Whereupon it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

ADAM OGILVIE AND OTHERS, APPELLANTS, *v.* THE KNOX INSURANCE COMPANY, LEVI SPARKS, AND OTHERS.

In a bill by judgment creditors against an incorporated insurance company and its stockholders, to compel the latter to pay up the balance due on their several subscriptions to the stock, they cannot be allowed to defend themselves by an allegation that their subscriptions were obtained by fraud and misrepresentation of the agent of the company.

It is too late, after the investment is found to be unprofitable, and debts are incurred, for stockholders to withdraw their subscriptions, under such a pretence or plea.

It is not a sufficient objection to the bill, for want of proper parties, that all the creditors or stockholders are not sued. If necessary, the court may, at the suggestion of either party that the corporation is insolvent, administer its assets by a receiver, and thus collect all the subscriptions or debts to the corporation.

THIS was an appeal from the Circuit Court of the United States for the district of Indiana.

It was a bill filed on the equity side of the court, by Ogilvie, Angle, & Co., traders in partnership in Iowa, together with twelve other persons, citizens of Missouri, Ohio, and Michigan, against the Knox Insurance Company, and against Levi Sparks and thirty-six other persons, subscribers to the capital stock of the company. Being a creditor's bill, filed by the complainants and such other creditors as might make themselves parties, thirty-two other creditors came in and made themselves parties to the suit. The bill alleged that the complainants had recovered divers judgments against the insurance company, upon which executions had issued, the return

to which had been, "no property;" that the other defendants severally subscribed for stock in the company, and were still indebted for it, payment not having been enforced by the company. The prayer of the bill was, that they might be decreed to pay their subscriptions, and that the judgments might be satisfied from the fund thus produced.

At the September rules, 1852, the bill was taken *pro confesso* against all the defendants; but afterwards they all (except the company) appeared, demurred, and, upon the demurrer being overruled, answered. The securities, being the subscription notes, were brought into court. Collum's answer was adopted by most of the other defendants, which answer is particularly noticed in the opinion of this court. After sundry other proceedings, not necessary to be mentioned, the court dismissed the bill, and the complainants appealed to this court.

It was argued by *Mr. Gillet* for the appellants, upon which side there was also a brief filed by *Mr. Judah*, and submitted on a printed argument by *Mr. Crawford* for the appellees.

The points made by the counsel for the appellants were, of course, similar in substance. The following were the fourth and fifth points of *Mr. Gillet*, and the third and fourth of *Mr. Judah:*

Mr. Gillet:

IV. The subscriptions and obligations of the defendants are not void, or voidable, even if it shall be admitted that the facts set up in their answers are true.

The defendants do not aver that the company authorized the false representations complained of, or that they approved of them after they were made. Nor do they aver that they repudiated the transaction as soon as they learned the true state of things. Nor do they state that they offered to restore things to their original condition. They set up that, on the 25th of June, 1851, more than a year afterwards, they would have nothing more to do with the company, nor would they pay their notes or bills. This was about a year after they

knew of the heavy losses. In order to defeat their liability, they must connect the company with the fraud alleged. This they have wholly failed to do, both in their answers and evidence. An unauthorized falsehood, told by their agent, was no act of theirs, and they cannot be held responsible for it.

If Carnan misrepresented the condition and affairs of the company, that was a matter between him and those who subscribed on the strength of the representation. It was he, and not the company, that deceived them. The answers do not set up a legal defence to the defendant's obligations. They do not even aver that they offered to restore things to their original condition. They do not allege that they returned, or offered to return, the stock to be cancelled. Nor do they state that they asked the company to do anything at all. They kept the consideration of their obligations, and at the same time repudiated them, not because the company had deceived them, but because Carnan told them two falsehoods, as they aver. As they have presented their case by their pleadings, the defendants have no defence to their obligations.

"It (a corporation) is not, however, responsible for unauthorized or unlawful acts, even of its officers, though done *colore officii*. To fix the liability, it must either appear that the officers were expressly authorized to do the act, or that it was done bona fide, in pursuance of a general authority in relation to the subject of it, or that the act was adopted or ratified by the corporation."

Angel and Ames, pp. 250, 251.

In Thayer *v.* Boston, (19 Pick., 516, 517,) Chief Justice Shaw used the same language.

The answers in the present case do not aver what is here required to be proved, to make the corporation liable for any supposed wrong on the part of Carnan.

V. The fact that from May, when the true amount of the Vincennes stock must have been known by the Jeffersonville stockholders, to the middle of August, no complaint was made on that account, is conclusive evidence that the defendants did not consider themselves injured by that fact.

The evidence is explicit and clear, that in April, 1850, Ryan

made out a statement, truly showing the condition of the company, and that it had some $25,000 or $26,000 of surplus on hand, and of course showed that there was no $40,000 of Eastern exchange. It also showed the amount of stock, because it was the same statement shown to Savitz and Hughs in August, and Savitz swears that he then noticed that the whole stock of the company amounted to only $97,000. Now, it appears that Carnan took this statement to Jeffersonville in May, 1850, and there showed it. He states that he never showed any other statement to them there; the stockholders then knew that $75,000 had not been subscribed at Vincennes. He swears he told them that he was sorry that they had taken $67,000, because it was a good deal more than had been taken at Vincennes, and he proposed to go and increase the stock at the latter place. But the Jeffersonville subscribers objected, because they wanted the smallest possible amount of stock to spread the anticipated dividend over. They then knew the facts as well as they ever did, and did not object, as they would have done, if they had thought themselves injured by the smallness of the Vincennes subscription. Not even a hint of complaint escaped the Jeffersonville subscribers until the middle of August, and then no formal objection made, nor for a very long time. They would not have been thus silent, if they had been really wronged.

Mr. Judah:

III. But further, admitting the charge of fraud to be proven, and that defendants relied on the representations, the defendants cannot protect themselves by it. It is too late.

When a party has the right to rescind, repudiate, on the ground of fraud, "he must do so at once, on discovering the fraud."

2 Parsons Cont., 278.

At the earliest moment after he has knowledge of the fraud.

Masson *v.* Burt, 1 Denio, 69.

2 Parsons Cont, 278, note S.

Any delay is a waiver, and mere lapse of time may be conclusive.

2 Parsons Cont., 279.

The party must act promptly, and rescind in toto.

Wheaton *v.* Baker, 14 Bart., 594.

Mann *v.* Worral, 16 Bart., 221.

But these men had the statement, called paper Z, on 4th May, 1850, and yet, up to the 4th June, increased their subscriptions $10,500, as appears by the dates of the securities, bill, and answers; and these men had the report of their committee, and the statement called W, in August or September, 1850—full knowledge of all the facts. And yet, between the 28th of September and 4th of October, these men, and amongst them Cullom, on his own stock, renewed their securities on 225 shares and $22,500. This whole defence is an afterthought.

IV. If these defendants might set up this fraud against the company, or their co-stockholders, they cannot set it up against the creditors of the company.

Suppose A, by fraud, induces B to become his partner in the firm of A & Co.; that A, in the name of A & Co., purchases goods for the firm on credit, and that, before payment is made, or even due, B discovers the fraud, and immediately rescinds for the sufficient fraud, what will be the effect on the sellers of the goods, creditors of the firm?

In such case, who will suffer? Nay, who should suffer? The rule is, that when one of two innocent parties must suffer by the fraud of a third party, he of the two who afforded the means, or gave the credit, must bear the loss.

Story on Agency, sec. 127, pp. 142, 143, and note 1.

Story's Eq. Jur., secs. 384, 385, 386, 387, 388.

Hiorns *v.* Holtom, 13 Eng. L. and E., 596.

So long as a man is a partner or a stockholder, however innocently, as relates to third and also innocent parties, he should suffer the consequences.

These men represented two-thirds of the capital; they had their names in the firm as stockholders, directors, officers.

Only some of the arguments of the counsel for the appellees can be given, and those are selected which are replies to the arguments upon the other side.

The plaintiffs have objected, that if Carnan did practice this fraud upon the defendants, it was his own wrong only; the insurance company did not authorize it, nor ought she to be affected by it. It is true she had the alternative to reject or adopt the unauthorized acts of her agent. If she had rejected them, there would have been no contract between her and the defendants. But she chose to adopt them, and therefore she took them tainted as they were.

Chit. Con., 679; 2 Par. Con., 276, and n. (a); 1 Story Eq. Jur., sec. 256.

Doggett *v.* Emerson, 3 Story, 735.

Atwood *v.* Small, 6 Cl. and Fin., 448.

Mason *v.* Crosby, 1 Woodb. and M., 342.

Jeffrey *v.* Bigelow, 13 Wend., 518.

Swatara R. R. Co. *v.* Brune, 6 Gill, 41.

Crump *v.* U. S. Mining Co., 7 Gratt., 352.

But the plaintiffs contend, that if the fraud has been ever so strongly proved, and it has not been waived, and might be a good defence in a suit brought by the insurance company, yet it is no defence against them. They claim to have a peculiar equity.

Yet their complaint alleges that the defendants severally made the subscriptions, notes, and bills, stated in it, and the issue joined; and the very question therefore to be tried is, as to their validity. It follows that the plaintiffs must prove them to be valid and binding on the defendants, or they do not maintain the issue. If the transactions are void on account of the fraud, then there is legally no subscription, note, or bill.

The plaintiffs allege that there are debts due from the defendants respectively to the insurance company, which she has failed to collect, and they pray that the defendants may be decreed to pay, so that the plaintiffs' judgments may thus be satisfied. In effect, they ask to be substituted in the place of the insurance company, and to be permitted to enforce the payment of debts which she has wrongfully neglected to enforce. This is the whole amount of all the right set forth in the complaint, and of the prayer with which it concludes. Then, if there is no valid debt due from any of the defendants

to the insurance company, there is no matter alleged in the complaint on which the plaintiffs can recover. By being substituted in place of the insurance company, and allowed to assert her rights, the plaintiffs can acquire no greater rights than she had; and where she had none, they acquire none.

Hyde *v.* Lynde, 4 Com., 387; In matter of Howe, 1 Paige, 125.

Mech. Bank *v.* N. York and N. Hav. R. R. Co., 3 Kern, 599.

Roberts *v.* Alb. and W. Stock. R. R. Co., 25 Barb., 662.

If the insurance company had before sued the defendants severally on their notes and bills, and, upon the trial, judgments had been rendered against her on account of the fraud, we submit that such judgments would be a bar to this action; for these plaintiffs come in as privies only, asking the enforcement of her right which she has neglected to enforce. So, if these defendants had filed their several complaints against the insurance company for relief, on account of the fraud, and the court had decreed their notes and bills were void, and should be given up, evidently such decrees would be a bar to this suit. And it is, as a general proposition, true, that what would be good matter of defence against the insurance company would be good also against the plaintiffs.

We admit two exceptions to this general proposition, and can imagine no others. One is, if the insurance company had fraudulently conveyed any of her property to the defendants, the fraud would be a good defence against her, but not against her creditors, in a suit to recover it. The other is, if the defendants had represented, or in any way really held out to the plaintiffs, that their notes and bills were valid, and a fund on the faith of which the plaintiffs might safely insure, they would be estopped from making this defence. But the defendants have done nothing of that kind. The mere fact that the insurance company had these fraudulent notes and bills in her possession did not authorize the plaintiffs to trust her on the defendants' credit. As well might it be claimed, that a note not negotiable, and void, in the hands of the payee, for his fraud in obtaining it, still gave him such a credit with the

world, that his assignee might enforce it as perfectly valid against the defrauded maker.

However, there is no ground whatever for the pretence that the plaintiffs trusted the insurance company on the credit of the defendants' names or paper. There is no evidence tending in any degree to prove the averment of the complaint, that the plaintiffs insured after the defendants gave their notes and bills.

Mr. Justice GRIER delivered the opinion of the court.

The complainants in this case are judgment creditors of the Knox Insurance Company. The numerous other defendants are stockholders of the company, and are severally charged as debtors to it, for the unpaid portion of the stock subscribed by them.

The company is insolvent, or at least is unable to pay its creditors, without calling in the capital subscribed and secured, but not actually paid in cash. This it has failed or refused to do. This bill is filed to compel these stockholders or debtors to the corporation to pay the amount of their debts, in order that the creditors of the company may obtain satisfaction.

The bill was taken *pro confesso* as against the corporation. The other defendants, being corporators, are consequently concluded as to the averments of the bill affecting them as such. As stockholders who have not paid in the whole amount of the stock subscribed and owned by them, they stand in the relation of debtors to the corporation for the several amounts due by each of them. As to them, this bill is in the nature of an attachment, in which they are called on to answer as garnishees of the principal debtor.

Where a number of special partners are incorporated to carry on the business of insurance, the stock subscribed and owned by the several stockholders or partners constitutes the capital or fund publicly pledged to all who deal with them. Insurance companies or corporations, unless they have the privilege of using their capital for banking purposes, seldom require the actual payment of it all in cash. Contracts of

insurance or indemnity, though not literally "gaming contracts," are nevertheless in the nature of wagers against the happening of a certain event. The calculation of chances is greatly in favor of the insurer. In a large number of policies, it is but reasonable to expect that the amount of premiums will exceed that of the losses. The insured are thus made to pay one another, and with common good fortune afford an overplus to make a dividend for the insurers. Hence the Knox Insurance Company, like others of the same description, did not require their stockholders to pay in cash more than ten per cent. of their several shares. They were allowed to retain the remaining ninety per cent. in their own possession, substituting therefor their bonds, or other securities. Thus every stockholder became a borrower from, and debtor to, the capital stock of the company. If in the course of events the chances were favorable, a dividend of twenty per cent. on capital would give a profit of two hundred on the money actually paid out by them. On the contrary, if they were adverse, the capital represented by securities must necessarily be paid in to satisfy the just debts of the company.

The ninety per cent. retained by the stockholders is as much a part of the capital pledged as the cash actually paid in. When that portion of the capital represented by these securities is required to pay the creditors of the company, the stockholders cannot be allowed to refuse the payment of them, unless they show such an equity as would entitle them to a preference over the creditors, if the capital had been paid in cash.

Let us now examine their defence, and see if they have established such an equity.

They do not deny that they paid the ten per cent., gave their securities for the balance, and have received their certificates for their several shares of stock; but they contend that they are not bound to pay these securities, because the agent of the corporation, who took the subscriptions of stock, made certain representations concerning the state of the affairs of the corporation, which were not true; and, as a consequence thereof, they are not bound to pay these securities.

The numerous defendants, with some immaterial variations and qualifications, adopt the answer of their co-defendant, Collum, which we shall give *verbatim* from the record, to show we have not misstated or mistaken the nature of the defence set up.

"And, by way of defence to said suit, said Collum alleges that just before he gave said note, accepted said first bill, Robert N. Carnan, an agent of said insurance company, came to Jeffersonville to procure persons there to give notes and bills for stock in said insurance company; and in order to induce said Collum to give his said note, and accept said first bill for such stock, said Carnan, as such agent, then and there falsely and fraudulently said and represented to said Collum, and in his hearing, that stock in said insurance company to the amount of seventy-five dollars had then been subscribed for at Vincennes, and on the Wabash river, and all of said amount had then been paid or secured as the charter of said insurance company required. Said Collum did not then know, nor then have the means of knowing, to the contrary of said representations, and he fully believed them to be true, and with that belief he gave his said note, and accepted said two bills for stock in said insurance company; and if he had not fully believed said representations, he would not have given said note nor accepted said bills, or either of them. At the time said representations were so made, and said given and said first bill accepted, there had not been more than twenty-five thousand dollars of stock in said insurance company subscribed for and paid and secured, as said charter required, at Vincennes, on the Wabash river, which said Carnan then well knew. Said Carnan also, at and just before said Collum made his said note and accepted his said first bill, represented to him that said insurance company then had $40,000 of funds on hand, mostly in Eastern exchange, which they could not dispose of at Vincennes, and they wished to get stockholders at Jeffersonville, so as to have an officer of said insurance company there, and they would then send those funds there to be sold and used. Said Collum did not then know, and had no means of knowing, to the contrary of said

representation, but he believed it, and it was a strong inducement with him to make his said note and accept his said bills; yet he is now informed and believes said representation was grossly false, and that said insurance company did not at that time have and had not at any time had that sum or anything like that sum of money on hand, and mostly in Eastern exchange, which they could not dispose of at Vincennes."

Carnan, who was examined as a witness, denies the charges made in this answer, and declares that he was not authorized by the company to make such representations, and did not make them.

To establish their defence, several of the defendants themselves were called as witnesses, alleging that, as their responsibility was several, and not joint, each one may be called as a witness for all the rest. Much of the argument of this case has been expended on the question of the competency of these witnesses to testify in their own case; but we do not think it necessary to decide it, as there are other facts in the case which show clearly that the matter pleaded cannot affect the relative rights of the parties in the case, assuming it to be true.

Those who seek to set aside their solemn written contracts, by proving loose conversations, should be held to make out a very clear case; and when they charge others with fraud, founded on such evidence, their own conduct and acts (which speak louder than words) should be consistent with such a hypothesis. Assuming the fact that Carnan did make the representations charged, what was the conduct of these Jeffersonville stockholders, who now seek to repudiate their contracts on the allegation of fraud? After having a full opportunity to examine for themselves into the affairs of the company, they alleged no fraud, nor expressed any desire to withdraw their subscriptions; on the contrary, when fully informed that the amount of stock subscribed at Vincennes did not equal that taken at Jeffersonville, and when an offer was made to increase the Vincennes subscriptions, so as to equal those at Jeffersonville, the defendants and those who acted with them *objected*, and insisted that the lower the amount of stock the

higher would be the dividend, and consequently it had better not be increased till after the first dividend of *twenty-five* per cent. had been made.

2. After the defendants had a full opportunity to know the situation of the company, its funds and its property, they organized at Jeffersonville a branch of the corporation, having resident directors at that place. This board met from time to time, through the months of April, May, June, July, and up to 13th August, 1850. While there was a prospect of a dividend of 250 per cent. on the amount of *cash* paid in, their eyes were shut to the deceit supposed to have been practiced on them. In the month of May, a fire at Owensville, Kentucky, was reported, in which the company lost about $50,000. This seemed to injure the prospect of the large dividend; yet even then it was not so clearly perceived that the defendants were defrauded.

The directors at Jeffersonville, who represented their interests, continued to meet till the middle of August, and till a succession of losses made it apparent that the capital of the company would be nearly all required to pay for the losses incurred. When these facts became patent, the directors at Jeffersonville, at their last meeting in August, "*after taking time to consider what was best to be done,*" concluded to consider themselves defrauded, and withdraw their capital from the company.

We need not cite authorities to show that this discovery was made too late, and that a court of equity cannot receive such a pretence as a valid defence against the creditors of this corporation.

II. The objection made to the bill for want of proper parties is equally untenable. The creditors of the corporation are seeking satisfaction out of the assets of the company to which the defendants are debtors. If the debts attached are sufficient to pay their demands, the creditors need look no further. They are not bound to settle up all the affairs of this corporation, and the equities between its various stockholders or partners, corporators or debtors. If A is bound to pay his debt to the corporation, in order to satisfy its creditors, he cannot

defend himself by pleading that these complainants might have got their satisfaction out of B quite as well. It is true, if it be necessary to a complete satisfaction to the complainants that the corporation be treated as an insolvent, the court may appoint a receiver, with authority to collect and receive all the debts due to the company, and administer all its assets. In this way, all the other stockholders or debtors may be made to contribute.

For these reasons, we are of opinion that the decree of the Circuit Court should be reversed, with costs, and that the record be remanded, with instructions to that court to enter a decree for the complainants against the respondents severally, for such amount as it shall appear was due and unpaid by each of them on their shares of the capital stock of the Knox Insurance Company, and to have such other and further proceedings as to justice and right may appertain.

THE UNITED STATES, APPELLANTS, *v.* HENRY F. TESCHMAKER, JOSEPH P. THOMPSON, GEORGE H. HOWARD, AND JULIUS K. ROSE.

Where none of the preliminary steps required by the act of 1824 and regulations of 1828 have been observed or shown, as there required, previous to the grant, and no record of the title, as also there required, and but slight evidence of possession, either as to value or permanency, the proof of the genuineness of the official signatures to the grant is not sufficient. Evidence, under the circumstances of grants in California, should be given so as to make the antedating of the grant irreconcilable with the weight of the proof; otherwise, there can be no protection against imposition and fraud.

The record of the title must be shown, or its absence accounted for to the satisfaction of the court.

THIS was an appeal from the District Court of the United States for the northern district of California.

The state of the title and a brief summary of the evidence are given in the opinion of the court.

It was argued by the Attorney General and *Mr. Stanton* for the United States, and by *Mr. Gillet* for the appellees.

The counsel for the United States stated the case, both as to the nature of the title and the evidence to support it, and then summed up the whole as follows:

Claimant derives title through Salvador and Juan Antonio Vallejo.

October 11, 1838.—Salvador Vallejo and Juan Antonio Vallejo petition their brother, M. G. Vallejo, who is styled by them "commandante general and director of colonization of this frontier," to grant eight leagues to each of them.

March 15, 1839.—Permission to occupy the lands they petitioned for, given by M. G. Vallejo.

September 5, 1844.—Grant by Micheltorena of sixteen leagues, more or less—"La Laguna de Lup-Yomi." Micheltorena's name is signed to the grant. No attestation by secretary, but at the foot is this:

"Note has been made of this decree in the proper book, on folio 4. In the absence of the commandante,

"FRANC'O C. ARCE."

Salvador Vallejo testifies that he and his brother got leave to occupy the land from another brother. Immediately after this permission was obtained, they stocked land with horses, cattle, and hogs. Afterwards, applied to the Governor for a title; it was sent him (S. Vallejo) by a courier. Swears that a map produced is true, but don't know if it was presented to the Governor when title was asked for. Does not say that he credited the Government with $2,500, or any other sum, out of his pay.

Juan Castenada knows the ranch was granted to the two Vallejos about 1844 or 1845, and they proceeded to occupy the land immediately after the grant, namely, in 1844 or 1845; yet he admits he knows nothing about the execution of the paper, and never was on the place in his life! This swift witness testifies, without hesitation, to the handwriting of all the Vallejos, of Micheltorena, and of Arce, being all the names on all the papers.

William D. M. Howard testifies to handwriting of Vallejo, Micheltorena, and Arce.

Salvador Vallejo (called again) testifies that he stocked the farm and built houses, &c., on land in 1842 or 1843, and solicited title from the Governor in 1843 or 1844; applied to Alcalde José de la Rosa for judicial possession. Rosa was afraid of Indians. When asked what the houses cost, he answered, "A great deal of meat and spunk."

José de la Rosa was appointed alcalde June 22, 1845; June 25, was called on by Salvador Vallejo to give judicial possession of Lup-Yomi; did not do so, merely because "there was a large revolution among the Indians," which continued until the middle of August; nobody killed.

José Ramon Carillo testifies that the boundaries of the ranch were natural, mountain and lake; occupied by stock in 1842 or 1843.

This constitutes the whole of the evidence. It will be seen that the grant, if made at all, was made without any previous petition, investigation, reference, or report; no map; no order of concession; no registry. Arce's certificate, (or the certificate with his name to it,) that note had been taken of this title in the proper book, is false. The proper book is here, and it contains no such thing. There is not a vestige or trace of this title, or anything like it, to be found among all the records of the Department.

This title was never produced, nor its existence publicly asserted, in any way whatever, before the 25th August, 1852, when the deed from Salvador Vallejo to the claimants was acknowledged before a notary. The deed from Juan to Salvador Vallejo is dated the 30th of December, 1849, but it was not acknowledged or recorded; nor does it appear ever to have been seen by anybody but the parties.

Salvador Vallejo and Carillo, their brother-in-law, swear that there was a sort of possession in 1842 or 1843, with some improvements, which, the former witness says, cost a great deal of meat and spunk. But they do not say, and there is no reason to believe, that the title now set up was exhibited, or the land claimed under it. Juan Castenada says the possession was not taken until after the grant in 1844 or 1845.

1. The grant is illegal, for want of a petition, map, inquiry, &c.

2. It is not proved, because a grant produced from the private custody of the claimant, without any record of it among the archives, is no grant at all.

3. It is false, forged, fabricated.

If it had been really made by the Governor at the time it bears date, why was it not recorded? Why was the false note of Arce placed at the foot of it?

The bad character of the Vallejos, as well as of their principal witnesses, renders it extremely probable that all the papers, including the petition for license to occupy, the license itself, and the pretended grant from the Governor, are sheer fabrications, fraudulently got up long after the change of Government.

The chief of the Vallejos (General Mariano) was a professional witness, until his credit ran down so low that he was no longer worth calling. In the case of Luco *v.* the United States, it was proved that he had forged a grant; and the claim under it was rejected, on that ground alone.

Juan Castenada is a well-known professional witness. So is Francisco Arce, who falsely certifies that this grant was recorded in the proper book.

The grant is dated in September, 1844. That was the very time at which the Vallejos were banding themselves and their followers against Micheltorena, to drive him from the country, and he knew it. It is not probable that he was making grants of valuable land to them at such a time.

Mr. Gillet, for the appellees, considered the following positions to be established by the evidence in the case:

I. A grant was made by Governor Micheltorena to Salvador and Juan A. Vallejo, on the 5th of September, 1844, for the premises in question.

II. The grantees settled upon and occupied the land granted.

III. Judicial possession was not given, because the magistrate applied to was afraid of the Indians.

IV. The United States offered no evidence in this case on any point, by way of contradiction or explanation, or otherwise, but left that of the claimants wholly unquestioned.

Under such circumstances, where the claimants made distinct proof of a fact, if they swore but a single witness to prove it, they had a clear right to consider such fact sufficiently proved, and this court must so consider it.

V. No objection was raised before the board, except that the conditions subsequent had not been performed, and that the localities and boundaries were not given with sufficient definiteness, and these were removed by testimony taken in the District Court.

Each of these positions was sustained by reference to the evidence, after which *Mr. Gillet* proceeded to divide his argument into several points, of which only two will be reported, as being those upon which the decision of the court turned:

VI. By the laws, usages, and customs of Mexico, a grant is valid, whether the usual preliminary formalities were observed or not.

The act of 1851, (9 U. S. L., 633, sec. 1,) under which these proceedings were had, provides that the board and courts shall be "governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the Government, from which the claim is derived, the principles of equity, and the decisions of the Supreme Court, as far as they are applicable."

The grantees' rights are the same under the treaty and the laws of nations. Whatever rights they had, whether perfect or imperfect, full and complete or otherwise, are protected under both.

In equity, all rights, whether legal and perfect, or equitable and imperfect, are protected, and can be enforced. Congress declared that those having rights of any kind should have all the advantages that a court of equity could decree them. The rules applied in equity cases should apply in these. It is a well-settled rule that a court of equity cannot apply its powers to confirm or enforce a forfeiture, while there is another which requires it to exert them, whenever practicable, to prevent forfeitures, and to set them aside, and to relieve against them in all proper cases.

In these land cases, except where the title is a strictly legal

one, the whole case is an equitable one, and the court deals exclusively in equitable principles, and enforces them. Every right which is not strictly legal is equitable, and its extent is immaterial.

The claimant shows that he has received some sort of title from the Government, and calls upon the courts, under the law of 1851, to confirm it. Here he is met by a claim of forfeiture, and, in the exercise of equity powers, the court is requested to enforce it. The law is too well settled that this cannot be done, to require the citation of authorities.

In the present case, the grant cannot be questioned. But it is objected that there were formalities usually observed which were omitted. If these were required by positive law to confer a legal title, they are not required to create an equitable one. If these had been observed, the Assembly having confirmed, the title would have been a legal title, and beyond the control of the Government, except where a third party had secured rights by denouncement for non-performance of conditions. In this case, the proof shows that everything has been done that was required by the strictest practice, if we except the presentation of a petition, &c. But there is no law declaring even the legal title void, if there was no petition; much less can it be void in equity. Something was done, and a title was given. This clearly creates an equitable right. The party received and acted upon it. He took possession and occupied under it. Is there anything to defeat this equitable right? No subsequent act is set up by the Government or a third party for that purpose. All that can be said against it is this: that it was not acquired with the formalities which are supposed to be necessary to create a complete legal right.

But no one will contend that an equitable right is invalid because it was not acquired in the same manner that is required to vest legal rights, because, if that were so, an equitable right could not be acquired at all, for all rights would then be legal rights. The very object of a court of equity is to relieve in those cases which are defective, under the strict rules of law.

Mexico did not sell her lands. She gave them away to have

them used, and they were principally used for raising horses and cattle. This very grant was applied to that purpose as soon as it was safe to put cattle and horses there, and as early as Fremont took possession of the Alvarado grant. The Government got all it expected from this or any other grantee. If Mexico had not ceded to the United States, there can be no pretence that, under her usages and customs, this grant would have been held a nullity by her judicial or other authorities. No one claimed it by denouncement. If, in September, 1844, the grantee had any interest, either equitable or legal, nothing has been done by Mexico, or her grantee, the United States, to defeat or annul it. The latter could not do so. Could Governor Micheltorena, the day after making this grant, have declared it null and void, and have taken the land from the grantee, and made it a part of the public domain? Clearly not. In Reading's case, (18 How., 1, 7,) this court said: "In other words, from our reading of these decrees, the Governor could not either directly recall a grant made by him, or indirectly nullify it, when it had been conformably with them, the laws and regulations." If he could not, then the grant must be held to convey an interest which has not been and now cannot be taken from the grantee. When Mexico ceded to us, the power to take away a grant by denouncement ceased. There is no law by which the United States can take away lands which have been granted, or authorize any one to do so. Their rights, and those of the grantees, now stand just as they did on the day the treaty was made. If these grantees then had any right in equity, they have it now. That they then had some right, and were in the occupation of the lands under it, cannot be denied, and consequently they now have the same, and the court must confirm it.

IX. The regulations specifying preliminary steps to be taken in applications for grants are merely directory, and may be dispensed with without vitiating the grant.

The regulation of November 21, 1828, is as follows:

"2. Every person soliciting lands, whether he be an *impresario*, head of a family, or single person, shall address to the Governor of the respective territory a petition, setting forth

his name, country, profession, the number, description, religion, and other circumstances, of the families or persons with whom he wishes to colonize, describing as distinctly as possible, by means of a map, the lands asked for."

There is no provision declaring that the grant shall be invalid if there is no petition to the Governor, in writing, specifying the various particulars thus enumerated. Every part of these directions, including the furnishing a map, stands upon the same ground. The regulation merely directs what is deemed proper to be done, but declares no consequences if there shall be omissions. Being merely directory, if not strictly pursued, it does not affect the rights of the party receiving the grant. It is not probable that, in all the cases confirmed by this court, there is one where the petition has conformed in every particular with this regulation. By the regulation, a map is just as essential as a petition. It is a highly important document. But it appears only in a part of the cases before this court. It was not shown in Ritchie's, Arguello's, or Peralta's case, Reading's, or Fossat's, or Fremont's case. On the contrary, in the latter case the petition showed there was no map, and an excuse was offered for not presenting one. This court held that the map was not essential, and confirmed the grant made without it. In 17 How., 561, the Chief Justice said: "According to the regulations for granting lands, it was necessary that a plan or sketch of its lines and boundaries should be presented with the petition; but, in the construction of these regulations, the Governors appear to have exercised a discretionary power to dispense with it under certain circumstances. It was not required in the present instance. The reason assigned for it in the petition was, the difficulty in preparing it, the land lying in a wilderness country, on the confines of the wild Indians. This reason was deemed by the Governor sufficient, and the grant issued without it; and in deciding upon the validity of a Mexican grant, the court could not, without doing injustice to individuals, give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities who were intrusted with their execution. It is the

duty of the court to protect the rights obtained under them, which would have been regarded as vested and valid by the Mexican authorities. And, as the Governor deemed himself authorized, under the circumstances, to dispense with the usual plan, and his decision in this respect was sanctioned by the other officers intrusted with the execution of the law, it must be presumed that the power he exercised was lawful, and that the want of a plan did not invalidate the grant. The fact that the country where the land was situated was such a wilderness, and bordered on such dangerous neighbors, that no plan could then be prepared, is proved by these documents; and that fact, officially admitted, is worthy of consideration, when we come to the inquiry whether there was any unreasonable delay in taking possession; for, dispensing with the plan or draft on that account, which was a condition precedent, it may justly be inferred that the conditions subsequent were not expected by the Governor to be performed, nor their performance intended to be exacted, until the state of the country would permit it to be done with some degree of safety."

Now, if the Governor can dispense with one condition precedent, or requirement of the regulation, he can with another, without rendering the title invalid in equity. The omission here is no greater than in Fremont's case, and the same indulgence must be shown.

In the United States *v.* Sutherland, (19 How., 363, 364,) this court said:

"In construing grants of land in California, made under the Spanish or Mexican authorities, we must take into view the state of the country and the policy of the Government. The population of California, before its transfer to the United States, was very sparse, consisting chiefly of a few military posts and some inconsiderable villages. The millions of acres of land around them, with the exception of a mission or a rancho on favored spots, were uninhabited and uncultivated. It was the interest and policy of the King of Spain, and afterwards of the Mexican Government, to make liberal grants of these lands to those who would engage to colonize or settle

upon them. Where land is plenty and labor is scarce, pasturage and raising cattle promised the greatest reward with the least labor. Hence, persons who established ranchos required and received grants of large tracts of country as a range for pasturage for their numerous herds. Under such circumstances, land was not estimated by acres or arpens. A square league, or 'sitio de ganado mayor,' appears to have been the only unit in estimating the superficies of land. Eleven of these leagues was the usual extent for a rancho grant."

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the District Court of the United States for the northern district of California.

The case involved a claim to sixteen square leagues of land known by the name of "La Laguna de Lup-Yomi," situate north of Sonoma, in the county of Napa, California. It was presented to the board of land commissioners on behalf of the appellees, who derived their title from the two brothers, Salvador and Juan Antonio Vallejo, claiming to be the original grantees of the Mexican Government. The board rejected the claim, but, on appeal to the District Court, and the production of further evidence, that court affirmed it.

The first document produced is a petition of the two brothers, S. and J. A. Vallejo, to the senior commandant general and director of the colonization of the frontiers, for a grant of eight leagues of land each, reciting that they were desirous of establishing a ranch in the Laguna de Lup-Yomi, situate twenty leagues north of this place, (Sonoma,) which tract is uncultivated, and in the power of a multitude of savage Indians, who have committed and are daily committing many depredations; and being satisfied that the tract does not belong to any corporation or individuals, they earnestly ask the grant, offering to domesticate the Indians, and convert them by gentle means, if possible, to a better system of life. Salvador Vallejo adds, that being in actual service in quality of captain of cavalry, and not having received his pay, he proposes to apply $2,500 out of his pay for his portion of the

land. This petition was dated at Sonoma, October 11th, 1838.

Under date of March 15th, 1839, the senior commandant general, M. G. Vallejo, a brother of the petitioners, accedes to their petition so far as to permit them to occupy the tract, but, for the accomplishment of the object, they must hasten to ask a confirmation from the Departmental Government, which will issue the customary titles; and, at the same time, they must endeavor to reduce the wild nature of the Indians, assuring them that the Government wishes a treaty and friendship with them.

The next document is a title, in form, granted by the Governor, Micheltorena, dated Monterey, 5th September, 1844. At the foot of the grant is a memorandum, as follows:

"Note has been made of this decree in the proper book, on folio 4.

"In the absence of the commandante,

"FRANCIS. C. ARCE."

The signatures of M. G. Vallejo to the permit of occupation, and of Micheltorena and F. C. Arce, the Governor and acting secretary, are genuine, if three witnesses are to be believed—Castenada, W. D. M. Howard, and Salvador Vallejo, one of the original grantees. The proof of possession and occupation is slight, and not entitled to much consideration, in passing upon the equity or justice of the title, or even upon its bona fides.

This proof rests mainly upon the testimony of S. Vallejo. He was examined twice on the subject—once when the case was before the board of commissioners, and again when on appeal before the district judge. In his first examination, he states, that immediately after permission was given to occupy the ranch (March, 1839) he placed on the land about one thousand head of cattle, between three and four hundred head of horses, and from eight hundred to one thousand head of hogs; that he built a house on the land the same year, and also corrals, and left an overseer and servants in charge of the place.

In his second examination, he states, that in the year 1842 or 1843 he placed cattle on the ranch, built a house and corrals, and in the year 1843 or 1844 received a title for the land; that he then lived on it, but was frequently absent visiting his house and lot in Sonoma, and his other farms, but always left a mayor domo on the ranch; and during this time he cultivated beans, corn, pumpkins, watermelons, &c. The last house he built on the place was about the time the country was invaded by the Americans. That during the time mentioned he had on the place from 1,500 to 2,000 head of cattle, 500 to 600 head of horses, and from 1,500 to 2,000 head of hogs. He further states, that most of his stock was subsequently stolen and driven off by the Indians and emigrants. This evidence is slightly corroborated by the testimony of Castenada and Carillo.

From the numerous cases that have already been before us, as well as from our own inquiries into the customs and usages of the inhabitants of California, especially those engaged in the business of raising cattle and other stock, this mode of occupation furnishes very unsatisfactory evidence of possession and cultivation of the land in the sense of the colonization laws of Mexico. Any unappropriated portion of the public lands was open to similar possession and occupation without objection from the public authorities. Indeed, according to the laws of the Indies, the pastures, mountains, and waters, in the provinces, were made common to all the inhabitants, with liberty to establish their corrals and herdsmen's huts thereon, and freely to enjoy the use thereof, and a penalty of five thousand ounces of gold was imposed on every person who should interrupt this common right. (2 White's Recop., 56.)

There is also a fact stated by the witness Vallejo himself, that is calculated to excite distrust as to the extent of the possession and occupation, and for the purpose stated. He says that there were constant revolutions among the Indians at the time; that it was unsafe for families to live there, and that the alcalde at Sonoma refused to deliver him judicial possession in 1845, on account of the danger.

It is quite apparent, also, from the testimony of this witness, that the huts built for the herdsmen of the cattle were of a most unsubstantial and temporary character. No possession of any kind is shown since the cattle and other stock were carried off by the Indians and emigrants. When that took place does not appear; but doubtless as early as the first disturbances in the country, in the fore part of the year 1846.

The possession and occupation, therefore, even in the loose and general way stated, was only for a comparatively short time.

We have said that the signatures of the officers to the documentary evidence of the title are genuine, if we can believe the witnesses—Castenada, Howard, and Vallejo; but, as all of these officials were living after the United States had taken possession of the country during the war, and even after the cession by Mexico, and, with the exception of the Governor, resided in California, these signatures may be genuine, and still the title invalid. It was practicable to have made the grant in form genuine, but ante-dated.

The permit to take possession of the tract, in connection with the short and unsubstantial character of the possession, is not of much importance in making out the claim. Vallejo had no power to dispose of the public lands. We do not understand that his permission to occupy, as director of colonization on the frontiers, laid the Governor or Mexican Government under any obligations to grant the title. If followed by valuable and permanent improvements, considerations might arise in favor of a claimant that should influence a Government, when called upon to grant the property to another. We think, therefore, that the claim rests chiefly, if not entirely, upon the grant of the title by the Governor of the 4th September, 1844.

This grant stands alone. None of the usual preliminary steps described by the regulations of 1828, such as the petition, marginal reference for a report as to the situation and condition of the land, report of the proper officers and minute of concession, were observed. These, with satisfactory proof of the signatures to the papers, give some character to the grant, and

tend to the establishment of its genuineness. Even the permit of Vallejo is not noticed by the Governor, nor any present occupation of the premises by the grantees.

So far, therefore, as respects the title, or even any rightful claim to the tract, it depends mainly upon proof of the signatures of Micheltorena and of F. C. Arce, the acting secretary. There is no record of the title in the proper book, shown in the case, nor exists in fact, as it is understood this book of records exists for the years 1844, 1845, and no record is there found. The memorandum, therefore, at the foot of the grant, by Arce, the secretary, "Note has been made of this decree in the proper book, on folio 4," is untrue. Nor has there been found any approval of the grant by the Departmental Assembly, for those records are extant, as found in the Mexican archives. These archives are public documents, which the court has a right to consult, even if not made formal proof in the case. The absence of any record evidence is remarkable, if the title is genuine, as one of the grantees, Juan Antonio Vallejo, resided at the time in Monterey, where these records were kept, and where all the formalities of a regular Mexican grant might readily have been complied with. The parties, also, were men of more than ordinary intelligence, and belong to one of the most influential Mexican families of the Territory, and doubtless well understood the regulations concerning grants of the public domain.

The non-production of this record evidence of the title, under the circumstances, is calculated to excite well-grounded suspicions as to its validity, and throws upon the claimant the burden of producing the fullest proof of which the party is capable of the genuineness of the grant. We do not say that the absence of the record evidence is of itself necessarily fatal to the proof of the title; but it should be produced, or its absence accounted for to the satisfaction of the court.

We have already said, that the genuineness of the official signatures to the paper title might be established, and yet the title forged, and stated our reasons. Proof of the genuineness of these alone can never be regarded as satisfactory. It must be carried farther by the claimant. The record proof is, gener-

ally speaking, the highest. Possession and occupation of some duration, permanency, and value, are next entitled to weight.

At least, satisfactory evidence should be required, under the circumstances in which most of these Mexican grants were made, as to make the ante-dating of any given grant irreconcilable with the proof; otherwise, there can be no protection against imposition and fraud in these cases.

The decree of the court below reversed, and the case remanded for further evidence and examination.

THE UNITED STATES, APPELLANTS, *v.* ANDRES PICO.

Where the preliminary proceedings to a grant of land in California were not produced, and the grant and certificate of approval came from the hands of the claimants, no record of them being found among the Mexican archives or in any book, nor is there any evidence of possession or occupation deserving notice or consideration, the case will be remanded to the court below for further evidence.

THIS was an appeal from the District Court of the United States for the northern district of California.

The state of Pico's title is mentioned in the opinion of the court, and need not be repeated.

The case was argued by the Attorney General and *Mr. Stanton* for the United States, and by *Mr. Gillet* for the appellee. It was very similar to the preceding case of Teschmaker.

The Attorney General's statement of the evidence and argument upon it was as follows:

This is a claim for eleven leagues of land called Moquelemos, which the claimant alleges, in his petition to the board of commissioners, was granted to him by his brother, Pio Pico, in the month of May, 1844, and confirmed to him in June, 1846. The land lies on the Moquelemos river, in what is now the county of Calaveras.

The documentary evidence of title produced by the claimant is:

1. A grant signed by Pio Pico, and countersigned by José Matias Moreno, describing the land in question, dated at the city of Los Angeles, on the 6th day of June, 1846.

2. A paper headed "Departmental Assembly of California," and signed Narciso Botello, deputy secretary, addressed to Secretary Moreno, in which the fact is stated, that this grant, and others which are named, were approved by the Departmental Assembly in that day's session.

NOTE.—The date of this paper (July 15, 1846) is certainly the date which it truly bears. It is so in all the records, the original Spanish as well as the translations.

3. A paper signed by Pio Pico and José Matias Moreno, dated June 15, 1846, setting forth that the most excellent Departmental Assembly, "in session of to-day," decreed the approval of the grant in question.

This is all the documentary evidence in the case. There is no petition, order of reference, information, decree of concession, map, or copy of the grant, found among the archives. No map or *diseno* of the land was exhibited to the court below, or is to be found upon the record sent here. There is no registry nor any kind of entry upon any book. The grant was produced from the private custody of the grantee himself. So, it appears, was the certificate of Pico and Moreno, that it had been approved by the Departmental Assembly. Judge Hoffman distinctly declares that the only paper found in the archives is the communication of Botello, transmitting the title deed, and asserting its approval. Who placed that paper upon the record, and how or when it came there, are questions not easily solved. That it did not get there honestly, will be very apparent to the court, long before this examination is finished.

No proof was offered of the genuineness of the paper with Botello's name to it, and found among the archives. But, to show that the other two papers, which were produced from the private custody of the claimant, were not forgeries—

Nicholas H. Den was called, who testified that he knew the handwriting of Pico and Moreno, and that their signatures to these two papers were genuine.

On this evidence, the board rejected the claim, declaring

that, in its opinion, the proofs and exhibits were insufficient to establish its validity. An appeal was taken by the claimant to the District Court, where the claimant called—

Charles M. Weber, who states that the boundaries of the land described in the grant can be identified. In the fall of 1848, he learned, for the first time, that Pico had a claim to this land, which adjoins that of the witness. He made a gift to Pico of some small improvements that he had made on the land. He knows of no stock that Pico ever had on the land.

Daniel Murphy says that, in 1848, he saw Pico on the land, with some twenty men and some horses. The witness himself afterwards had about 1,000 head of cattle upon it, and Pico allowed him to occupy it with about 1,500 more; was on the ranch, with Pico's consent, about eighteen months.

This was absolutely all the evidence in the case. No proof of the documents was made by the testimony of the persons whose names were signed to them. Neither the Governor himself nor the countersigning secretary was called. Nobody swore even to their handwriting, except Nicholas H. Den. There was no evidence that the claimant ever had any possession; and his nearest neighbor, the owner and occupant of the adjoining tract, not only knew of no possession, but never even heard of the claim until after the discovery of the gold mines, and the commencement of the city of Stockton in the neighborhood. With this illegal and insufficient evidence of the documents, which the claimant had kept in his pocket without any evidence of possession or even claim, and without producing from the record a single entry to corroborate the allegation of the grant, he had boldness enough to demand a decree confirming his title and allowing his claim. The judge manifestly did not believe that the grant was a genuine one. He felt that the whole thing was a fabrication, but, in his opinion, he was bound to treat it as genuine, because Nicholas H. Den was unimpeached and uncontradicted, and he had declared it to be his opinion that the signatures of Pico and Moreno were written by themselves. But he adds, that any one acquainted with the facility and unscrupulousness with which, in this class of cases, frauds have been committed, and

sustained by testimony apparently conclusive, a grant, unsupported either by evidence from the archives or by proof of occupation of the land, must appear suspicious. He then adds what seems to have finally determined him in favor of allowing the claim. He says, in the case at bar, a document is found in the archives, which affords the best, if not the only, moral evidence of the genuineness of the grant.

The objections which the Government now makes to the affirmance of this decree are those which follow:

1. The grant is made by the Governor to his own brother, and is therefore void.

2. It is void, because Pio Pico, at the time of making it, had no authority, jurisdiction, or power, to make any grant in this case, for want of a petition, investigation, and map, such as the laws of 1824 and 1828 require in all such cases.

3. There is no record evidence of the grant, nor any explanation furnished of its absence, and therefore it is, to all intents and purposes, the same as if no evidence at all of it had been given.

4. It is a forgery. The proof of this is powerful and overwhelming. It is not possible to furnish any reason why the grant was not entered upon the record, if it was really made at the time it bears date. In addition to that, the journals of the Departmental Assembly furnish very strong circumstantial evidence against the genuineness of this title.

It will be observed that the letter of Botello to Moreno is dated on the 15th of July, and it accompanies the title deeds of this and two other claims. The letter, as well as the deeds, professes to be sent for the information of his Excellency the Governor; and if there is any truth in that letter, the Governor could have had no information of it at any earlier period than its date. Yet we find the Governor's certificate, which purports to be extracted from the minutes of the Departmental Assembly, is dated on the 15th of June, just a month earlier than Botello says it was approved. These certificates, if actually signed by the parties whose names are attached to them, were made long after their date, and at a time when the parties who concocted the fraud supposed that the journals of the

Assembly had been irrecoverably lost. But those journals have been found, are in the archives, have been fully authenticated, and they show that no such grant as this to Andres Pico was before the Assembly, either on the 15th of June, or on the 15th of July, or on any other day. The journal contains a very full account of everything that was done by the Assembly, especially with reference to land grants. The whole proceedings of the body on the 15th of June are given, and not a word is said about the approval of this or any other land title. On the 15th of July, no session was held. There was an adjournment from the 8th of July to the 24th of the same month, which was the last day that the Departmental Assembly ever met. The journal affords the strongest reason to believe that Pio Pico was not at Los Angeles, where both the grant and his certificate of approval are dated, at the times when they respectively bear date. Pio Pico met the Assembly, and was in his seat, as President, on the 3d of June. The journal says that, upon that day, a communication was received from the Commandante General, in which Fremont's invasion was mentioned, and the General requested the presence of his Excellency the Governor. At the next meeting of the body, Francisco Figueroa presided, Pio Pico being absent. On the 15th of June, Figueroa presided again. On the 1st of July, an official communication from his Excellency the Governor was read, dated at Santa Barbara on the 23d of June, transmitting copies of certain documents from the districts of the north, and expressing his Excellency's desire to have this honorable body near him, in order to consult with it upon the management and means of saving the country. Another document was also read from his Excellency, dated June 29, with an invitation to the Assembly to repair without delay to Santa Barbara, to enact the necessary measures to save the Department and chastise the invaders, making it [the Assembly] responsible before God and the nation, if it should neglect to go to that point. At all the subsequent meetings of the Legislature, Figueroa continued to be President, down to the session of July 8, 1846; and at an extra session on the 24th of July, being the last day of the Assembly's existence,

Pio Pico was present. Inasmuch as he was, upon the 3d of June, requested to go to Santa Barbara, where the Commandante General was stationed, and as we see no more of his name upon the journals from that time until the 8th of July, it may reasonably be supposed that he left on the 3d of June, or immediately afterwards, in pursuance of the summons sent to him by the General. This very safe presumption will contradict the allegation that he issued a grant to his brother on the 6th of June; and it is very certain, from the journals, that he was not at Los Angeles on the 15th of June, the date of his pretended certificate of approval. On the 15th of July, there was no session at all, and that makes it certain that Botello's certificate is false, from beginning to end.

The argument of *Mr. Gillet* in the preceding case was applicable to this, and, in addition to the points therein reported, the following is now added, because it contains references to the former decisions of this court.

6. It is to be presumed that Governor Pico performed his duty in relation to the necessary preliminaries of this grant, until the impeaching party proves to the contrary.

In all official transactions, it is a universal rule, that the officer is presumed to have conformed to his official duty. Whoever disputes it, must make his proof, or be silent. In this case, we insist that this rule must be applied, If the law required the Governor to grant only on receiving petitions, making references and receiving reports, then it is to be presumed that all this was done. But references and reports are optional matters with him, and are not required unless he chooses. The legal presumption is, that he received a petition, if that was necessary, before the grant; and there is no evidence that he did not receive one, nor was this questioned below. All that can be said is, that the claimant did not produce and prove it on the trial below. If such evidence were necessary to make the grant a legal one, still it was not required to establish the equitable right, which can be proved without proving a full legal right.

This presumption is really sustained by strong, if not con-

clusive proof. The Governor says, in the grant, that the grantee, "a Mexican by birth, has solicited, for his personal benefit and that of his family, the land known, &c., * * * having first made the necessary inquiries and investigations according to the requisitions of the laws and regulations," &c. Those who deny that there was an application, cannot sustain their position without charging the Governor with asserting a falsehood, as well as omission of duty.

It is insisted on the other side that this statement of the Governor in the grant is no evidence of the fact alleged. This is an error. Even in case of private individuals, their statements, in notes, bonds, contracts, and deeds, are taken as true among themselves, and can in but few cases be disputed. But where an officer of Government makes a recital, stating that he has performed certain things required by law in the premises, such recitals are, unless otherwise provided by statute, taken and deemed to be true. The recitals by a sheriff in a deed, when he sells and conveys on execution, are always deemed to be true. The recitals by a magistrate in a writ, that an affidavit was made on which he issued the writ, are taken to be true. When the President recites, in a proclamation or order, that certain things have occurred, they are always taken as true. In cases of an insurrection, or compliance or non-compliance with a treaty, this court has so held.

The production of a commission signed by the President, reciting that the Senate had consented to the appointment, is conclusive of the fact recited, and is also evidence that the President had made the nomination. His signature to a land patent is conclusive upon the Government, of the recitals it contains. It is evidence of the survey, and that (except in pre-emption cases) the land had been offered at public sale, without which it could not be granted. The recital that money had been paid under the act of 1820, or that the grantee or his assignor was entitled to bounty land, cannot be questioned by the Government. It is the same in the recitals in patents to half-breed Indians. The recitals in a land claim confirmed by this court cannot be disputed by the grantor or grantee, or those claiming under either, by subsequent con-

veyance. Those who dispute these recitals, where not estopped, must prove their allegations.

It is a rule of nearly universal application, that the recitals by official personages, in papers made and issued in the line of their duty, are deemed and taken to be true. Public business could not be carried on without allowing such presumptions to prevail. The rule is as applicable to a California Governor in making a land grant, as to any other official person. His recital that there was an application, &c., is just as much to be relied upon as that in which he states that the grantee was a Mexican, or naturalized citizen, or of the secretary that the grant had been recorded or confirmed by the Assembly.

In Fremont's case, the recitals in the grant were treated as true and highly important. The Chief Justice said: "But the grant, after reciting that Alvarado was worthy, for his patriotic services, to be preferred in his pretensions for his personal benefit and that of his family, for the tract of land known by the name of Maroposas, to the extent of ten square leagues, within certain limits mentioned in the grant, and that the necessary requirements, according to the provisions of the laws and regulations, had been previously complied with, proceeds, in the name of the Mexican nation, to grant him the aforesaid tract, declaring the same by that instrument to be his property in fee, subject to the approbation of the Departmental Assembly, and the conditions annexed to the grant."

17 Howard, 558.

"And the grant was not made merely to carry out the colonization policy of the Government, but in consideration of the previous public and patriotic services of the grantee. This inducement is carefully put forth in the title papers." Id.

He further said: "It (consideration of personal merit) is an acknowledgment of a just and equitable claim."

Here the argument of the Chief Justice rested on this point wholly upon what the Governor recited in the grant or title papers. The Chief Justice also, at page 562, speaks of the fact of the inability to furnish a map being "officially admitted" by the Governor.

In Reading's case, Mr. Justice Wayne disposed of certain

points made by the Attorney General by referring to and adopting as true certain facts recited in the grant. He said:

"But the fact of Reading's Mexican naturalization is not an open question in this case. The record admits the regularity and genuiness of his documentary title for the land. The admission is good for all the necessary recitals in them, as it is for the main purpose for which they were inserted in those documents. That was a grant of the land. The recitals are those "requisite conditions" stated in the second and third paragraphs of the decree of November 21, 1828, concerning which the Governor is enjoined to seek information, which, when affirmatively ascertained, make the foundation of the Governor's exercise of his power to grant vacant lands."

"In his petition for a grant, Reading says he is a native of the United States, and had resided in the country since the year 1842. The Governor states him to be a Mexican by naturalization in the grant, and 'that as the proper proceedings and investigations had been previously complied with according to the provisions and laws and regulations concerning the matter,' he, in virtue of the authority vested in him, grants the petitioner the land known as Buena Ventura. * * * Now, this is not merely the language of clerical formality, though it might be the same from usage in like cases, but it is a declaration of the Governor's official and judicial conscience, that his power to make the grant has been used in a fit case for the approval of the Departmental Assembly, or for the decision of the Supreme Executive Government, in case the action of the Assembly should make it necessary for him to carry it there for its decision. We consider it conclusive of the fact of the petitioner's Mexican naturalization, precluding all other inquiries about it, in our consideration of this case, by the record."

18 Howard, 8, 9.

When Spanish and Mexican agents state that they hold certain offices, and are authorized to make grants, their averments thus made are taken to be true, and so this court has held. In Peralta's case, this court, by Justice Grier, said:

"We have frequently decided that the public acts of public

officers, purporting to be exercised in their official capacity, and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given, or subsequently ratified. To adopt a contrary rule would lead to infinite confusion and uncertainty of titles. The presumption arising from the grant itself makes it *prima facie* evidence of the power of the officer making it, and throws the burden of proof on the party denying it. The general powers of the Governors and other Spanish officers to grant lands within the colonies in full property, and without restriction as to quantity, and in reward for important services, were fully considered in this court in the case of the United States *v.* Clarke, 8 Peters, 436."

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the northern district of California.

The appellee presented to the board of commissioners a claim for eleven square leagues of land, known by the name Moquelamos, situate in the county of Calaveras, California. The board rejected the claim; but, on appeal to the District Court, and the production of some further proof, that court affirmed it.

The preliminary proceedings required by the regulations of 1828, before a grant of the public lands, were not produced, if any existed. The only evidence of the title is a grant of the tract by a formal title to the claimant, dated Los Angeles, 6th June, 1846, signed by the Governor, Pio Pico, and J. M. Moreno, the Secretary of State, and two other papers, relied on as furnishing proof that the grant was approved by the Departmental Assembly. One of them is a certificate to that effect of the Governor and Secretary, bearing date 15th June, 1846; the other purports to be a communication from N. Botello, deputy secretary of the Departmental Assembly, of the approval, to Moreno, Secretary of State, for the information of the Governor. This approval, according to the deputy secretary of the Assembly, was in a session held on the 15th July, 1846. The paper was found among the Mexican archives.

The other documents—the grant and certificate of approval—came from the hands of the claimant. No record of them was found among the Mexican archives or in any book, nor is there any evidence of possession or occupation deserving notice or consideration.

The case falls within the principles and is governed by the views of the court in the case of the United States *v.* Teschmaker and others, decided at this term. Besides the suspicious character of the grant, it appears to be wholly destitute of merit.

The decree below reversed, and the case remanded for further evidence.

THE UNITED STATES, APPELLANTS, *v.* MARIANO G. VALLEJO.

Where neither the grant of land in California, nor the certificate of approval by the Departmental Assembly, are found among the Mexican archives, nor the record of them upon any book of records, but both papers came from the hands of the claimants, the case will be remanded for further evidence.

THIS was an appeal from the District Court of the United States for the northern district of California. It was similar, in many of its circumstances, to the two preceding cases. The state of the title is set forth in the argument of the Attorney General.

It was argued by the Attorney General and *Mr. Stanton* for the United States, and by *Mr. Phillips* for the appellee.

The Attorney General thus explained the title:

This is a claim for a tract of land called Yulupa, containing three square leagues, more or less. The claim rests upon an alleged grant by Governor Micheltorena to Miguel Alvarado, dated November 23, 1844. The claim was rejected by the board, but confirmed by the District Court. In support of this claim, a paper, purporting to be a "*titulo*" is produced, signed, "Manuel Micheltorena," and attested by "Francisco

Arce, Secretary Int. It is accompanied by no expediente, nor any record evidence. No petition, reference, report, decree of concession, or other official act prior to the grant, appears. The attesting witness was not called. The only proof of execution is the testimony of José de la Rosa as to the handwriting of Micheltorena and Arce. But another paper is produced by the claimant, bearing the names of Pico and Corvarubias, and purporting to be a certificate that the grant was confirmed on the 18th of February, 1845, by the Departmental Assembly. But there is no proof of the authenticity of this paper, save the testimony of José de la Rosa as to the handwriting of Pico, the Governor, and Corvarubias, the attesting secretary. Neither of them was called.

The usual effort is made to supply the defect of legal proof by testimony of occupation and possession.

There is no expediente on file. The grant is not found in Jimeno's Index. The claim rests upon the production of two papers and proof of handwriting. It is not supported by any legal evidence requisite to establish a valid claim.

The following specific objections are made to confirmation:

1. No expediente or official record of the proceedings required by the Mexican laws in granting lands is produced, nor any record evidence whatever.

2. The law required the "*titulo*" to be authenticated by the secretary of the Department. Jimeno was the secretary; and if, from any cause, Arce acted as secretary *ad interim*, the fact should have been shown, and he should have been called to prove the execution of the instrument by the Governor.

3. Handwriting is secondary evidence, and competent only when, from the nature of the case, primary evidence by the attesting witness cannot be obtained.

4. The paper bearing the names of Pico and Corvarubias is nothing more than a private certificate by those persons. No proof is made as to when it was given, and it affords no evidence of the action of the Departmental Assembly, which should be shown by their own journal. The journal of the Assembly for 1845 shows no session on the 18th of February, 1845, the day that the certificate states the confirmation to

have been made. If there was a session on that day, the fact might be, and should have been, proved.

5. If this grant were genuine, it would have appeared regularly numbered and entered in Jimeno's index, with a corresponding expediente, on file in the archives. It would also have been noted in the Toma de Razon of that year, but there is no mention of it. Every claimant is bound to establish his claim by legal proof, in conformity with the Mexican laws and usages in granting lands. The whole burden of proof is upon him; and unless that burden is fully discharged, he has no right to a decree of confirmation. The absence of an expediente, or any record evidence of the grant, is unaccounted for. No excuse is shown or ground laid for secondary evidence. The confirmation by the District Court affords no presumption in favor of the claim, for an appeal to the Supreme Court was allowed because of errors that might be committed in the court below; and this case was confirmed before any organized system of fabricating land grants in California had become known. Until the decree of the Supreme Court in Cambuston's case, very little regard was paid to the evidence offered in support of private land claims, and confirmations were made without scrutiny, and sometimes against the manifest impression of the court that the claim was fabricated and false.

For the reasons that have been mentioned, and apparent upon this record, it is submitted that the claim should not be confirmed.

Mr. Phillips stated the title and evidence as follows:

The present claimant derives his title under a deed of warranty in consideration of $3,000 from Miguel Alvarado, dated 20th February, 1849, for "three sitios de ganado mayor, which I have granted to me by the Departmental Government of this territory, approved by the Assembly of the same."

This deed is witnessed by Castenada and Salvador Vallejo, and is acknowledged before the alcalde on 22d February, 1849.

The title on which confirmation is rested is a grant from

Micheltorena to Miguel Alvarado, dated at Monterey, 23d November, 1844.

In this formal grant the following facts are recited:

1. That Alvarado had solicited the land.

2. That the proper measures and examinations had been made.

3. That the land is shown by the map attached to the expediente.

4. That the intent was to confirm him in the ownership of the title, which he had obtained from the Señor director, &c., Don Mariano Vallejo.

If the court is satisfied that this grant is genuine, then these facts are established by their recital.

Besides the grant, there is the approval of the Departmental Assembly, signed by Pio Pico and José M. Corvarubias.

These were produced as original documents, and the signatures of all the parties proved.

No objection can be made in this court that they were not proved by competent evidence.

"No objection shall be hereafter allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken in the court below, and entered of record." (13th Rule.)

In addition to this proof of genuineness, we have the evidence of Caetano Juarez, who was the alcalde of the district, that he heard of the grant in 1844.

Salvador Vallejo testifies that, "in 1844 or 1845, Miguel Alvarado made a petition to the Government for the rancho Yulupa, and received a grant for it; I knew of it at the time."

Julio Carillo says he first heard of the grant, he "thinks, in 1845; I heard of it from some of the neighbors, and he told me himself."

Still stronger evidence as to the verity of this transaction is to be found in the proof of occupation and improvement.

José de la Rosa: "Miguel Alvarado first occupied it in 1843 or 1844. He had a house on it, and cultivated a small garden. He also had a corral on it, and over 100 cattle and horses. The house is still standing. In 1849, he sold it to

General Vallejo, who has occupied it since with cattle and horses."

Jasper O. Farrell: "In 1847 or 1848, one Roulette held a mill site and a portion of red-wood land under M. G. Vallejo; in 1848 or 1849, to the best of my belief, I saw the mill-dam and mill built by him."

Julio Carillo: Alvarado "commenced the occupation thereof in 1842 or 1843. At this time he built a house on the place; a corral. He had cattle and horses on it; he had a small field enclosed; he continued to occupy the land until the time he sold to the present claimant, which, I believe, was in 1848 or 1849. The present claimant has since that time, and now does, occupy said land."

Caetano Juarez: "I have heard that Alvarado has had possession of it ever since (1844.) In 1845, he had a house and corral on the place."

Salvador Vallejo: "At that time Alvarado had possession (1844 or 1845.) Since that time I do not know who has had possession of it. I know Alvarado sold it."

The genuineness of the title was established to the satisfaction of the board of commissioners, who rejected the claim, on the ground that the quantity of land was not sufficiently designated.

The decree of Judge Hoffman shows that this defect was cured by the evidence of other witnesses, "whose testimony, taken on appeal, in our opinion, establishes the identity of the land granted to Alvarado, and removes the only objection urged to a confirmation of the claim."

The absence of record evidence, either in the archives or in Jimeno's index, can amount to no more than cause of suspicion. It cannot of itself invalidate the title.

The attempt to raise the question as to the bona fides of the grant is condemned by the decision of this court.

"It has been urged, this grant is a fictitious one, &c. Our answer to this suggestion is, that no objection to the bona fides of the grant was taken before either of the tribunals below, where it should have been made, if relied on by the Government, so as to have given the complainants an opportunity

to have met it. To permit it to be taken in the appellate court for the first time, where there is no opportunity for explanation, would be a surprise upon them of which they may justly complain."

Larkin's case, 18 How., 561.

Mr. Phillips proceeded to argue that possession was the strongest proof of title, because title always followed possession without fee or reward being required. If there was possession and no title, it would be an exceptional case. We have proved possession in Alvarado from 1842–'43 to 1849, when he sold. This court must go by the record; four witnesses prove possession, and the United States do not deny this evidence. If the authority of the Governor be denied, the United States ought to show that he had no authority, and not require us to prove that it existed.

Mr. Stanton replied to the argument of possession, that if the grant was valid, the party would have had judicial possession. The law required this. Sometimes this court has excused the absence of judicial possession, as in Fremont's case; but there is no excuse here. The rule requiring a point to be taken below before it can be argued here, does not apply to these California cases.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the northern district of California.

The appellee, Vallejo, presented to the board of land commissioners a claim for three square leagues of land, known by the name of *Yulupa*, situate in the county of Sonoma, California, having derived his title from Miguel Alvarado, the original grantee.

The documentary evidence of the title is: 1st. A grant in due form, dated Monterey, 23d November, 1844, purporting to be signed by Micheltorena, Governor, and Francisco Arce, secretary, with a memorandum by the secretary: "Note has been made of this title in the proper book;" and 2d. A certificate of approval by the Departmental Assembly, bearing date

at the city of Los Angeles, 18th February, 1845, signed by Pio Pico, Governor, and Jose M. Corvarubias, secretary.

Neither the grant nor the certificate of approval has been found among the Mexican archives, nor the record of them upon any book of records. Both papers came from the hands of the claimant. The genuineness of the title depends upon proof of the official signatures, and some evidence of possession.

The board rejected the claim; but on appeal to the District Court, and the production of further proof of possession, that court affirmed it.

The case falls within the views of the court in the United States *v.* Teschmaker and others, decided this term.

Decree reversed, and the case remanded for further evidence.

EMMA B. C. THOMPSON AND WILLIAM G. W. WHITE, PLAINTIFFS IN ERROR, *v.* RICHARD ROE, EX DEM JANE CARROLL, MARIA C. FITZHUGH, ANNE C. CARROLL, SARAH NICHOLSON, REBECCA CARROLL, HENRY MAY BRENT, DANIEL H. FITZHUGH AND CATHARINE D. HIS WIFE, DEVISEES OF DANIEL CARROLL OF DUDDINGTON, DECEASED.

Under the act to incorporate the city of Washington, passed on the 15th of May, 1820, amended by the act of 1824, it is not a condition to the validity of the sale of unimproved lands for taxes, that the personal estate of the owner should have been exhausted by distress.

The ordinances of the corporation cannot increase or vary the power given by the acts of Congress, nor impose any terms or conditions which can affect the validity of a sale made within the authority conferred by the statute.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Columbia.

The facts of the case and instruction given by the Circuit Court are stated in the opinion of the court.

It was argued by *Mr. Carlisle*, upon a brief filed by himself and *Mr. Badger*, for the plaintiffs in error, who claimed under

the tax title, and *Mr. Brent* and *Mr. Tyler* for the defendants, upon which side there was also a brief by *Mr. Marbury* and *Mr. Redin.*

Those parts of the arguments upon both sides which relate to the construction of the charter of 1820, and the subsequent act of 1824, will be noticed, omitting all those which referred to the ordinances of the corporation. It was agreed that the last charter of the city in 1848 had nothing to do with this case, the sale having been made in 1835.

Mr. Carlisle gave the following construction to the charter of 1820 and act of 1824:

1. By the 10th section of the charter of 1820, (3 Stat., 589,) "real property, whether improved or unimproved," might be sold for taxes. The only restriction was in the proviso (p. 590) "that no sale shall be made, in pursuance of this section, of any improved property whereon there is personal property of sufficient value to pay the said taxes."

By the 12th section, (p. 590,) power is given to collect taxes by "distress and sale of the goods and chattels of the person chargeable therewith."

Both these sections contemplated that the property should be assessed to the true owner. The 10th section distinguished, in the term of notice required, between resident and non-resident owners. The 12th section subjected to the payment of taxes the "goods and chattels of the person chargeable therewith."

No person could be "chargeable" with the taxes, except by their being assessed to him. The corporation charged by assessment.

These provisions were found to be practically inefficient for the collection of taxes. It was absolutely necessary that the corporation should be relieved from the duty of ascertaining the true owner, and assessing the land to him. Accordingly, the act of Congress of 1824, (4 Stat., 75,) supplementary and amendatory to the act of 1820, was passed.

By its 1st section, the provisions of the act of 1820, so far as "inconsistent with the provisions of this act," are repealed.

By its 2d section, it is provided that "no sale of real property for taxes, hereafter made, shall be impaired or made void by reason of such property not being assessed or advertised in the name or names of the lawful owner or owners thereof."

The same section abolished the distinction between residents and non-residents, in respect to the advertisement, and prescribed a uniform term in all cases, irrespective of ownership.

The provisions of the act of 1820, requiring the corporation to ascertain the person chargeable with the taxes, was inconsistent with the provision of the act of 1824, which made it unnecessary to assess the property to the "lawful owner or owners thereof," and therefore the former were repealed.

For it cannot be maintained that a mere stranger, having no interest in the land, could be chargeable personally with the taxes, so as to subject his goods and chattels to distress. And yet the land might be assessed to such person, (*e. g.*, a former owner,) and advertised in his name; and the real owner might be wholly unknown, and the sale of the land would not "be impaired or made void thereby."

The effect of the act of 1824 was to authorize the corporation to proceed *in rem*, the tax being assessable directly and exclusively upon the lands, and not to any person.

This is understood to be the construction upon which this court proceeded in Holroyd *v.* Pumphrey, (18 Howard, 69.) There the Circuit Court of this District had holden the tax sale void, because the property was assessed to a dead man, it having been, for previous years, assessed upon the books of the corporation to his heirs. This court reversed the judgment, declaring, in effect, that under the charter of 1824 it was immaterial to what person, or whether to any existing person, the land was assessed.

It would seem to be hardly defensible to assert, that there being but one assessment—and that being sufficient to pass the land, irrespective of the true ownership—there is, nevertheless, to be imputed to the corporation another assessment, ascertaining "the person chargeable" with the taxes, so as to

compel a resort to the personalty, or otherwise to avoid the sale.

This view may be further illustrated by the case of Mason *v.* Fearson, referred to in the opposite brief. There it was held, in effect, that if A, owning fifty lots, and having them all assessed to him, sell and convey forty-nine of them, but the whole fifty remain assessed to him, one lot (and it may be the only one belonging to him) must be sold for the taxes on the whole. But if the doctrine of the court below be right, it would seem to follow, that in order to make the sale of such a lot valid, the personal property of the owner must first be exhausted by distress, thus making him personally chargeable with the taxes on all the lots assessed to him.

2. This view of the question, founded mainly upon the amended charter of 1824, is wholly disregarded by the brief on the other side, which merely remarks that the act of 1824 "makes some changes in the charter of 1820, but not necessary to be noticed." In our apprehension, these changes are conclusive of the matter, even if, by the true construction of the charter of 1820, it was imperative that recourse should be first had to the goods and chattels of the owner.

But was such primary recourse required by the act of 1820 itself?

It is submitted that it was not. Nor, in the multitude of tax titles which have been tried in the court below, was the point ever suggested until the present case in 1857.

The whole argument in its support depends upon the assumption that the language of the 12th section, declaring that "the person or persons appointed to collect," &c., "shall have authority to collect the same by distress and sale of the goods and chattels of the person chargeable therewith," is mandatory upon the corporation, requiring a distress in all instances. This is assumed because of the well-settled law, that, in certain cases, the word "may," and other equivalent expressions, will be construed "must," in order to give effect to the intention of the Legislature, as in Mason *v.* Fearson.

But is this such a case?

In Mason *v.* Fearson, the charter had provided for the sale

of one lot to pay the taxes on all; and this court held that the corporation was bound to exercise the power so conferred, and that, the first two lots having produced more than enough to pay the taxes on the whole, the subsequent sales were void. This is not at all analogous to the present case, which is that of the express grant of co-ordinate remedies, to be exercised optionally. The sale of one lot for the taxes due on all those owned by the same person, instead of unnecessarily selling them all, each for its own taxes, is manifestly for the benefit of the owner. But is it manifestly for his benefit that the summary remedy of a distress warrant shall be applied to his household furniture, rather than that a vacant lot lying in commons shall be sold?

The exemption clause in the bankrupt act of 1841, and the homestead and exemption acts in the States, indicate a prevailing idea to the contrary; and no stronger individual case can be put for illustration than that of the venerable gentleman who owned this property in 1835.

This precise matter has been adjudicated by the Supreme Court of New Jersey, in the case of Martin *v.* Carron, 2 Dutcher, 230. There the clauses in the charter of Newark were identical with those in this charter of 1820. This same objection was taken. But the court held that "the remedies are co-ordinate. It is not necessary that the goods and chattels of the owner or occupant of the lot be exhausted before proceeding against the land."

Martin *v.* Carron, 2 Dutch., 230.

Mr. Marbury and *Mr. Redin*, for the defendants in error, contended that, under the tenth and twelfth sections of the charter of 1820, there is no discretion in the corporation or collector; but that it is mandatory upon them, under the provisions of that act, first to take the personal property of the owner, possessed by him within the corporation, for taxes claimed, before resorting to his real estate.

The tenth and twelfth sections of the charter of 1820 relate to the same subject, and must be taken together. The tenth section (which authorizes the sale of real property) is not in-

dependent, but must be construed in connection with the twelfth section, (which provides for the seizure and sale of the goods of the owner;) and thus taken and construed, the two sections mean, that if the owner of the real property has personal property upon the premises, or anywhere else in his possession within the corporate limits, sufficient to pay the taxes claimed, it shall be taken for them, and the real property, whether improved or unimproved, saved from sale therefor. The taxes to be collected were those which should be "imposed by virtue of the powers granted by the act." The taxes which the act authorized to be imposed were taxes on unimproved as well as improved lots. And all the taxes so imposed, on all descriptions of property, were, by the terms of the act, to be collected out of the goods of the persons chargeable with the tax; "the person appointed to collect any tax imposed by virtue of the powers granted by this act shall have authority to collect the same by distress and sale of the goods and chattels of the person chargeable therewith." If he had goods upon the property on which the tax was imposed, they were to be taken there. If he had no goods thereon, but possessed them elsewhere within the corporate limits, it was not meant that the real property upon which the tax was imposed should be sold, but that such goods should be taken wherever they were found in his possession within the jurisdiction of the corporation. It is the same as to both descriptions of property, improved and unimproved: taxes are imposed equally upon both, "by virtue of the same act;" and are, as to both, to be alike collected in the same way, out of the goods of the person chargeable with the tax. The real property might be resorted to in the contingency of there being no personal property; but not "until all the other means of collection, prescribed in the act, had been tried, and failed." The twelfth section may be read as a further proviso to the previous tenth section; and the third proviso of the tenth section, as to improved property, may be considered to have been inserted merely from abundance of caution as to that particular description of property, and not as any restriction upon the duty required by the twelfth section, viz: to take

goods for all taxes imposed by virtue of the act, wherever the party possessed them within the corporate limits. The twelfth section of itself was sufficient to protect both descriptions of property, improved as well as unimproved. This construction produces harmony, and protects all the real property from sale, where the owner possessed personal property sufficient for the taxes claimed within the corporation, which the collector could find, and which, when taken, would be protected from replevin by the last clause of the twelfth section. It effects, it is submitted, the intent, and secures the rights of all parties, the corporation as well as the citizen; whereas a contrary construction, limiting the protection from sale to the improved property only, would leave the unimproved exposed, although the owner might have abundant personal property for all the taxes claimed, and would violate the intent.

Similar sections of the act of Congress of the 14th of July, 1798, to lay and collect a direct tax, were thus placed together and construed by this court, in the case of Parker *v.* Rule's Lessee, 9 Cra., 67. The thirteenth section of that act, which authorized the sale of lands, was held not to be independent of the ninth and eleventh sections of the same act, which provided for the publication of certain notices previous to the distress and sale of goods; but that, "taking the whole statute together, and looking to the policy required," and the obvious "solicitude to collect the tax by distress and sale of personal property, rather than by a sale of the land itself," the thirteenth section was construed in subordination to the direction to distrain and sell personal property contained in the ninth and eleventh sections, and the notices required by those sections, before such distress could be made, not having been given, the sale made of the land, under the thirteenth section, was declared void; the Chief Justice holding the language above quoted, that "all the means of collection prescribed by the act must have been tried, and must have failed, before a sale of the land can be made."

The solicitude expressed by the court runs through all our decisions and legislation; not only is it manifested in the act of Congress of 1798, but also in the legislation of Maryland

existing at the time this District was laid out, whose tax acts contained a similar section to the twelfth section of the charter of 1820. So did the first charter in 1802, and, from abundance of caution, a prohibition against the sale of unimproved lots for taxes. The policy of the law has ever been to make the personal estate the primary fund for the payment of debts, and especially of encumbrances and charges for taxes. The authorities are numerous; but in addition to Parker and Rule's Lessee, and the act of Congress of 1798, reference is merely made to Blackwell on Tax Titles, pages 205, 209, 213; 12 Ala. Rep., 617; Scales *v.* Avis, the Tax Acts of Maryland, 1785, chap. 83, sec. 8; 1797, chap. 90, sec. 1; and 2 Gill and John., 376, Mayor of Baltimore *v.* Chase—all going to establish that personal property must be resorted to before the real estate.

In the case at bar, the lot was unimproved, and the owner at the time of the sale, and at all times, possessed abundant personal property. The fact that he had such was known to the corporation and its officers; the quantity, value, and description, and the particular locality where to be found, being all entered upon their own books. The fact that he possessed such, and that the collector could have taken it, is found by the jury.

"Taking the whole statute together," therefore, and "looking to the policy required," the duty to take such personal property, and abstain from the sale of the unimproved real property, was imperative and mandatory upon the corporation and collector, under the provisions of this charter of 1820.

Mason *v.* Fearson, 9 Howard, is a direct authority in support of the view that it was mandatory. The duty, if not precisely the same, was of the same character in both cases, and the words are equivalent. In the act of 1824, they are, (sec. 4,) "it shall be lawful for the corporation, where several lots are assessed to the same person, to sell one or more for the taxes and expenses due on the whole." In the charter of 1820, (sec. 12,) the person appointed to collect any tax "shall have authority to collect the same by distress and sale of the goods and chattels of the person chargeable therewith."

Upon these sections ten and twelve, then, of the charter of 1820 alone, and independent of the corporation ordinance of July, 1824, we submit that it was imperative first to take the personal property possessed by Mr. Carroll at the time of the sale; and that there was no discretion, in corporation or collector, first to resort to the unimproved real estate.

Mr. Brent, upon the same side made, the following point upon this branch of the case:

First Point. The act of 1820, ch., 104, sec. 10, (3 Stat. at Large, p. 589,) gives the corporation of Washington no power to sell real estate until after two years' taxes are due and in arrear, but no such limitation is found in regard to the liability of personal property for taxes, which may be distrained on and sold the moment they are assessed, and upon ten days' notice, according to the 12th section of this act.

The 7th section of the act of 1820 authorizes the corporation "to lay and collect taxes upon the real and personal property within the city."

It is therefore clear that Congress looked to the personal property of the debtor as the primary fund for the immediate and available revenues of the city, and to the realty as only secondarily or ultimately chargeable.

The power to collect taxes by distress on the goods, &c., is compulsory, and not optional, on the part of the city.

Mason *v.* Fearson, 9 How., 248.

Parker *v.* Rule, 9 Cranch, 67.

The only difficulty is occasioned by the third proviso of the 10th section of the act of 1820, which forbids a sale of improved property, whereon there is personal property sufficient to pay the taxes.

An argument is based on this proviso, to the effect that recourse need not be had to personal property, primarily, except where it is found on improved real estate; but we consider this proviso as merely designed to subject primarily all personal property on the real estate, irrespective of its ownership.

It might happen that the owner of the improved real estate had no personal effects liable to distress and sale, and hence

the legislative purpose to subject personal effects of the tenant or a stranger found on the improved real estate, primarily, to the payment of the taxes, and in exoneration of the real estate.

This proviso, in connection with the 12th section of the same act, manifestly shows that *quoad* taxes on real estate, if improved, the personal effects (even of a stranger) found on the premises were to be considered as the goods, &c., of a "person chargeable with said taxes."

But if we are wrong in the construction of the act of 1820, we maintain that the proviso in the 8th section of the act of 1824, chapter 195, (4 Statutes at Large, p. 77,) runs through all the tax sales referred to in the law, because there is no reason for a distinction in tax sales in Georgetown, Alexandria, and Washington, and the principle of primary resort to personal property of "the owner or tenant" equally applies to all tax sales in any city. This view is confirmed by the confused and irregular manner in which the sections and clauses of this act are interwoven, without reference to order or division of subject matter.

But, be this as it may, the corporation of Washington had the right of pursuing, at its election, either the remedy by distress or by sale of unimproved real estate, and this is held on the authority of the adverse case cited on the other side.

Martin *v.* Carson, 2 Dutcher Rep., 228.

The ordinance of 3d July, 1824, (Rothwell's Laws, p. 169,) is a conclusive election by the city to require the collector to exhaust the personal effects of debtors before selling the real estate.

This ordinance is conclusive to show a want of authority on the part of the collector who made the sale.

Mr. Justice GRIER delivered the opinion of the court.

The lessors of the plaintiffs below claim to recover a lot of ground in the city of Washington, the title to which was admitted to have been in their ancestor in 1835. In that year it was sold for taxes by the corporate authorities. The plaintiffs in error claim through mesne conveyances of the tax title.

The lot in question was assessed as vacant and unimproved; but the owner, Mr. Carroll, resided in Washington city. He owned a large number of unimproved lots, the taxes on which amounted to $5,690. He had personal property in and about his house, estimated at between five and six thousand dollars.

On the trial, but a single defect was alleged against the tax title, which raised the question, "Whether, upon the true construction of the charter of 1820, as amended by the act of 1824, it was a condition to the validity of the sale of unimproved lands for taxes, that the personal estate of the owner should have been previously exhausted by distress."

The court instructed the jury: "That if Carroll resided within the limits of the corporation of Washington, and had in his possession personal property sufficient to pay all taxes due by him, which might have been seized and subjected to distress and sale, it was the duty of the corporation, through their collector, to resort first to such personal property; which not being done, the sale of the lot in question was illegal and void."

The correctness of this instruction is the only question presented by the record for our consideration.

The authority granted to the city and the mode of its exercise is to be found in the 10th section of the act "to incorporate the city of Washington," passed on the 15th of May, 1820. It provides "that real property, whether improved or unimproved, on which two or more years' taxes shall have remained unpaid, may be sold at public sale, to satisfy the corporation therefor;" with this proviso, that no sale "shall be made in pursuance of this section of any improved property, whereon there is personal property of sufficient value to pay the taxes," &c.

It is the obvious intent of this law, that the thing or property shall be held liable for the tax assessed upon it, and that the tax is a lien *in rem*, which may be sold to satisfy it. It seems to assume, also, that the property should be assessed to some person as owner, for it provides for a longer or shorter notice by advertisement, according to the residence of the owner, whether in or out of the District or of the United States. Where

the owner is out of the jurisdiction of the corporation, the assessment can impose no personal liability on him. But where he resides in the city, he may be considered as personally liable for the taxes assessed against his property, and "charged to him;" and though not liable to an action of debt, the 12th section of the act provides an additional remedy for the corporation. Besides that of proceeding *in rem*, under the provisions of the 10th section, it enacts that "the person or persons appointed to collect any tax imposed by virtue of the powers granted by this act shall have authority to collect the same by distress and sale of the goods and chattels of the person chargeable therewith," &c.

The act of May 26th, 1824, which modifies and changes some of the provisions of this act, provides, among other things, "that no sale for taxes shall be void by reason of such property not being assessed or advertised in the name of the lawful owner."

Without inquiring whether this act repeals the 12th section of the previous act by implication, it shows plainly that the property assessed is considered as primarily liable for the tax, without regard to ownership. But assuming that the owner, residing in Washington, is still personally liable for taxes assessed on his unimproved lots, there is nothing to be found in this law that, by any fair construction, requires that the remedy against the person must be exhausted before that against the property charged with the tax can be resorted to. It is not necessary to the validity of the assessment and sale of the property taxed, that the name of the true owner be ascertained. The collector, therefore, cannot be bound to search for him, or to distrain the personal property of one who may or may not be the owner, even when named as such in his assessment list.

The remedy given by the twelfth section to the corporation is co-ordinate or cumulative, but is not imperative as a condition precedent to the exercise of the authority to sell the property assessed. It is a power conferred on the officer, to be used at his discretion—not a favor to the owner. If he is unable to pay the taxes assessed on his property, it may not

be a very desirable measure for him to have his household furniture distrained and sold on ten days' notice, when the remedy against his land cannot be pursued till two years' taxes are due and unpaid; and the owner has then two years more to redeem his land after the sale. A construction of this act, which made it the imperative duty of the collector to distrain the personal property, might be ruinous to the proprietor, and deprive him of an important privilege.

The city of Washington was laid out on an immense scale. But a very small portion of the lots and squares were improved or productive. Their value to the owners was, in a great measure, prospective, while the present burden of taxes, to those who owned large numbers of them, was oppressive. As we see in the present case, if the collector had levied on the personal property of the owner for the taxes charged on his vacant and unproductive lots, it would have left him without furniture in his house, or servant to wait on him. Hence, a four years' delay was to him a valuable privilege. It demonstrates, too, the evident policy of the act of Congress in not compelling a sale of the owner's personal property before the lands charged could be sold. In Georgetown and Alexandria, old-settled towns, where the lots were nearly all improved, and yielding profit to the owners, the statute adopted a different policy. By the proviso to the eighth section of the act of 1824, which applies exclusively to those towns, the collector is not permitted to sell real property where the owner charged with the tax has sufficient personal estate, out of which to enforce the collection of the debt due.

The case of Mason *v.* Fearson (9 How., 248) has been urged in the argument as an example of the construction of this statute, which should be followed in this case, and where the word *may* is construed to mean *must*. But that case has no analogy to the present. It is only where it is necessary to give effect to the clear policy and intention of the Legislature, that such a liberty can be taken with the plain words of a statute. But there is nothing in the letter, spirit, or policy, of this act, which requires us to put a forced construction on its language, or interpolate a provision not to be found therein.

In this case, the owners of the tax title have had the possession, paid the taxes, built and made valuable improvements on the lot, in the presence of the former owners, for near twenty years. That which was of comparatively small value at first, has now become valuable. Under such circumstances, a court of justice should be unwilling to exercise any judicial ingenuity to forfeit even a tax title, where the former owners have been so slow to question its validity.

The counsel for the appellees have endeavored to support this instruction of the court, by a reference to certain ordinances of the corporation, which, among other things, direct the collector to levy first on the personal property of the person charged with the tax, unless such person shall give consent in writing to the contrary. This direction to the collector is a very proper one. It leaves the election of this remedy to the person charged, and not to the officer. But the power to sell the lands for taxes is to be found in the acts of Congress, not in the ordinances of the corporation. They can neither increase nor vary it, nor impose any terms or conditions, (such as evidence of the owner's election,) which can affect the validity of a sale made within the authority conferred by the statute.

The purchaser of a tax title is not bound to inquire further than to know that the sale has been made according to the provisions of the statute which authorized it. The instructions or directions given by the corporation to their officers may be right and proper, and may justly be presumed to have been followed; but the observance or non-observance of them cannot have the effect of conditions to affect the validity of the title.

The question argued by the counsel of appellees, again bringing up the endless controversy as to the *terminus a quo*, in the computation of time, and which was noticed by this court in the case of Griffith *v.* Bogert, (18 How., 162,) is not in the case as presented by the record, and we cannot anticipate its decision.

Judgment reversed, and *venire de novo*.

HENRY DALTON, APPELLANT, *v.* THE UNITED STATES.

Where the objection to a grant of land in California was, that the grantee was a foreigner, and therefore not entitled to hold land, this court is of the opinion that the testimony of conversations of admissions, relied upon to prove that fact, ought not to be received to outweigh the *prima facie* (if not conclusive) presumptions arising from the expediente and definitive title.

THIS was an appeal from the District Court of the United States for the southern district of California.

The title of Dalton to the land which he claimed is set forth in the opinion of the court.

The board of commissioners confirmed the title, but the District Court reversed the decree, apparently upon the ground stated in the following exception:

Upon the trial of this cause, the United States district attorney offered to prove, by Daniel Sexton and J. S. Mallard, witnesses called on the part of the United States, that Henry Dalton, the appellee in this case, was not, at the time of the grant of the land to him in this case, a citizen of Mexico, but was an alien and a subject of Great Britain, which proof was objected to by J. R. Scott, counsel for appellee; but his honor the judge overruled the objection, and permitted the evidence to be given; to which the appellee, by his counsel, excepted, and prays the court to sign this his bill of exceptions, and make the same part of the record in the case, which is accordingly done.

The evidence of these two persons upon this subject was as follows:

Daniel Sexton sworn, and says:

1. *Question.* What is your name, age, place of residence, and occupation?

Answer. My name is Daniel Sexton; my age, about 37; I reside in San Gabriel; I am a farmer.

2. *Q.* How long have you lived in California?

A. I have lived in this part of California, county of Los Angeles, since the fall of 1841.

3. *Q.* Do you know or not Henry Dalton, the appellee in this case?

A. I do.

4. *Q.* How long have you known him?

A. I have known him since the latter part of 1844, or beginning of 1845.

5. *Q.* Do you know how long he has resided in California?

A. Yes; since the latter part of 1844 or beginning of 1845.

6. *Q.* Do you know the country of his birth?

A. He has frequently told me he was an Englishman.

7. *Q.* Do you recollect the last time he told you so?

A. Yes—in May, I think it was, in 1847; I was coming, in company with Mr. Dalton, from Azusa to Santanita; he told me that he was an Englishman; that he never was a Mexican citizen, and never intended to be an American citizen.

J. S. Mallard:

My name is J. S. Mallard; residence, San Gabriel; my age is 39, and a merchant by occupation; I have resided in California five years, and in Los Angeles county the same length of time, with the exception of four months. I know Henry Dalton, and have known him since January, 1850, as a resident of Los Angeles city.

Question. Do you know the rancho of San Francisquito?

Answer. I don't know that I do, only from report.

Q. Do you know the country of Mr. Dalton's birth?

A. I do not.

Q. Do you know whether or not Mr. Dalton, the appellee in this case, is a native of Mexico? And if not, state generally how you know the fact.

A. Some time in the year 1853, I heard Mr. Dalton say that he claimed not to be a citizen of the United States, nor of Mexico. I know it was in a court of justice, and think he was called as a juror; (the court reserved their decision.) I think he was under oath, but am not certain. I think it was in the Court of Sessions, whilst I was sitting as an associate justice; but I am not certain if it was in that court, or in a justice's court, whilst I was a judge of both courts. I think he was excused on that ground.

Q. Did you ever hear Mr. Dalton say, on any other occasion, that he was not a naturalized citizen of Mexico?

A. I do not recollect that I ever did.

Cross-examined by Claimant's Counsel.

Question. Did he say anything more than that he claimed not to be a citizen?

Answer. My answer is, that he did. My recollection is, that he stated, that while in Mexico, he had either applied to become a citizen, or had some papers made out; and that, from some reason, which I do not recollect, the business of his naturalization was not completed.

Q. Did he not say this, that the papers had been made out in Mazatlan, but that they had not reached him?

A. It might have been so; but my recollection was, that the action on his application had not been completed, and that, for that reason, he (Dalton) said he did not consider himself a Mexican citizen.

It was argued in this court by *Mr. Brent* for the appellant, and by *Mr. Black* (Attorney General) for the United States.

The arguments upon the point whether or not Dalton, if a foreigner, could hold lands in California, are omitted. Upon the question of the evidence bearing upon this fact, *Mr. Brent* remarked as follows:

II. It is submitted that there is no sufficient evidence in the record to show that he was an alien to Mexico.

All the evidence in the record upon the subject of alienage is in the deposition of J. S. Mallard, and answers in the deposition of Sexton.

The substance of the deposition of Mallard, on the point of alienage, is simply this—that the appellant, with the object of avoiding jury service, made loose declarations that he did not claim or consider himself to have been a citizen of Mexico. The witness, Mallard, nowhere says that Dalton admitted that he was born in England, but only that he did not claim to be an American or Mexican citizen. He may very well have been

a Mexican citizen, and not have *claimed* to be one; but would that destroy his citizenship? The testimony of the other witness, Sexton, shows that, in 1847, Dalton declared he was not a Mexican citizen, and that he never intended to be an American citizen. The court will recollect that, in 1847, we were at war with Mexico—that our forces were overrunning California in every direction, and that, even supposing Mr. Dalton to have been a naturalized Mexican citizen, it may not have been suitable for his interest to avow that fact, in the midst of the clamor of the war; or there may have existed a hundred motives why he would not have proclaimed the fact to the American, Sexton.

None of these declarations of Dalton are in a positive form. They were made to third parties, under circumstances not affecting this litigation, and they are not sufficient to rebut the presumptions that he was a Mexican citizen. If the court deem that a material presumption to sustain this grant against these loose declarations of his, we have the positive patent of the Mexican authorities, not issued improvidently by the Governor, but after near two months' consideration, and after due report from the municipal authorities that there was no impropriety in the grant. It seems to be a conclusive presumption from a genuine grant, that the grantee was naturalized, or otherwise competent to take.

3 Pick., 224.

United States *v.* Reading, 18 How., 8, 9.

The Attorney General contended that the alienage of Dalton was clearly and satisfactorily proved.

Mr. Justice GRIER delivered the opinion of the court.

The title of Dalton is found in the archives, and its authenticity is not disputed. The expediente exhibits:

1st. A petition of Henry Dalton, dated March 12th, 1845, at Los Angeles, setting forth that he is a resident of that city; that he is endeavoring to increase the number of cattle on the premises which he possessed, called Azusa, but that he lacked more land for that purpose; that the mission of San Gabriel

owned a large plain adjoining his tract of Azusa, which was useless to them. It was accompanied with a diseno or map of the land. The quantity desired was two sitios.

On the 13th of March, Pio Pico, acting Governor, makes the usual marginal order for information, referring the petition to Father Thomas Estinega, minister to the mission of San Gabriel, to report.

March 26th. Estinega reports, that the tract solicited is one of those which the mission cannot cultivate, because it is deficient in water; and considering that Dalton offers to deliver him, as a gift for the Indians, five hundred dollars, he consents that a grant of the land be made to Dalton.

This petition was referred also to the municipal counsel of Los Angeles, who reported in favor of the grant, and on the 14th of April certified their approval to the Governor.

On the 26th of May, 1845, Governor Pico orders a grant to be made out for two sitios, and sent to the Departmental Assembly for their approval.

June 9th, 1845. The Departmental Assembly, upon report of the committee on waste lands, to whom the expediente had been referred, approve the grant as in conformity with the law of August 18th, 1824, and the regulations of 21st of November, 1828.

In pursuance of this grant, judicial possession was delivered to Dalton, February 14, 1846, in due form, with a regular survey of the boundaries.

The only objection urged in this court to this title, as justifying its rejection, is, that Henry Dalton was a foreigner, and had not been naturalized, and was therefore incapable of taking a grant of land.

The counsel for the plaintiff in error deny both the law and the fact as assumed in this objection.

1st. They contend that it was no part of the policy of the Spanish or Mexican Government to exclude foreigners from holding lands; that the colonization law of 1824 invites foreigners to "come and establish themselves within the Mexican territory, and gives them privileges against taxation," &c., &c.; and provides that, until after 1840, the General Congress

shall not prohibit any foreigner as a colonist, unless imperious circumstances should require it with respect to *individuals of a particular nation.*

2d. They contend, also, that the regulations of 1828 require the Governor to obtain the necessary information as to whether the petitioner is a person within the conditions required to receive a grant; that the expediente found in the record shows a full compliance with the law; that the definitive title, which is a valid patent, recites that the petitioner was "in the actual possession, by *just title*, of a rancho" known by the name of Azusa; that this is a legislative adjudication of the fact of the grantee's capacity to hold land, and per se a naturalization, if he had previously been an alien; that, at least, it affords a prima facie if not a conclusive presumption of the grantee's capacity to receive a further grant of lands.

3d. They contend, also, that any legislation repugnant to this policy of the Government of Mexico since that time originated in, perhaps, a just jealousy of their American neighbors, and was aimed wholly at them, and intended to apply only to the colonies bounding on the United States; that this is apparent from the edict of Santa Anna of 1842, which permits foreigners not citizens, residing in the Republic, to acquire and hold lands, and excepts only the Departments "*upon the frontier and bordering upon other nations;*" that California was never treated as within this category, as the colonized and settled portion of it is separated a thousand miles from the frontier or border of any nation, and was at that time almost a *terra incognita* to the rest of the world.

4th. They contend that, by the Spanish as well as by the common law, a foreigner is not incapable of taking a grant of land, but holds it subject to be denounced in the one case, and forfeited by an inquest of escheat in the other; that the grant in this case being complete, neither the United States land commissioners, nor the courts authorized to adjudicate the Mexican title under the treaty, can exercise the functions either of denouncers or escheators.

5th and lastly. It is contended, that even if the court considered itself bound to declare this grant void by reason

of the alleged incapacity of the grantee to take or hold, yet that there is no sufficient evidence to establish the fact of alienage against the strong presumption of the contrary, arising from the face of the expediente and definitive title.

The court do not intend to express any opinion upon the first four of these propositions, as the last suggests a sufficient reason for the confirmation of this grant.

In all cases, the testimony of admissions or loose conversations should be cautiously received, if received at all. They are incapable of contradiction. They are seldom anything more than the vague impressions of a witness of what he thinks he has heard another say—stated in his own language, without the qualifications or restrictions, the tone, manner, or circumstances, which attended their original expression. If a complete record title with ten years' possession could be divested by such testimony, its tenure would be very precarious, especially where the owner is surrounded by a population of settlers interested in defeating it. All the evidence on the record on the subject of alienage, besides that of a brother who proved *himself* an alien, is in the deposition of two witnesses. One states that Dalton, in *order to avoid serving as a juryman*, said "he did not claim to be an American or Mexican citizen." He might well have been a citizen, although he was not desirous of setting up such a claim on that occasion. The other states that in 1847, during the war, when the country was occupied by the American forces, he said "he was not a Mexican, and never intended to become an American citizen." At such a time, he may have had many motives prompting him to make such a representation. The Mexican Government had ceased to protect him, and the treaty of Guadalupe Hidalgo had not then made him an American citizen.

Now, assuming that these witnesses have remembered and reported the precise words used by the claimant in these loose conversations, they contain no positive assertion that he had never been naturalized, or was born out of Mexico. Such testimony ought not to be received to outweigh the prima facie (if not conclusive) presumptions arising from the expediente and definitive title.

In this respect, this case closely resembles the case of United States *v.* Reading. (18 How., 1.)

The decree of the District Court is reversed, and the title of the claimant to the land in question is hereby confirmed.

JOSE MARIA FUENTES *v.* THE UNITED STATES.

A petition was presented to the board of commissioners in California, claiming the confirmation of a title to land, which petition alleged—

1. that a grant had been issued by Micheltorena, and delivered in June, 1843.
2. That it was recorded.
3. That it was not to be found in the archives, because the record had been burned.
4. That the grant was approved by the Departmental Assembly, but that the record of such approval had been burned.
5. That therefore the claimant could not produce any evidence that the grant had been so approved.

The secondary evidence offered does not prove the existence of such records, nor their destruction. The recital in the grant is not sufficient evidence of this.

The paper produced by the claimant, purporting to be a grant, must therefore be judged by itself. There was no evidence that it had been preceded by the usual formalities, such as a petition, an examination, an inquiry into the character of the applicant, an order for a survey, a reference to a magistrate for a report, a transmission of the grant to the Departmental Assembly, nor was there an expediente on file.

Where these requirements do not appear, a presumption arises against the genuineness of the grant, making it a proper subject of inquiry before that fact can be admitted.

The evidence produced in this case does not establish the genuineness of the grant.

There is also an absence of all proof that the grant had been delivered to the grantee, then a minor, or to any one for him. If the grant was genuine, and not delivered until after the cession of California to the United States, it would not give the grantee any right to claim the land.

A recital in the paper or grant, that the pre-requisites had been complied with, is not sufficient ground for a presumption that they had been observed. The cases decided heretofore by this court do not support the position.

These cases examined.

If the conditions imposed by the grant were conditions subsequent, yet the grantee allowed years to pass without any attempt to perform them until a change of circumstances had taken place, which amounts to evidence of an abandonment.

THIS was an appeal from the District Court of the United States for the northern district of California.

The nature of the title, and evidence in support of it, are stated and commented on in the opinion of the court, and need not be repeated.

It was argued by *Mr. Blair* for the appellant, and by *Mr. Black* (Attorney General) for the United States. *Mr. Blair* also filed a brief by *Mr. Crockett*, which he adopted as his own.

Mr. Blair contended:

1. That neither the grant itself nor the law fixed any period within which the grantee was required to take possession. See Jones's Report, p. 22, and Larkin's case.

2. That the minority of the grantee was, perhaps, the reason why the common requirement as to time was not one of the conditions of the grant, and repels any presumption of an intention to abandon the claim arising from the delay in occupying the land.

3. That no law, regulation, or custom, forbade grants to minors, and the court will not undertake to revise the discretion of the Governor as to the proper persons to receive grants.

4. That as the grant purports to have been recorded in the archives, and it is shown that the book corresponding to the year in which this grant was made was destroyed, the case made comes fully up to the requirements of the Cambuston case.

5. That as the genuineness of this grant was not questioned below, it cannot be impeached here, even on the testimony in the record. So the court held in Larkin's case. *A fortiori*, the court will not consider the extraneous matter offered by the Attorney General, whether offered as testimony or as historical facts, which, if true, might have been explained, if they had been offered below.

These points were more particularly stated in the brief which *Mr. Blair* adopted, viz:

1. That the grant is valid, and ought to be confirmed, not-

withstanding there was no approval of the Departmental Assembly, and no judicial measurement.

United States *v.* Fremont, 17 How., 560.
United States *v.* Reading, 18 How., 8.
United States *v.* Cruz Cervantes, 18 How., 553.
United States *v.* Vaca, 18 How., 556.
United States *v.* Larkin, 18 How., 563.

2. The grant was duly recorded, and on the face of the grant the original is ordered to be delivered to the grantee, who now produces it.

3. The proof shows that it was written and recorded in 1843, when, it is conceded, Governor Micheltorena had full authority to grant lands.

4. The authenticity, date, and recording of the grant, being clearly established, and the grant itself reciting that the grantee had petitioned for the land, and that all "the necessary steps and the precautionary proofs required by the laws and regulations" had been taken, the law will presume that the Governor had performed his duty in these respects, and had not exceeded his powers.

United States *v.* Peralta, 19 How., 347.
United States *v.* Aredondo, 6 Pet., 729.
United States *v.* Delassus, 9 Pet., 134.
Minter *v.* Crommelin, 18 How., 88.
Bagnell *v.* Broderick, 13 Pet., 448.

5. This grant had only the usual conditions; and they were all subsequent conditions, the non-performance of which would not, *ipso facto*, avoid the grant.

6. The fact that the grantee was a minor did not invalidate the grant. There is nothing in the act of 1824, or the regulations of 1828, restricting the power of the Governor in this respect. Under the Mexican and civil law, the age of majority was twenty-five; and the policy of the colonization laws was not at variance with a grant of lands to a person under that age. For aught that appears, a minor might be as capable as any other of cultivating and improving his lands. If minors be excluded for want of capacity, the same reasoning would exclude old, infirm, and indigent persons, or females

of feeble capacity, and especially married women. The capacity of the grantee, and his fitness to take the grant, and the propriety of making it, under all the circumstances, were precisely the questions submitted to the discretion of the Governor, and these questions cannot be litigated over again.

7. If it be conceded that the conditions were not fulfilled, this fact can raise no presumption of abandonment in this case. In the case of Fremont, this court decided, that whilst the conditions are subsequent, and a failure to perform them, in the absence of a "denouncement" of the land by another, will not divest the title, yet that an unreasonable delay in performing the conditions may amount to evidence of abandonment; and that the party is now seeking to resume his ownership, after the lands have become enhanced in value. In the Fremont case, a failure to perform the conditions was excused, because of the unsettled state of the country, and the dangers arising from hostile Indians in that vicinity. In the case at bar, the country was not only in a revolutionary state from the date of the grant, until about the period when the American forces took possession of the country, but the grantee was a minor, and so continued, until the last-named period. We maintain, that no presumption of abandonment will arise against a minor, under either the civil or common law.

Under the Spanish law in force in Mexico, the rights of minors are more fully protected than even at common law, as will appear by reference to 1 Domat's Civil Law, page 529, book IV, title 6, section 2, where the law relating to minors is fully collated.

Under the civil law, the term "abandonment" has a technical and definite meaning, to wit: "that if a man be dissatisfied with his unmovable estate, and abandon it immediately, and depart from it corporeally, with an intention that it shall no longer be his, it will become the property of him who first enters thereon.

1 Partidas, Law 50, p. 365.

Escriche, p. 5, title "Abandono de cosas."

Landes *v.* Perkins, 12 Missouri R., 238.

In certain cases, the doctrine of abandonment is rigidly en-

forced under the Spanish law; but these are special cases, and this is not one of them.

See Escriche, page 6.

The author says: "But these strict principles are not admitted in our general laws, and we have already seen that every proprietor may preserve his estate in lands, although he has failed to cultivate them for many years." But an intention to abandon his estate will not be presumed against a minor, nor will prescription run against him.

Escriche, p. 1230, title "Menor."

Calvin *v.* Innis, 10 Martin (La.) R., 287.

9 Louisiana R., 379.

Orso *v.* Orso, 11 Louisiana R., 62.

It is evident therefore that under the Spanish law of abandonment the grantee in this case did not lose his land. But, in such cases, how is the fact of abandonment to be ascertained? The only effect of it is, not to forfeit the land to the sovereign, but to enable the first occupant to claim it as his. Before his right is established, it must be done by some judicial proceeding; and no other is known to the Spanish law than the process of "denouncement," which is employed not only in obtaining a title to abandoned lands, but also to mines which have been abandoned. It is a judicial proceeding, conducted with much formality, and after due notice.

1 Rockwell's Spanish and Mexican Law, 50 to 56.

9. The title of the grantee is a legal and not an equitable title. His grant is a patent, and conveys the legal estate, which would maintain ejectment.

Ferris *v.* Coover, 10 Cal. R., 589.

In several cases before this court, from California, grants similar to this have been deemed and held to be equivalent to patents. The claimant's application for a confirmation is not, therefore, addressed to the equity side of the court; but he invokes its judgment upon the question whether or not he has a valid legal title to the land; and if so, he asks that it be confirmed. In such a case, the only question presented is, whether or not he produces a valid and definitive grant, free from fraud. If his grant be of that character, it is not per-

ceived how the question of abandonment can arise. No mode is known to our laws, by which a legal title can be "abandoned," so as to work a forfeiture; and we have already shown, that under the Spanish law, in order to divest the title, the fact of abandonment must be ascertained. No such proceeding having occurred in this case, the title is unimpeached.

The Attorney General referred particularly to the dates of the grant and other papers connected with the title, and then made the following points:

This grant is illegal and contrary to the laws and customs of the Government of Mexico, because—

I. The grantee was a minor at the time of its date, and incapable for that reason of performing the conditions annexed to it.

II. It is void because it was made by a Governor who was a near relative of the grantee.

III. There was no petition; no examination into the condition of the land or the character of the applicant; no map of the land; no reference to any magistrate or officer; no report upon the case; and, therefore, the Governor had no authority, jurisdiction, or power, to make the concession, even if the grantee had been a stranger to his blood.

IV. There is no expediente on file, and no note or record in any book among the archives of the Department.

V. Besides all this, it is fraudulent and spurious, a base and impudent forgery. For this assertion I give the following reasons:

1. The fact that no trace of this grant is to be found upon the record, is of itself conclusive evidence against its genuineness.

2. The grantee never took possession of the land, nor claimed title under it, nor produced the grant, until 1852.

3. The subscribing witness to the execution of the grant (Jimeno) was not called, and we must presume that he was not called because it was known that he would pronounce the paper to be fraudulent.

4. The testimony substituted in place of the best evidence

was that of witnesses who, at the very most, could prove nothing beyond their own belief. One of them does not prove even so much, but only that the signatures are like those of Micheltorena and Jimeno.

5. But these witnesses, no matter what they swear to, are unworthy of belief. They are professional witnesses. (See table in Limantour documents.) No court in California, where Manuel Castro's achievements as a witness are known, would pronounce a judgment upon his testimony. Abrego was incontestably proved to be guilty of perjury in the Limantour case, and the fact was so announced by the court.

6. The grant is dated at Monterey, on the 12th of June, 1843. Manuel Castro says it was written and executed there. But the fact is, that Micheltorena was not at Monterey until the 28th of September, 1843, that being the date of the earliest public paper on record which appears to have been issued from that place. On the 12th of June, 1843, he was at Los Angeles, as his public correspondence shows.

Exhibit H, Limantour case.

7. But the forgery of this paper can be conclusively established by ocular demonstration. On page 73 of the photograph exhibits contained in the library of the court will be found an exact photographic copy of this grant. On page 75 are the signatures. The signature of Manuel Jimeno there, when it comes to be compared with the genuine signatures elsewhere in the same book, will speak for itself.

It is not at all difficult to see how and when this grant was fabricated. It is in the handwriting of Manuel Castro, a part of whose business consisted in forging land grants. Probably enough, Micheltorena's name may have been put to it by his own hand, or it may have been written on one of those blank grants which Micheltorena issued after the treaty of peace. Either way, it is very certain it was done at the city of Mexico, as late as the year 1850. Manuel Castro wrote it then and there, and not at Monterey in 1843. The court will observe that, though the grant is dated in 1843, and the power of attorney on the back of it bears date at the city of Mexico, in 1848, there is no official attestation of either, nor anything

else which can repel the presumption of forgery, earlier than 1852. It is very certain that at that time the paper was in existence, with the power of attorney on its back. But it had been fabricated a very short time before. There are several other grants in Manuel Castro's handwriting. (See pages 54, 56, 64, and 67, of the photograph exhibits.) They were made about the same time, and they are known to be forgeries, for they have Limantour's false seal, which was certainly not made before 1850.

Mr. Justice WAYNE delivered the opinion of the court.

The appellant has come to this court asking for a confirmation of his claim to eleven leagues of land, called Potrero. The paper under which he claims the land purports to be a grant from Governor Micheltorena. It recites that the land is within the ex-mission of San Jose, bounded on the north by the locality called the Warm Springs, on the south by Palos, on the west by the peak of the hill of the ranchos Tulgencio Higuera and Chrysostom Galenda, and on the east by the adjoining mountains. It also recites that the Governor had taken all the necessary steps and precautionary proofs which were required by the Mexican laws and regulations for granting lands, and that he had granted the land upon the following conditions to the appellant:

1. That he should enclose it without prejudice to the crossways, roads, and uses; that he shall have the exclusive enjoyment of it, and apply it to such use and culture as may best suit his views.

2. That he should apply to the proper judge for judicial possession of the same, by whom the boundaries shall be marked out, and along which landmarks should be placed to designate its limits, and that fruit and forest trees shall be planted on the land.

3. That the land given should contain eleven leagues for large cattle, as is designated by a map said to be attached to the expediente. The land is to be surveyed according to the ordinance; and should there be an overplus, it was to inure to the benefit of the nation.

The title is to be recorded in the proper book, and then to be delivered to the petitioner for the land, for his security. This paper bears date the 12th June, 1843, and has the name of Micheltorena to it, which is denied to be his signature.

The first inquiry, then, concerning it, should be into its genuineness. Was it executed by Governor Micheltorena? Has the party claiming proved it?

The testimony introduced in support of the genuineness of the paper is to be found in the depositions of Zamon De Zaldo, Jose Abrego, Manuel Castro, and Joseph L. Folsom. Zaldo declares himself to be chief clerk and interpreter to arrange and classify the Spanish and Mexican archives in the custody of the surveyor general of California. He was not interrogated as to the signature to the paper, and says nothing about its having been executed by Micheltorena. He was asked what he knew of the book of land titles of the Mexican Government for the year 1843. He answers that he knew that a book for the year 1843 was not in the office, though he did not know of his own personal knowledge that such a book ever existed, and that all that he did know about it had been learned from a correspondence in the office, that such a book belonging to the archives had been in the possession of J. L. Folsom, United States quartermaster at the time, and that he had learned, in the same way, that it was destroyed with Folsom's papers by the fire in San Francisco of 1851. Folsom states that a book of records, containing grants of land in Upper California, had been put into his possession in the spring of 1851, to be used as evidence in the suit of Leese & Vallejo *v.* Clark, then pending in the Superior Court of the city of San Francisco. It was in the Spanish language, and came from the archives of the Mexican Government of California, then in the possession of the commanding general at Benicia, and was delivered to him as an officer of the army, for safe keeping. He adds: after the book was used as evidence, it was returned to me, and was deposited in my office in the city of San Francisco; and whilst there, the great fire of the 3d and 4th May, 1851, occurred, by which my office and its contents, including the said book, were destroyed. And he then con-

cludes his deposition, saying: "*I am not positive as to the date of the grants contained in the said book, but from my best recollection, my impression is that they were for the years* 1843 *and* 1844." The purpose for which Zaldo and Folsom were made witnesses for the claimant was to connect the book which Zaldo said was not among the archives with the book which Folsom said had been burned, that it might be inferred, from the date of the paper upon which Fuentes rests his claim, that it had been recorded in that book. It is stated in the petition that the grant was issued and delivered in due form of law on the 12th June, 1843; that it was recorded at the time it was issued; that it was not to be found in the archives; and that he believes that the copy of the grant was burned, and on that account could not be produced. It is further stated, that the grant had been approved by the Territorial Legislature, and was in all respects formally completed according to law, but that the records of the Legislature for the year 1843 were in like manner destroyed by fire at the same time with the record of the grant, and that the claimant could not produce any evidence of the approval of the grant by the Legislature. In this recital from the petition we find a very exact anticipation of what the evidence ought to be, to prove that such a grant had been issued, and that it had been duly recorded, but none such was introduced. Zaldo believes, from a correspondence in the office, that a book belonging to it had been burned while it had been in the safe keeping of Folsom. Folsom says a book from the archives was burned, but that he cannot be positive as to the date of the grant in it, but that from his best recollection his impression was, the grants in it were for the years 1843 and 1844; and Zaldo declares that he had no personal knowledge that such a book ever existed, but adds, that there is wanting in the office a book for the year 1843. This falls far short of the evidence which was necessary to connect the alleged grant with the archives of the office. There is no other evidence in the record to supply such deficiency. And it is admitted now that the paper was never sent to the Departmental Assembly.

In truth, between that burned book and the Fuentes paper,

the testimony in the record makes no connection whatever. The mere declaration that it was dated in 1843 cannot do so. Nor can any implication of the kind be raised from the testimony of Abrego and Castro. Neither of these witnesses were interrogated concerning the burned book, nor was any attempt made to prove that any of the records of the Departmental Assembly, *especially its approval of this grant*, had been burned at the same time. What has been said of the insufficiency of the evidence to prove the record of the paper applies with equal force to the certificate which is alleged to have been given by Jimeno, that the paper set out in the petition as a grant had been recorded in the proper book, which is used in the archives of the secretary's office.

The case, then, stands altogether disconnected from the archives, and exclusively upon the paper in the possession of Fuentes. It has no connection with the preliminary steps required by the act of Mexico of the 18th August, 1824, or with the regulations of November 28, 1828. It is deficient in every particular—unlike every other case which has been brought to this court from California. There was no petition for the land; no examination into its condition, whether grantable or otherwise; none into the character and national status of the applicant to receive a grant of land; no order for a survey of it; no reference of any petition for it to any magistrate or other officer, for a report upon the case; no transmission of the grant—supposing it to be such—to the Departmental Assembly or Territorial Legislature, for its acquiescence; nor was an expediente on file in relation to it, according to the usage in such cases.

All of the foregoing were customary requirements for granting lands. Where they had not been complied with, the title was not deemed to be complete for registration in the archives, nor in a condition to be sent to the Departmental Assembly, for its action upon the grant. The Governor could not dispense with them with official propriety; nor shall it be presumed that he has done so, because there may be, in a paper said to be a grant, a declaration that they had been observed,

particularly in a case where the archives do not show any record of such a grant.

The act 1824 and the regulations of 1828 are limitations upon the power of the Governor to make grants of land. They are, and were also considered to be, directions to petitioners for land, before they could get titles. Where the petition and the other requirements following it have not been registered in the proper office with the grant itself, a presumption arises against its genuineness, making it a proper subject of inquiry before that fact can be admitted. It is not to be taken as a matter of course; nor should slight testimony be allowed to remove the presumption. Both the kind and quantum of evidence must be regarded. We proceed to state what they are in the record.

None can be found to establish with a reasonable probability the genuineness of the paper upon which the claimant relies. The only testimony bearing upon the genuineness of the paper is that of Abrego and Castro. Both speak of the signature of Micheltorena, and no further. Abrego says that he knew the Governor; that he had frequently seen him write, and that he had examined the signature to the document presented to him, and that he knows it to be the signature of Governor Micheltorena.

Castro is more particular, but not so positive; and he gives a narrative of the origin of the paper, which is certainly peculiar, and from which a reasonable suspicion may be indulged against his disinterestedness. He says: "An instrument in writing is now shown to me, purporting to be a grant to Jose Maria Fuentes, dated June 12, 1843, and it is attached to the deposition of Jose Abrego, heretofore taken in this case, and marked H. J. T., No. 1. I know the paper; it is in my handwriting. I was at the time secretary in the prefect's office in Monterey, and being on terms of friendship with Secretary Jimeno and Mr. Arce, a clerk in his office, I frequently assisted them in their official duties, at their request, and in that manner I wrote the body of this grant. It was written in June, 1843, at the time of its date. I know the signature of Micheltorena; and the signature purporting to be his *appears*

like his; and the signature of Jimeno on said paper also appears like his." The words of the witness have been given.

The signature of Jimeno, of which Castro speaks, purports to be a certificate from Jimeno that the grant had been recorded, the day after its date, in the proper book of the archives of the secretary's department. It is upon the same paper with the title, and purports to have been put upon it by the order of the Governor, "that the title might be delivered to the party interested, for his security and ulterior ends."

Abrego, in a second deposition, says he knew Fuentes and his family, and that he was not of age, but was a minor, on the 7th July, 1846—more than three years after the date of the grant.

Such is all the testimony in this record to prove the genuineness of the signature of Micheltorena, unless it be the notarial certificate, given under the seal of the National College in the city of Mexico; which, as it is presented in this case, is not evidence, and of no account at all.

We will now show that the testimony of Abrego to the signature of Micheltorena is insufficient to establish that fact, and that Castro's deposition gives to it no aid. In truth, the whole case has no other evidence in support of the genuineness of the signature of the Governor than what Abrego has said. In showing this, we shall have no occasion to impeach his character as a man, or his truthfulness as a witness, as there is nothing in this record, whatever there may be in others, to justify such an attack. The case must be decided upon what its own record contains, and upon nothing else.

Abrego's deposition has not that foundation which the rules of evidence require a witness to have, to enable him to prove the genuineness of an official signature to a public document, or a signature to a private writing. The document in this instance purports to be genuine; but whether so or not, it discloses the fact that there is upon it an official witness of its execution and record, who should have been called to prove it, if he was living, and if absent beyond the jurisdiction of the court, whose signature should have been proved by a witness who was familiar with his signature and handwriting, before

secondary evidence could be received of his own signature, or that of the official who is said to have executed the paper.

It was the duty of Jimeno to record all grants which were made by the Governor, and to give attestations of that fact, and which it is said Jimeno did give to the paper in this instance. Why was not Jimeno called? It seems that he was overlooked or not thought of.

The simplest and best proof of handwriting is the testimony of one who saw the signature actually written; and inferior evidence as to his handwriting is not competent, until it has been shown that his testimony to the execution of the paper could not have been procured. And when a document, either public or private, is without a witness, the best evidence to disprove the signature, and to prove it forged, is the testimony of the supposed writer, if he be not incompetent from interest, and can be produced. In the latter case, the next best evidence is the information of persons who have seen him write, or been in correspondence with him.

Such, however, is not this case, though it was acted upon in the court below as if it was so.

Abrego here, then, is in the attitude of an incompetent witness, who was called and permitted to testify before the party by whom he was introduced, had laid a foundation for the next best evidence, when the paper submitted to him showed the fact that the better could have been had, either primarily or secondarily, in the manner we have already indicated. Abrego swears that he knew Micheltorena; that he had frequently seen him write; that he had examined the signature to the document presented to him, and that he knew it to be the signature of Governor Micheltorena. But had Secretary Jimeno been called as a witness, as it was his official duty to test the signature of the Governor to grants, his would have been the best testimony to prove its genuineness in this instance, and that the grant had been transferred to him officially, for delivery to the grantee.

Castro's deposition is in the same predicament with that of Abrego, but with an aggravation of its insufficiency to prove the signature of Micheltorena, and of his incompetency as a

witness. He was not asked if he knew Micheltorena, or was familiar with his handwriting or with his signature, or if he had ever seen him write. He only says: I know the signature of Micheltorena, and the signature to the paper appears like his, and the signature of Jimeno appears like his. He does not say how he had become qualified, by comparison or otherwise, to swear to the signature of Micheltorena; and notwithstanding his declared friendship with Jimeno—so much so, that he was frequently asked to assist him in the duties of his office, and particularly asked to write out in his own hand the paper in question—he has left it to be inferred that he only knew enough of Jimeno's handwriting to enable him to say that the signature to the grant which he wrote out in his own hand appears like Jimeno's signature.

If such was the way of doing business in the secretary's office, which we have no cause for believing, it must have been an easy matter to get from it such a paper as that now in question, and not at all difficult to have been accomplished by one who had such familiar access to the office as Castro represents himself to have had, especially if all of the prerequisites of a grant enjoined by the act of 1824 and the regulations of 1828 were allowed to be disregarded.

This narrative of De Castro, instead of bringing the mind to any conclusion in favor of the genuineness of the signatures of Micheltorena and Jimeno, rather suggests caution in receiving it, and that it ought to be corroborated by other witnesses before that shall be done. It seems to us, too, somewhat remarkable that this witness, familiar as he was with the origin and object of this paper prepared by himself, should not have been questioned concerning its delivery to Fuentes, then a minor, to whom it was delivered for him, or what was done with it at the time of its date, or in whose possession it was from that time until it was presented to the land commissioners for confirmation, in 1852.

There is entire absence of all proof of its having been delivered to Fuentes himself, or to any one for him; but it seems to have found its way to the city of Mexico, as the record shows, and reappears in California years after its cession to

the United States, and more than eight years after it is said to have been executed. The assertion in the paper itself, that the Governor had directed it to be delivered, can be no proof of that fact, until its genuineness shall have been ascertained. If the minority, too, of Fuentes is considered, in connection with the conditions upon which this grant is said to have been made, it may well be inferred that it was not delivered to the grantee, as he was not then in a situation to carry out the conditions of the grant, without the intervention of a tutor or guardian, and nothing was done to perform those conditions at any time afterward.

We do not speak now of such non-performance as a cause sufficient for denying a right claimed under a genuine grant; but only as a fact in this case accounting for the non-performance of the conditions of the grant, and making it probable that Fuentes did not receive this paper until some time after its date from Micheltorena, and not until after the cession of California to the United States. A delivery after the latter event, by a former Governor of California, would not give a grantee a right to claim the land by any obligation imposed upon the United States by the treaty of Guadalupe Hidalgo.

We have given to this case a very careful examination, and have concluded that no evidence can be found on its record to sustain the genuineness of the paper under which the land is claimed. That there is none to prove its registry in the archives of the Secretary's office, at the time of its date or afterwards. That no reliable proof has been given to connect it with the book of records, which had been committed to the care of the witness, Folsom, and was burned in his office. That it does not appear that any one of the precautionary requirements, before a grant of land could be made by a Governor of California, had been complied with in this case. That there is no proof whatever that such a paper as that in question had been delivered to the claimant at any time before the power of Mexico in California had ceased; and it was admitted, in the argument of the case here, that no such paper had been sent to the Departmental Assembly for its acquiescence, as a grant from the Governor.

It was, however, urged in the argument, that such prerequisites for a grant of land should be assumed to have been observed, on account of a recital in the paper or grant that they had been. Several cases from the reports of this court were cited, being supposed by counsel to support the position. None of them do so. We have not been able to find a case reported from this court, either under the Louisiana or Florida cession, that does. Peralta's case, in 19 Howard, 343, does not do so. The decision there is, that when a claimant of land in California produced documentary evidence in his favor, *copied from the archives in the office of the Surveyor General*, and other original grants by Spanish officers, the presumption is in favor of the power of those officers to make the grants. There, the authenticity of the documents was admitted, and the validity of the petitioner's title was not denied, on the ground of any want of authority of the officers who made the grant. This court then said, that the public acts of public officers, importing to be exercised in an official capacity and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified.

In the case of Minturn et al. *v.* Crommelin, 18 Howard, 88, it was ruled that when a patent for land has been issued by the officers of the United States, the presumption is in favor of its validity, and passes the legal title, but that it might be rebutted by proof that the officers had no authority to issue it, on account of the land not being subject to entry and grant. In Delassus's case, 9 Peters, 117, 133, the inquiry was, whether the concession was legally made by the proper authority; but the concession, being in regular form, carried *prima facie* evidence that it was within the power of the officer to make it, and that no excess or departure from instructions should be presumed, and that he who alleges that an officer intrusted with an important duty has violated it, must show it. But there was no question in that case about the genuineness of the concession. That was admitted. The genuineness of the grant in Arredondo's case, 9 Peters, was not questioned. Nor was the genuineness of the patent in Bagnel's case, 13 Peters,

437, a subject of controversy. This court ruled in that case, that a patent for land from the United States was conclusive in an action at law, and that those who claim against it must do so on the equity side of the court. It is not, however, to be supposed that no title in California can be valid, which has not all of the preliminary requirements of the act of the Mexican Congress of 1824, and of the regulations of 1828. But if none of them are to be found in the archives, and it cannot be established by the proof that they were registered there, this court will not presume that they were preliminary to a grant, because the Governor recites in the grant that they had been observed. In what we have said upon this point, we are reaffirming this court's opinion in Cambuston's case, 20 Howard, 59. And we now take this occasion to repeat, that when it shall appear that none of the preliminary steps for granting land in California have been taken, this court will not confirm such a claim. For the reasons already given, we shall affirm the decree of the District Court in this case.

But we also concur with that court in its rejection of this claim, supposing it to be genuine, upon the ground that there was no proof of a survey or measurement of this land, or any performance of its conditions, from which it may be inferred that the grantee had abandoned his claim. It is said that these were conditions subsequent, the non-performance of which do not necessarily avoid the grant. This is the case as to some of them; but even as to such, when a grantee allows years to pass after the date of his grant without any attempt to perform them, and without any explanation for not having done so, and then for the first time claims the land, after it had passed by treaty from the national jurisdiction which granted it, to the United States, such a delay is unreasonable, and amounts to evidence that the claim to the land has been abandoned, and that a party under such circumstances, seeking to resume his ownership, is actuated by some consideration or expectation of advantage, unconnected with the conditions of the grant, which he had not in view when he petitioned for the land, and when it was granted. The language just used was suggested in the Fremont case. The

occasion has arisen in this case, when it becomes necessary to affirm it as a rule, to guide us in all other cases hereafter which may be circumstanced as this is.

The decree of the District Court in this case is affirmed.

THE NEW YORK AND BALTIMORE TRANSPORTATION COMPANY, APPELLANTS, *v.* THE PHILADELPHIA AND SAVANNAH STEAM NAVIGATION COMPANY, OWNERS OF THE STEAMSHIP KEYSTONE STATE.

In a collision which took place in the river Delaware, between a steamship and a barge which was in tow of a propeller, the latter was in fault.

The lookout was not properly stationed, being in a place where his view was obstructed; and the propeller violated the rule which requires steamers approaching each other from opposite directions to port their helms, and pass each other on the larboard side.

A propeller with a barge in tow is not within the rule which applies to sailing vessels, and which requires steamships to keep out of their way. Propellers have nearly the same speed as side-wheel steamers, and quite as much power, and must be subject to the same rules of navigation.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Pennsylvania.

It was a case of collision between the steamship Keystone State and a barge called the A. Groves, jun., which took place on the river Delaware, whereby the barge was sunk in the river, and her cargo greatly damaged.

The facts of the case are fully stated in the opinion of the court.

The libel was filed by the New York and Baltimore Transportation Company against the owners of the Keystone State. The District Court dismissed the libel, and the Circuit Court, upon appeal, affirmed the decree. The libellants then appealed to this court.

It was argued by *Mr. Wharton* and *Mr. Schley* for the appellants, and by *Mr. McCall* and *Mr. Campbell* for the appellees.

The points of fact averred by the respective counsel were stated briefly and clearly, and each position maintained by references to the evidence. They were as follows:

Points of Fact averred by the Libellants.

1. The Artisan, with her tow, was on the Jersey side of the channel, near the buoy on the lower end of Marcus Hook bar, steering a course having Christine Light on her starboard bow.

2. The opposing vessels were nearly opposite the same point on the Pennsylvania side, (viz: Naaman's Creek,) when the steamship ported her helm.

3. By porting her helm, the steamship must have run across the channel.

The respondent's witnesses cannot say what course the steamship was steering when she ported her helm.

4. The channel was from a half to three-fourths of a mile wide, and the speed of the steamship was from nine to ten miles per hour.

That speed was maintained until she reached the propeller, and she came in line with her by porting the helm.

5. There was no necessity for the steamship to port her helm, and it was one cause of the disaster. When she did it, she was aware of the presence of the Artisan.

6. If the steamship had kept her course without porting, the vessels would have passed.

7. The propeller did all that she could to avoid the disaster, and escaped. The tow was comparatively helpless, and suffered. She was struck on the starboard side, about thirty feet from her stern, in a diagonal line inclining thereto, her whole length being about eighty feet. A touch of the wheel of the steamship to starboard would have cleared the barge.

Points of Law relied on by Libellants.

1. The Artisan and her tow were not on an equality with the Keystone State, and the rules, whether statutory or judicial, applicable to vessels on an equality with respect to capacity of self-management, are not applicable to the former.

The act of Congress of August 30, 1852, (10 Stat. at Large, 61—72,) applies only to passenger steamers.

See section 42.

So, also, the rules of the inspectors, under the authority of the 29th section, in the matter of vessels passing each other, signal lights, &c., embrace only the same class of steamboats, and are intended to avoid collisions between such vessels.

Those rules were, however, obligatory on the Keystone State. The fifth rule of the Supervising Inspectors, adopted October 29, 1852, provides that it shall not be lawful for an ascending boat to cross a channel when a descending boat is so near that it would be possible for a collision to ensue therefrom.

This rule was violated by the steamer.

Although not bound by the statute, the propeller did adopt the dictates of prudence and good seamanship, by keeping in to the Jersey side of the channel, and leaving the centre of it free.

A tug with a tow in charge is at least as helpless, in comparison with a steamer, as a sailing vessel; and with respect to the latter, the rule is well settled, that the steamer meeting such a one must give way.

Fashion *v.* Wards, 6 McLean, 153.

New York and Liverpool Mail Steamship Co. *v.* Rumball, 21 Howard, 372.

The Oregon *v.* Rocca et al., 18 Howard, 570.

St. John *v.* Paine et al., 10 Howard, 583.

The Genesee Chief, 12 Howard, 451.

There is nothing in our case to make it an exceptional one, or subject it to other rules of navigation.

The Keystone State could have avoided the collision, by either of two very simple modes. She could have stopped her engines in time, or she could have put her helm to starboard, having the channel to her larboard free; and by the law of 1852, and the decisions of this court, she was bound to avoid the collision if possible.

2. It being night, and the steamer approaching the harbor,

it was her duty to proceed slowly and with caution. Not having done so, she is responsible for the consequences.

Culbertson *v.* Shaw, 18 Howard, 584.

Steamer Louisiana *v.* Fisher et al., 21 Howard, 1.

Peck *v.* Sanderson, 17 Howard, 178.

The James Watt, 2 W. Rob., 271.

The Birkenhead, 3 W. Rob., 75.

Steamboat New York *v.* Rea, 18 Howard, 228.

3. Even if the libellants committed any fault, (which is, however, denied,) a small exertion on the part of the respondents being sufficient to have prevented a collision, they were bound to make it.

The Genesee Chief, 12 Howard, 461; (*ut supra.*)

St. John *v.* Paine, 10 Howard, 557.

Newton *v.* Stebbins, 10 Howard, 586.

4. If both vessels were in fault, it was an error to throw the whole loss on the libellants; the damages should have been divided.

Brig James Gray *v.* John Frazer, 21 Howard, 184.

Schooner Catharine et al. *v.* Dickinson et al., 17 Howard, 170.

Chamberlain *v.* Ward, 21 Howard, 548.

The barge (the tow) followed the course of the Artisan, (the tug,) and obeyed her movements. She was entirely under her control. There is no evidence of any fault imputable to the barge; her being, therefore, the thing which actually came into collision with the steamer, makes no difference.

The James Gray, (*ut supra*,) 21 Howard, 194.

The question arises from the relative condition and action of the Artisan and the Keystone State.

Points of Fact averred by Appellees.

1. Independently of all regulations, and of the rules of the maritime law, the usage of the river requires that approaching steamers shall port their helms and keep to the right in passing.

2. The vessels, steamer and propeller, with her tow, were, when first seen by each other, in or near the middle of the

ship channel, and the channel was of the width of three-quarters of a mile. The river, from shore to shore, was wholly unobstructed, and no reason of any character is suggested which should have caused a deviation, on the part of the propeller, from the law and usage which required the steamers to port their helms, and pass larboard to larboard.

3. The propeller, from the time the lights were first discovered, was duly reported by the lookout, and, for the distance of two or three miles, was kept constantly and attentively in view by the pilot of the steamship. The helm of the steamship was ported and the lights of the propeller kept a point or a point and a half on the larboard bow; when in close proximity, a wrongful change of direction on the part of those having charge of the propeller, by starboarding her helm, instead of porting it as they should have done, ran her across the bows of the steamer, and caused the collision of the barge with the steamship.

4. Those on board the propeller appear to have had no lookout; utterly disregarded the lights of the steamer, which clearly indicated her direction; made no change of course of any kind until the collision was imminent, and then the wrongful movement above referred to.

5. The pilot of the steamship, on perceiving this wrongful movement, which brought both vessels in peril, ordered the helm hard a-port, and the steamship to be slowed and stopped, which orders were instantly complied with, and the steamship was almost, if not entirely, at rest at the time of the collision.

The effect of these orders, which were prudent and necessary, was to enable the propeller to go clear; but she, being still under full headway, brought the barge in contact with the steamship.

6. No timely precaution of any kind was used by the propeller to avert the collision.

7. The steamship was proceeding up the river at a lower rate of speed than upon other parts of her voyage, and cautiously, with pilot and lookout.

8. The barge was attached to the propeller by a hawser, drag-

ging behind her in a direct line, at the distance of 180 feet, in such manner that it was impossible for the pilot of the steamship to see the barge until the moment of collision.

9. If the barge had been attached to the propeller's side, or near her, or under her control, the collision would not have occurred, the propeller passing fully clear of the steamer, with a space of fifty feet intervening.

10. If the propeller had ported her helm, as required by law and the usage of the river, or had even slowed her speed, her tow would have cleared the steamship; and the fact that those on the propeller saw the red and white light of the steamer only, clearly exhibited the necessity for such movements; it necessarily follows, that when the bright and red light only are seen, the larboard side of the vessel is in view.

11. When those on board the propeller first saw the steamer, the propeller was above the buoy on the lower end of Marcus Hook. The channel below that point being on the western or Pennsylvania side of the river, gave to the steamship coming up the middle of the channel the appearance of being toward the Pennsylvania side. This may account for the erroneous statement of some of the libellant's witnesses, that the steamer was on the Pennsylvania side, and not in the mid-channel.

Map Coast Survey.

12. The captain of the propeller states that she had the Christine light a little on her starboard bow, but before the collision, and before his wrongful order to starboard, the captain also says: We were near the middle of the river, steaming down. The latter statement must be taken as correct, especially in view of the respondent's evidence. In any event, it would not be inconsistent with the fact that the steamer was in the middle of the channel.

Points of Law relied on by Appellees.

1. The act of Congress of 1852, 10 Statutes at Large, 61—72, and the rules of the supervising inspectors appointed under the same, were applicable to the Keystone State, as a passenger steamer, and to the propeller also, if carrying passengers, as

set forth in the libel, so far as respects lights and movements.

2. The admiralty rules are imperative—they are obligatory upon vessels approaching each other from the time the necessity for precaution begins, and continue so long as they advance.

N. Y. and L. U. S. S. Co. *v.* Rumball, 21 Howard, 383.

3. The rule laid down is, that when two steam vessels are approaching each other, each shall port, and go to the right, passing each other larboard and larboard.

This rule is imperative in English courts of admiralty, and fully adopted by the United States courts.

The Duke of Sussex, 1 Wm. Rob., 285.

The Gazelle, 1 Wm. Rob., 471.

The James Watt, 2 Wm. Rob., 271.

St. John et al. *v* Paine, 10 Howard, 558.

Origin et al. *v* the Rocca, 18 Howard, 572.

Wheeler *v.* the Steamer Eastern State, 2 Curtis, 142.

4. A propeller, whether carrying passengers or engaged and used only for towing, and when having a tow in charge, is still a steamer, subject to all the general rules applicable to steamers; and the rule of law makes no such distinction as would require them to be considered with respect to other steamers as sailing vessels; on the contrary, a steamer with a tow in charge is bound to adopt the same rules with regard to a sailing vessel as a passenger steamer; no distinction is recognised between them.

Steamer New York *v.* Rea, 18 Howard, 223.

They are required also to have a lookout, charged specially with the duty.

Chamberlain *v.* Ward, 21 Howard, 571.

5. It was the duty of the propeller to have a competent and vigilant lookout stationed at the forward part of the steamer, in the position best adapted to descry vessels at the earliest moment, actually and vigilantly employed in the performance of that duty.

St. John *v.* Paine, 10 How., 557.

Chamberlain *v.* Ward, 21 How., 548.

The James Gray *v.* the John Frazer, 21 How., 192.

6. No such condition of things existed at the time and place of the collision as required the speed of the steamer to be reduced more than that stated in the evidence. The distance from the port of Philadelphia was twenty miles, and there were no vessels at anchor, or otherwise to interfere with the full use of the whole channel.

Steamer New York *v.* Rea, 18 Howard, 223.

Culberston *v.* Shaw, 18 Howard, 584.

The James Gray *v.* the John Frazer, 21 Howard, 185.

7. The 5th rule of the supervising inspectors, adopted October 29th, 1852, is cited in appellant's brief as providing, "that it shall not be lawful for an ascending boat to cross a channel when a descending boat is so near that it would be possible for a collision to ensue therefrom." This rule (the appellants aver) was violated by the steamer. The rule cited refers exclusively to boats navigating the "rivers falling into the Gulf of Mexico and its tributaries."

Mr. Justice CLIFFORD delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the eastern district of Pennsylvania, in a cause of collision, civil and maritime.

It was a suit *in rem* against the steamship the Keystone State, brought by the appellants as the owners of the barge known as the A. Groves, jun., to recover damages on account of a collision which took place on the eighteenth day of August, 1857, between the steamer and the barge on the river Delaware, whereby the barge was sunk in the river, and her cargo was greatly damaged.

At the time of the disaster the barge was in tow of a propeller, called the Artisan, which was also owned by the appellants, and to which the barge was attached by a hawser, about one hundred and seventy feet in length. It occurred between one and two o'clock in the morning, about twenty miles below the city of Philadelphia, to which port the steamer was bound on her return trip from Savannah, in the State of Georgia.

According to the case made in the libel, the propeller, with

the barge in tow, was on her way from the city of New York to the city of Baltimore, with her usual complement of freight. She was proceeding down the river, on the eastern side of the channel, and the steamer was coming up the river, on the opposite side of the channel, with ample room to have kept clear of the barge.

To show that neither the propeller nor the barge was in fault, it is alleged by the libellants that both those vessels had proper lights, and that the propeller had sufficient lookouts properly stationed on the vessel, and that they were vigilantly employed in the performance of their duties. They also allege that the steamer, when about three-quarters of a mile distant from the propeller, changed her course more out into the stream of the river, heading diagonally across the channel, in the direction of the descending vessels, and ran with great force and violence against the barge, striking her on the starboard side, near the after gangway, and cutting her down to such an extent that she immediately sunk in the river. In this connection they also allege that the barge, at the time of the collision, was laden with a cargo of merchandise, valued at seventy thousand dollars, and that the goods were damaged by the disaster to an amount equal to half their estimated value.

It is denied by the respondents that the circumstances attending the collision are truly stated in the libel. On the contrary, they aver that it was occasioned wholly through the fault and gross negligence of those in charge of the descending vessels. To lay the foundation for that theory, they allege that while the steamer was proceeding up the river at mid-channel, in the regular course of her voyage, and when about four miles below Marcus Hook, the second mate, pilot, and lookout of the steamer, discovered lights directly ahead, which appeared to be about three miles distant; that the steamer continued her course up the channel, keeping the lights on her larboard bow, but as near ahead as was practicable; that after continuing that course for some time, and when about a mile distant from the lights, they were found to be the lights of the propeller, and appeared to be at mid-channel.

Orders were then given by the pilot of the steamer to port her helm, so as to bring the lights of the propeller a point on the larboard bow of the steamer; and the order was forthwith obeyed. At that time the steamer, as alleged in the answer, was heading northeast by east; and she continued on that course, keeping the lights of the propeller one point on her larboard bow, until she approached within three hundred yards of the lights, when the propeller suddenly starboarded her helm, and attempted to cross the bows of the steamer. On seeing the propeller change her course in that direction, the pilot of the steamer gave the signal to slow and stop in immediate succession, and the orders, as alleged, were promptly obeyed. Those orders were so far carried into effect that the propeller passed on her course without injury; but the barge was dragged by the hawser directly against the bows of the steamer, and thereby received the damage, as alleged in the libel.

Such is the substance of the pleadings, respecting the circumstances attending the collision, so far as it is necessary to examine them at the present time.

After the hearing in the District Court, a decree was entered for the respondents, dismissing the libel; and on appeal to the Circuit Court, that decree was affirmed—whereupon the libellants appealed to this court.

As appears by the proofs, the steamer, at the time of the collision, was well manned and equipped, and was in charge of a branch pilot, fully qualified to conduct and manage steam vessels on that river. She was a side-wheel steamer, of fifteen hundred tons burden, engaged in carrying freight and passengers, and had proper lights and sufficient and vigilant lookouts. They discovered the lights of the propeller when she was three miles distant, and continued to watch the lights till the collision occurred. On the other hand, the propeller was a vessel of one hundred and twenty-two tons burden, and the tonnage of the barge was about the same.

Three men, the master, the wheelsman, and one of the watchmen, were on the deck of the propeller at the time of the collision. All of the other hands, including the pilot, were below. Of those on deck, the master was standing for-

ward of the pilot-house, but the watchman was standing aft the house, which he admits was higher than his head, so that he could not see over it. His position for a lookout was clearly an improper one, as the view forward was entirely obstructed by the house of the vessel. Chamberlain and al. *v.* Ward and al., 21 How., 570. Lookouts stationed in positions where the view forward, or on the side of the vessel to which they are assigned, is obstructed by the lights or any part of the vessel, do not constitute a compliance with the requirement of the law.

To constitute such a compliance, they must be persons of suitable experience, properly stationed on the vessel, and actively and vigilantly employed in the performance of that duty.

In this case, however, it appears that the steamer was actually seen by the master, who was in charge of the deck, in season to have adopted every necessary precaution to have avoided the disaster, but he admits that he did not pay much attention to the approaching vessel. When he first saw her, he says she was proceeding right up the river, but adds, that in the course of five minutes she changed her course, and ran from the western towards the eastern shore, which is the theory set up in the libel. According to the evidence, the speed of the steamer was nine or ten miles an hour, and that of the propeller was seven or eight miles an hour, with an ebb tide. At the place where the collision occurred, the channel of the river is about three-fourths of a mile wide, and the evidence shows that there is a cove or bend in the river below, so that a vessel coming up the river in the night-time would appear to an inattentive or casual observer, standing on the deck of a descending vessel, as being near the western shore, when in point of fact she was at mid-channel. Witnesses on both sides were examined as to the character of the night, and they generally agree, that while it was somewhat cloudy, there were intervening stars, and that it was not unusually dark.

Two propositions were chiefly relied on by the libellants. In the first place it was insisted in their behalf, that the propeller, with the barge in tow, ought to be regarded in the

same light as a sailing vessel, and that it was the duty of the steamer to keep out of the way. No authority was cited in support of the proposition, and we are not aware of any decided case that favors that view of the law. Steamers are required to keep out of the way of sailing vessels, upon the ground that their power and speed are far greater than vessels of the latter class, and because those in charge of them can more readily and effectually command and appropriate that power and speed so as to avoid a collision, when it would be impossible for the sailing vessel to keep out of the way. St. John *v.* Paine, 10 How., 583. The Genesee Chief, 12 How., 463. Steamship Co. *v.* Rumball, 21 How., 384. None of the reasons on which the rule is founded, as applied to sailing vessels, exist in a case like the present. Propellers have nearly the same speed as side-wheel steamers, and quite as much power. Whether they obey the helm as readily or not, may admit of a question, but there is not sufficient difference in that behalf to justify any discrimination whatever in the application of the rules of navigation. If they take other craft in tow, those in charge of them ought to augment their vigilance in proportion to the embarrassments they have to encounter, especially when they do not see fit to slacken their speed.

It is insisted, in the second place, that the collision was occasioned through the fault of the steamer; that she changed her course and attempted to pass the bows of the propeller, as is alleged in the libel.

On the part of the respondents, this proposition of facts is denied, and they insist that the fault was committed by the propeller, in omitting to port her helm and go to the right. Beyond question, the law is well settled that steamers approaching each other from opposite directions are respectively bound to port their helms and pass each other on the larboard side.

No attempt was made at the argument to controvert the proposition, and it is too firmly established by decided cases to require any argument in its support. The Duke of Sussex, 1 Wm. Rob., 285. The Gazelle, 1 Wm. Rob., 471. The James Watt, 2 Wm. Rob., 271. St. John *v.* Paine, 10 How., 558. The Oregon *v.* Rocca, 18 How., 572. Wheeler *v.* the

Eastern State, 2 Cur. C. C., 142. Much testimony was introduced on the one side and the other upon this point, and it is somewhat conflicting. All that can be done under the circumstances with any possible advantage to either party will be to state our conclusions upon the evidence. After a careful examination of the depositions, we think it is clearly proved that both vessels as they approached each other were near mid-channel. Most of the witnesses on board the steamer expressly affirm that she was near mid-channel when the lights of the propeller were first discovered, and they all agree that her helm was not changed, except for the purpose of bringing the lights of the propeller one point on her larboard bow, until the propeller starboarded her helm, and attempted to cross the bows of the steamer. That movement of the propeller was a direct violation of the rules of navigation, and was entirely without any excuse. Her master may have been deceived as to the course of the steamer, by the slight bend in the river; but if so, it is the misfortune of those who employed him that he was not better acquainted with the navigation, or more attentive to his duty.

The decree of the Circuit Court is therefore affirmed with costs.

MARY FORT ADAMS, ADMINISTRATRIX OF JOHN HAGAN, JUN., DECEASED, APPELLANT, *v.* JOHN S. PRESTON AND CAROLINE M. PRESTON HIS WIFE.

This court has never reviewed the judgment of an inferior court of a State, where there was an appeal to the Supreme Court of the State, upon a subject within the jurisdiction of such court, upon the allegation that its proceedings were irregular or illegal, and contrary to the law of the State.

The present is such a case.

The Parish Court of New Orleans had exclusive jurisdiction over property ceded by insolvents, and the courts of the United States have no jurisdiction over such insolvencies.

An allegation of fraud in a bill filed to review such proceedings in insolvency, which was afterwards abandoned, is not sufficient to give to the Circuit Court jurisdiction to review the proceedings of the State court.

Moreover, the complainant has no equitable claim to relief, his assignors having no mortgage lien on the property, when the judgments were assigned to the complainant.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Louisiana.

The facts in the case were complicated, and not to be understood by a brief narrative. The reader is therefore referred to the opinion of the court, in which they are historically related.

It was argued by *Mr. Taylor* for the appellant, who also adopted a brief filed by *Mr. Steele*, and by *Mr. Benjamin* for the appellees.

Mr. Taylor made the following points:

I. A mortgage in the State of Louisiana, when duly inscribed in the register of mortgages, in the parish where the debtor has his domicil, will affect or bind the slaves of the debtor, no matter in what part of the State such slaves may be employed.

C. C., 453, 454, 458, 461, 3246, 3247, 3248, 3250, 3216, 3238.

C. M. Hyams *v.* McH. Smith, 6 An., 363.

Patin *v.* Creditors, 9 L. R., 71.

Hooper *v.* the Union Bank of La. et al., 10 R. R., 63; 11 R. R., 20.

Cumming *v.* Bionalt, Curator, et al., 2 An., 794.

Crouch *v.* Lockett, 3 An., 121.

Bibb et al. *v.* Union Bank, 3 An., 324.

Spencer *v.* Amis, 12 An., 127.

Voorhies *v.* De Blanc, 12 An., 864.

II. No mortgage of any kind existed in favor of the heirs of Hampton upon the slaves, which are the object of the present action, on the 2d day of February, 1841, when they filed their intervention in the suit then depending in the Parish Court of New Orleans, wherein the syndics of the creditors of Thomas Barrett were plaintiffs, and Robert Bell was defendant, or at any time thereafter, nor did any privilege exist on them in favor of the heirs of Hampton; and these slaves were then affected by and subject to the judicial mortgages resulting from the judgments duly recorded against Thomas Barrett in the parish of New Orleans, where he had his domicil.

C. C., 3333.

Transcript, 104 to 108.

C. C., 2216, 3246, 3247, 3248, 3250, 3238, 3289, 3317, 3318, 3290.

III. The proceedings had in the case of the Syndics of the Creditors of Thomas Barrett against Robert Bell, in the Parish Court of New Orleans, upon the intervention of the heirs of Hampton, filed therein, were and are, so far as to the mortgage rights of the Union Bank on the property of the insolvent Barrett, *res inter alios acta*, and can have, in law or equity, no effect in sheltering the slaves in question from pursuit, when the object is to subject them to the operation of the judicial mortgages which existed in favor of that bank, at the time of making such intervention. Neither was there anything in the proceedings in the case of Thomas Barrett *v.* his Creditors which could have had any such effect.

Bullard and Curry's Dig., 479, and seq., secs. 44, 10, 11, 12, 44, 45, 46, 15, 16, 31, 35.

Brown *v.* Kenner, 3 M. R., 278.

Saul *v.* Creditors, 7 N. S., 425.

Rivers *v.* Hemstack, 2 R. R., 187.

Egerton *v.* Creditors, 2 R. R., 201.

Corion *v.* Millaudon, 3 An., 664.

Gravin *v.* Lafon, 7 N. S., 613.

Pandelly *v.* Creditors, 9 L. R., 387.

Morgan *v.* Syndics, 4 L. R., 174.

Morgan, Dorsey, & Co. *v.* their Creditors, 19 L. R., 84.

Suc. of A. Petayvin, 10 R. R., 118; 1 An., 92.

C. C., 1169, 1170.

Robert *v.* Creditors, 2 An., 535.

Lee *v.* Creditors, 2 An., 994.

West *v.* Creditors, 3 An., 532.

Williams *v.* Nicholson, 5 An., 720.

Mr. Benjamin made the following points:

I. The bill must be dismissed, for want of proper parties. This objection was taken in the court below, and is insurmountable.

The bill prays to annul a judgment rendered in a suit between the syndics of Thomas Barrett and Robert Bell, and the heirs of Wade Hampton intervening; yet neither of the original parties to that suit is before the court, and only one out of the three intervening parties.

It seeks to set aside a sale made by Barrett's syndic and Robert Bell to the three heirs of Wade Hampton; yet none of the vendors are before the court, and only one of three purchasers is made party.

The bill attempts to excuse the want of parties that it admits to be necessary, by averring them to be beyond the jurisdiction of the court.

This excuse cannot avail.

Shields *v.* Barron, 17 Howard, 130.

Corion *v.* Millaudon, 19 Howard, 113.

II. The Parish Court of New Orleans was vested by law with full power over all the property ceded by the insolvent, and over the respective claims of the creditors. This jurisdiction has been exercised, and the regularity of the proceedings and legality of the action of that court cannot be reviewed in this court, which has no jurisdiction over the settlement of insolvencies in the State courts.

Any error or illegality in the proceedings of the Parish Court should have been corrected by appeal to the Supreme Court of Louisiana.

Tarver *v.* Tarver, 9 Peters, 174.

Gaines *v.* Chew et al., 2 How., 619, 644.

Fonvergne et al. *v.* City of New Orleans, 18 How., 471.

That the law of Louisiana vested in the Parish Court full and exclusive jurisdiction over the property surrendered, and the distribution of its proceeds amongst the creditors, is too clear to admit of dispute.

Insolvent Law of Louisiana, 1817.

Insolvent Law of Louisiana, 13th March, 1837.

Act of Louisiana Legislature, 1826.

All the property previously owned by the insolvent becomes vested in the creditors, represented by the syndic as their trustee.

Schroeder *v.* Nicholson, 2 L. R., 354.

Morgan *v.* Creditors, 7 L. R., 62.

Dwight *v.* Simon, 4 An., 492.

And all creditors who are parties to the insolvent proceedings are absolutely prohibited from seeking remedies in any other court, even of the State of Louisiana, than that in which the insolvency is pending.

Jacobs *v.* Bogart, 7 Rob. Rep., 162.

Marsh *v.* Marsh, 9 Rob. Rep., 46.

Tyler et al. *v.* Cred's, 9 Rob. Rep., 373.

And not only is this so, but previously-existing suits in other courts are all required by law to be transferred to the court having jurisdiction of the insolvency, and to be there cumulated with the insolvent proceedings.

Code of Practice, art. 165, sec. 3.

III. If, however, it be pretended that the Circuit Court had jurisdiction of the complainant's demand, on the ground of the frauds charged in the bill, the answer is, that those frauds are denied in the answer, and not one scintilla of proof has been offered in support of them.

The allegation that it was a fraud to claim a mortgage, because, in complainant's opinion, the effect of the mortgage had expired by lapse of time, without renewal of registry, is not worthy of serious refutation.

No attempt was made to prove any of the fraudulent combinations charged in the bill, and indignantly denied by the answer.

Indeed, the charge of fraud appears to be entirely abandoned, as not a word is said to support it in the elaborate brief filed by the counsel for appellant in this court.

IV. Should it be decided by the court that the foregoing points are not sustainable, and that the merits of the controversy between the parties are open for examination, then it is contended, in behalf of appellees:

1. That complainant has no such mortgage rights as are alleged by him, because these mortgages were cancelled many years before he acquired the judgments assigned to him.

These mortgages were cancelled by consent of complainant's assignor.

Independently of this consent, they were cancelled by the syndics by virtue of power vested in them by law, and this was done on the 2d June, 1841.

Act of 1817, sec. 31.

It is true that this act directs the proceeds of the property to be kept subject to the same rights in favor of mortgagees as they had on the property itself; but this mandate of the law, as to what is to be done with the proceeds of sale after the mortgage has been cancelled, cannot affect the legality of the erasure and cancellation ordered before the sale "in order to effect it."

These mortgages claimed by complainant were also ordered to be erased and cancelled by judgment of the court, rendered contradictorily with the Union Bank more than four years before the transfer by the bank to the complainant.

It is true that this last fact is not averred in the answer, and was not made a question by the pleadings, but it was proven by the record evidence introduced by complainant himself at the trial, and is conclusive against him.

The complainant seems to think that because the law provides that mortgages cease to have effect after a lapse of ten years from the registry, unless the registry be renewed, it is therefore in the power of a mortgagee to revive a mortgage legally cancelled and erased by the *ex parte* act of reinscribing it on the books of the mortgage office. No argument can be needed on such a pretension. If, however, the position of the complainant is misapprehended by us, we seek in vain for any other basis of his assertion in the bill, that he still holds the mortgages erased before his purchase of the judgments.

Observe, in the transfer from the bank to Hagan, the bank does not profess to sell any mortgage claims; does not pretend that there then, in 1849, existed any inscription of the judgments, but simply transfers its claims without any warranty. The idea on which this suit was brought is plainly an afterthought, and the suit itself purely a speculation in litigation.

Again: The appearance and action of the bank in the *concurso* or meeting of creditors, and fixing the terms of sale of the property, was a legal waiver of any right to follow the

property, and an agreement to look alone to the proceeds in the hands of their agents, the syndics.

Egerton *v.* Creditors, 2 Rob., 201.

Saul *v.* Creditors, 7 N. S., 446, 447.

Finally, the sale of the property by order of court in the partition suit extinguished the mortgages, and left the parties entitled to them no other recourse than to claim the proceeds of the sale. The law is the same in probate and insolvent sales.

Fabre *v.* Hepp, 7 Annual, 5.

Gilmore *v.* Menard, 9 Annual, 212.

Williamson *v.* Creditors, 5 Martin, 620.

Kohn, Syndic, *v.* Marsh, 3 Rob. R., 48.

2. That the rights of the Union Bank, as judgment creditors, were finally settled in the Parish Court; and that the judgments therein rendered for the application of the proceeds of the sale to the payment of Hampton's heirs, and the judgments finally homologating the accounts of the syndics, are final and conclusive adjudications of the subject matter of this suit, and form *res judicata* against complainant.

Morgan *v.* Creditors, 4 La. R., 174.

Ory *v.* Creditors, 12 La. R., 121.

Lang *v.* Creditors, 14 La. R., 237.

Smith *v.* De Lallande, 1 Rob. R., 384.

Egerton *v.* Creditors, 2 Rob. R., 201.

Corion *v.* Millaudon, 3 Annual R., 664.

And it makes no difference that the price was not actually paid to the syndics, but retained by Hampton's heirs in satisfaction of their claim, as this was their legal right.

Goodale *v.* Creditors, 8 La. R., 302.

Rodriguez *v.* Dubertrand, 1 Rob. R., 535.

Robert *v.* Creditors, 2 Annual, 535.

3. That complainant's claim is barred by prescription. It is important to remark that the complainant does not allege any recent discovery of the frauds charged in the bill, nor ignorance of the alleged frauds at a date immediately after they were committed, nor any difficulty in discovering them as soon as committed, if due diligence had been used.

Under these circumstances, the suit to annul the judgments and decrees of the Parish Court is barred by the lapse of one year.

Louisiana Code of Practice, 607, 613.

And the mere lapse of time, long acquiescence, and laches of the complainant and assignors, from the sale in 1841 till the filing of the bill, in 1853, coupled with the fact that the complainant is a mere assignee of a right to file a bill in equity for fraud, form a sufficient ground for the dismissal of the bill.

2 Story's Eq. Juris., sec. 1520, and authorities there cited.

Prosser *v.* Edmonds, 1 Younge and Coll., 481.

Ward *v.* Van Bottelen, 2 Paige Ch. R., 289.

Warsham and al. *v.* Brown, 4 Georgia R., 284.

The complainant's right to enforce his mortgage, even if it were valid, is prescribed by the lapse of ten years.

C. C., 3495, 3374, sec. 6; 3508, 3444.

Lawrason *v.* Minturn, 11 L. R., 256.

4. That the original inscriptions of the mortgages claimed by Hampton's heirs were valid, and that the registry of the sale from Leroy Pope to Barrett created a privilege in their favor, and operated as a valid reinscription of the original mortgages.

C. C., 3315, 3316.

Mallard & Armistead *v.* Carpenter, 6 Annual R., 397.

Sauvinet *v.* Landreaux, 1 Annual R., 220.

Ells *v.* Simms, 2 Annual R., 251.

Bonaffe *v.* Lane, 5 Annual R., 227.

5. And that the heirs of Hampton were legally and rightfully recognised as entitled to the privilege accorded by law to partnership creditors in the partnership assets.

C. C., 2806, 2794.

Mr. Justice WAYNE delivered the opinion of the court.

We have given our best consideration to this record, in connection with the minute statement made from it by the counsel of the complainant, without having been able to find any cause for the reversal of the judgment.

The plaintiff sued the defendants, John S. Preston and

Caroline M. Preston his wife, as the joint possessors of one hundred and thirteen negroes, and their increase, to subject them, and the revenues which had been derived from their labor, to the payment of certain judgments which the plaintiff says he owns, as the assignee of the Union Bank of Louisiana.

Those judgments had been obtained by that bank against Thomas Barrett, a resident of the city of New Orleans. He alleges that Barrett was the owner of the slaves when the judgments were obtained, and that, by reason of that fact, and the bank's assignment to him, he had a judicial mortgage upon them, their increase and revenues, to pay the judgments.

The suit was brought in the third District Court of New Orleans, when the defendants were sojourners there; and being cited to answer, they appeared. Being citizens of the State of South Carolina, they removed the cause to the United States Circuit Court for the eastern district of Louisiana, in which it was filed on the chancery side of the docket. There the defendants filed a dilatory exception, in bar of the action against them; which being overruled, they were required to answer. And they did so.

They neither admit nor deny the original validity of the judgments against Barrett, nor the assignment of them to the plaintiff; and they admit that the one hundred and thirteen slaves had belonged to Barrett; but giving at the same time their narrative of the manner in which Barrett had acquired title to them, and the judicial proceedings under which they bought the property. They state, in their answer, that Wade Hampton, of South Carolina, being the owner of Whitehall plantation, in the parish of St. James, in Louisiana, sold it on the 8th April, 1829, to Leroy Pope, for $100,000, payable in twenty years from the first day of January, 1830, with interest at six per cent. per annum, payable annually. That the seller took from Pope a mortgage on the plantation, and also an obligation that he would add to the plantation seventy working hands, and mortgage them to Hampton, with their increase, to secure the payment of Pope's purchase and interest. Pope, on the 23d of February following, complied with his obligation, by mortgaging seventy working hands and thirty-

one children to Hampton. He was then a resident of the parish of St. James.

Pope, two years afterwards, on the 18th March, 1833, sold the plantation and slaves to Thomas Barrett, of New Orleans, for $151,034. In payment, Barrett assumed to pay the debt of $100,000, and the accruing interest annually, to Hampton, and received the property, subject to the rights of Hampton upon the plantation and slaves. Two days afterwards, Barrett conveyed one-half of his purchase to Robert Bell, with an agreement that Bell's interest should be considered as having attached from the day of Barrett's purchase. Barrett failed to pay the interest; and Hampton being dead, his heirs brought suits for it, and these judgments were obtained against him in January, 1838, March, 1839, and April, 1839. The judgments were recorded in New Orleans, where Barrett lived; but the mortgages and conveyances given to Hampton, and his conveyance of the plantation, were recorded, when they were executed, in the parish of St. James, where the slaves were, and where Pope and Bell both lived.

Barrett became embarrassed, and applied for the benefit of the insolvent laws of Louisiana, on the 12th May, 1840. In the schedule of property surrendered to his creditors is found an item of Whitehall plantation and one hundred and fifty slaves, valued at $210,000, subject to the bond for $100,000, and the interest due thereon.

A meeting of Barrett's creditors was held on the 15th June, 1840. Syndics were elected by them, with general discretionary powers, *particularly with the power to sue for the partition of any property whatsoever held and owned by the insolvent jointly with others, and to claim partition in kind or by sale;* also, to appoint agents for the disposal of property out of New Orleans. Amongst the creditors at this meeting who elected the syndics was the Bank of Louisiana, by its representative, its president. In October, after this meeting of the creditors, the heirs of Hampton intervened in the insolvent proceedings, claimed their rights under the mortgages upon Whitehall and upon the negroes; and they took a rule upon Magoffin and Morgan, the syndics of the creditors, to show cause why the

plantation and negroes should not be sold, and the proceeds applied to the payment of their claim. The rule was made absolute, by a judgment recognising their right as mortgagees, and ordering a sale of the property.

At a subsequent meeting of the creditors, at which the Union Bank of Louisiana was again represented by its president, the creditors gave to the syndics a power to raise all mortgages recorded against the insolvent on any estate owned by him alone, or jointly with other persons, which had been surrendered to his creditors, *with authority* to make partition of the same with the co-proprietors, either amicably or judicially.

Upon the petition of the syndics to the judge of the Parish Court of New Orleans, that act of the creditors was homologated, and the syndics were authorized by the court to do all which it empowered them to perform, by the votes of the creditors who appeared or who were represented at the meeting.

In conformity with such powers, the syndics instituted a suit, alleging that Whitehall plantation and slaves had been purchased for the joint account of Barrett & Bell, and that an action of partition was necessary, to enable them to liquidate that special partnership. They also asked that the proceeds of the crop made on the plantation might be deposited in bank, subject to the order of the court; that an inventory and appraisement of the property should be made, and returned into court; and that such proceedings might be had as would lead to a prompt and final settlement of the partnership.

Bell united in this petition, and declared himself to be a creditor of the partnership; prayed for a settlement of its affairs, and for the allowance in his favor of a lien on the partnership property, for such sum as might be found due to him.

The heirs of Hampton intervened in this partition suit, stating their claims upon the property as mortgage creditors; and insisted that the property should be sold, subject to the assumptions, by whoever might become at the sale vendee, for the payment of their claim, principal and interest.

On the 6th of February, 1841, the court gave a judgment, sustaining the claims of Hampton's heirs, and directing the sale of the property, with the condition, "that the vendees should assume the payment to Mary Hampton, John S. Preston and wife, and John L. Manning and wife, of $100,000, payable on the 1st of January, 1856, with six per cent. interest from the 1st of January, 1841; and, further, that it should be taken as a term and condition of the sale, that the purchaser should specially mortgage and keep mortgaged the plantation to the intervenors, and the eighty-one slaves described in the inventory, to them and their heirs and assigns."

The property was advertised and sold by the sheriff, pursuant to this judgment; was bought by the heirs of Hampton for $116,000; was paid for by surrendering to the sheriff the bond of Leroy Pope for $100,000, and by applying arrears of interest due on that bond to the payment of $16,000. An account was filed a few days afterwards, by the heirs of Hampton, of the whole amount due them, and after giving credit for the $116,000, and there was still remaining due $11,248.11½.

A rule was then taken on both the plaintiff and defendants, by the heirs of Hampton, for them to show cause why the account should not be approved, and their demand against the partnership of Barrett & Bell be liquidated, at the sum of $11,248.11½; and why the same should not be paid out of any money belonging to the partnership.

Upon the rule a judgment was rendered on the 23d April, 1844, according to its purport, declaring that, after having credited the account with $116,000, there was still due to the heirs of Hampton, by the partnership of Barrett & Bell, the sum of $11,248.11½, and a judgment was passed in their favor for that sum, against Mrs. Caroline Bell, the heir of Robert Bell, and J. B. Hullen, who had been elected the syndic of the creditors in the place of Magoffin and Morgan. A representative of the Union Bank was present, and voting for Hullen.

A final judgment was afterwards rendered, settling all matters in dispute between the parties to the suit. The proceeds

of the crop were appropriated to the payment of legal charges; and, that being insufficient for that purpose, the heirs of Hampton were required to pay $2,020.51, in satisfaction of them—it being declared that the legal charges were higher in rank than their privilege upon the copartnership fund. The heirs paid the amount, and that was a final settlement of all the matters in controversy between plaintiff, defendants, and intervenors.

Contemporary with the proceedings in the partition suit, the matters connected with Barrett's insolvency were concluded in the same court.

Among other acts done by the syndics, Magoffin and Morgan, was their petition to the Parish Court of New Orleans to be discharged from their office of syndics in the insolvency of Thomas Barrett and Thomas Barrett & Co. They annexed to their petition an account of the collections and disbursements which had been made by them since their last account had been filed. They showed that they were, as syndics, parties to a number of suits, which were still pending; refer particularly to the partition suit instituted by them, and still pending, against Robert Bell, as the partner of Barrett; pray that the creditors of the insolvent may be ordered to meet to elect other syndics, on account of their not being able to act longer in that capacity, as their private affairs compelled them to leave the State of Louisiana.

The court gave an order upon this petition, that the parties interested show cause, within ten days from the publication of the order, why the accounts of the syndics should not be homologated, why the funds stated by the syndics should not be distributed in accordance therewith, and why the syndics should not be discharged. And it further ordered, that a meeting of the creditors should be held on Wednesday, the 9th May, to elect another syndic in place of Magoffin and Morgan.

Such a meeting was held. James B. Hullen was elected by the creditors sole syndic, with all the powers which had been conferred by the creditors at former meetings upon Magoffin and Morgan. They were then discharged by the court from their functions as syndics, upon their paying the bal-

ances in their hands to the parties entitled thereto, reserving to themselves, however, whatever claim they might have on the sale of the Whitehall plantation; and James B. Hullen was confirmed as sole syndic of Barrett and Thomas Barrett & Co. This order was given by the court on the 20th May, 1842.

Seven days after the meeting of the creditors had been held, pursuant to the order of the court, Christopher Adams, jun., president of the Union Bank, filed a paper in the court, acknowledging himself to be fully cognizant of all the proceedings of the meeting; that he was present at it; that the bank was a creditor; that Hullen had been unanimously elected by the creditors sole syndic, in place of the former syndics, on the same terms and conditions that they had been, with the same powers which the creditors had conferred upon the former syndics. And further shows, that at the meeting on the 9th May, 1842, he had voted for the dispensation of Hullen from giving the security required by law to be given by syndics.

This narrative discloses the connection of the Hamptons with the proceedings of the syndics, and in the partnership suit which they had brought against Bell to settle his claim as a partner in the purchase of the Whitehall plantation and slaves. Thus matters remained for nine years, no one supposing that there was any irregularity in the judicial proceedings under which the heirs of Hampton had bought the property, the bank all the time acquiescing in the result. Indeed, nothing was done without the knowledge of the bank; everything that was done was with its approbation. The record shows that every step taken by the syndics for the settlement of Barrett's insolvency was in conformity with the powers which the creditors had given to them. But nine years after the final and conclusive settlement of the whole matter in controversy, the president and directors of the bank assigned to the plaintiff in this suit five judgments, which the bank had obtained against Thomas Barrett in 1838 and 1839. Upon this assignment it is that the plaintiff now claims that these judgments were a mortgage upon the Whitehall plantation and slaves. He

alleges that all the proceedings in the Parish Court of the parish and city of New Orleans, in the matter of the insolvency, were irregular; that the disposition of property surrendered by Barrett for his creditors, and the creditors of Thomas Barrett & Co., "were irregular, insufficient, null, and void," and had been procured by fraudulent combination between the heirs of Hampton with Bell, and with the syndics of the creditors, for the purpose of defrauding the Union Bank particularly. He also alleges that the Union Bank has not been a party to the suit of the syndics, and that neither the bank nor himself are in any way bound by its proceedings. And the fraud with which he charges the defendants is, that they claimed as creditors of Barrett, under the mortgage which Leroy Pope had made to their ancestor, Hampton, when the plantation was bought from him, and which Barrett assumed to pay when he purchased from Pope, well knowing at the time that the efficacy of the inscription of the mortgages upon both plantation and slaves had expired, according to law, without any renewal of the registry of them. The defendants deny, in their answer, the fraud charged, or fraud of any kind, in their intervention in the proceedings in insolvency. No attempt was made to prove it; consequently, the plaintiff's whole case depends upon his assertion that there are irregularities in the suit, and in the rendition of a judgment, and under which the heirs of Hampton purchased the property at sheriff's sale, which made that judgment a nullity. The plaintiff is the assignee of the Union Bank, and the argument in support of his claim as assignee is, that he is entitled to a judgment, subjecting the property to the payment of the judgments which the bank had obtained against Barrett, unless the mortgages of the bank were extinguished by the sale made by the sheriff to the heirs of Hampton, and unless the settlement between the syndics, Robert Bell, and the heirs of Hampton, upon the judgments rendered in the cases of the syndics and Bell, are *res judicata.*

These positions are in themselves an abandonment of the charge of fraud, originally made, and for no other purpose than to give to the Circuit Court jurisdiction of the case

against the defendants, and without which the court could not have taken jurisdiction. With what propriety, then, can this court now be called upon to review a judgment of the Parish Court of New Orleans for any irregularity or illegality in the proceedings of that court, if either existed, when there could have been an appeal to the Supreme Court of Louisiana for its correction? This court has never done so in any case in which the subject matter of a suit, being within the jurisdiction of a State court, upon the allegation that its judgment had been given contrary to the law of a State. See the cases of Fonvergne et al. *v.* City of N. O., 18 Howard, 471; Gaines *v.* Chew et al., 2 Howard, 619, 644; and Tarver *v.* Tarver, 9 Peters, 174. The Parish Court of New Orleans had, by law, full power over all the property ceded by the insolvent, and over the claims of each of the creditors. It exercised its jurisdiction, and the legality of its judgment cannot be questioned by this court. Besides, the courts of the United States have no jurisdiction over the settlement of insolvencies in the State courts. The Parish Court had not only jurisdiction, but exclusive jurisdiction, over the property surrendered, and the distribution of it among the creditors of the insolvent. By the laws of Louisiana, the property surrendered becomes vested in the creditors, represented by the syndics as their trustee. Schroeder *v.* Nicholson, 2 Lou. R., 354; Morgan *v.* Creditors, 7 Lou. R., 62; Dwight *v.* Linn., 4 An., 492. And the creditors of an insolvent who become parties to the insolvent proceedings are prohibited from seeking remedies in any other court of the State of Louisiana. Jacobs *v.* Bogart, 7 Rob. Rep., 162; Marsh *v.* Marsh, 9 Rob. Rep., 46; Tyler et al. *v.* Creditors, 9 Robinson. It is also declared, in the Civil Code, (art. 165, sec. 3,) "that, in all matters relative to failures, all suits already commenced, or which may be subsequently instituted against the debtor, must be carried before the court in which the failure has been declared;" and "where a party claims from the syndics goods which had been surrendered by an insolvent, the suit may be brought before the court where the *concurso* is pending." 2 Robinson, 348.

The want of jurisdiction, then, in the courts of the United States, to review the proceedings of the Parish Court of New Orleans, in a case of insolvency, is, of itself, sufficient to prevent the court from giving to the plaintiff a decree in this suit.

There are, however, other grounds sufficient, to be found in the record, from which we have concluded that the plaintiff has neither an equitable claim against the defendants in this proceeding, nor any right, under the law of Louisiana, to subject the property in controversy to the judgments of which he is the assignee. But we shall confine ourselves to the discussion of one of them.

The judgments of the Union Bank, if they ever had at any time mortgage rights against the Whitehall plantation, and the slaves upon it, better than the mortgages given by Leroy Pope at the time of his purchase, and which were assumed by Barrett when he bought the property, and which were equally obligatory upon Bell, when himself and Barrett formed their particular partnership in respect to that property, those judgments had been legally cancelled before they were assigned to the plaintiff by the bank. It will be found, at pages 20 and 21 of the record, that the assignor of the plaintiff united with the other creditors in giving to the syndics the power to raise all mortgages granted by or recorded by Thomas Barrett, or Thomas Barrett & Co., on any real estate owned by Barrett, jointly with other persons, and surrendered by him to his creditors, with power also to effect partitions of the said property with his co-proprietors, either amicably or judicially, &c., &c.

The creditors, too, authorized the syndics, or either of them, to vote, deliberate, and give their opinion for them, at any subsequent meeting of the creditors of Barrett, or Thomas Barrett & Co. And the powers so given to the syndics were homologated by the judge of the Parish Court of New Orleans. Under such a power, the syndics might have erased the judicial mortgages of the bank in the fair and bona fide discharge of their relation to the creditors as their trustees, and the bank would have been bound by their action. But

they proceeded, according to law, to have the judicial mortgages of the bank cancelled; and they were cancelled on the 1st of February, 1841. This cancellation was made by the syndics, in conformity with the thirty-second section of the act of February, 1817, entitled, "An act relative to the voluntary surrender of property, and to the mode of proceeding, as well for the direction as for the disposal of debtors' estates," &c., &c. The erasure and cancellation of mortgages may be made in Louisiana, by consent or by order of the court. Articles 3335, 3336. In this instance, the erasure was made by the judgment of a court of competent jurisdiction; when by the latter, it has the effect of a *res judicata*. 7 Rob., 382, 518; 11 Rob., 171. After the erasure so made, there can be no subsequent reinscription of a mortgage. That which was made in 1848 revived no lien upon the property which the bank's mortgages may have had before they were erased. But there was another erasure of the bank's judicial mortgages in a suit brought by Barrett against it, before its assignment was made of its judgments against Barrett to Hagan, the plaintiff. Rec., 83, 88, 94, 99, 103. It was done by a court having competent jurisdiction, and it concluded the right of the bank to convey its judgments to the plaintiff as judicial mortgages, though they might be transferred as judgments to entitle the assignee to a participation in any unadministered proceeds made from the sale of the property surrendered by the insolvent for his creditors. But neither the reinscription of 1848, nor the assignment to the plaintiff, could have the effect to give to the plaintiff any claim upon property of the insolvent which had been sold under the judgment of a court having jurisdiction in insolvency. The property now claimed by the plaintiff, as subject to his assignment, had been recognised by the judgment of the Parish Court to be subject to the claims of the heirs of Hampton; had been ordered by the court to be sold by the sheriff; had been sold by him, and adjudicated to the purchasers; and the consideration money of the purchase had been accounted for by the sheriff to the syndics of the insolvent, and by them accounted for to the court, in strict accordance with its order, nine years before the bank made an

assignment to Hagan. The sale could not have been in any way subject to the judicial mortgages of the bank, nor could it in any way affect the property purchased by the defendants. Indeed, there can be no doubt that, after the appearance of the bank in the *concurso* of the creditors, and its acquiescence with them in fixing the terms for the sale of the property of the insolvent, it must be taken as a waiver by the bank of all its rights to pursue it for the payment of its judgments against Barrett, the insolvent, and that it would look to the proceeds of its sale, as the other creditors did, for the satisfaction of their respective claims. Egerton *v.* Creditors, 2 Rob., 201; Saul *v.* Creditors, 7 N. S., 446, 447. Without pursuing the discussion further, we have concluded that the bank, when it assigned its judgments to the plaintiff, had no mortgage lien on the Whitehall plantation and slaves to transfer; that the language of the assignment, interpreted by the acknowledged acts of the bank in the insolvency, cannot mean any such transfer, and that the judgment and sale under the partition suit barred the bank from making such an assignment, and the plaintiff from any such claim as he has made in his bill.

We direct the affirmance of the decree of the Circuit Court.

JOHN HOWLAND, SAMUEL MEEKER, JOHN CHADWICK, AND OLIVER S. HALSTEAD, JUN., CLAIMANTS OF THE BARQUE GRIFFIN, HER TACKLE, &C., APPELLANTS, *v.* JOHN GREENWAY AND GEORGE S. DICKSON, LIBELLANTS.

The regulations at the port of Rio Janeiro require the master of a foreign vessel, upon her arrival at the port, to deliver to the proper officer, upon his visit to the vessel, his passport, manifest, and list of passengers. He is also required, at the end of the manifest, to make such declarations or statement for his security, by adding any packages that may be omitted or exceeded in the manifest, giving his reason for such omissions; no excuse will afterwards be admitted for any omissions or error.

The regulations further declare that, when it is proved that the vessel brought more goods than are specified or contained in the manifest, and not declared by the master, such goods will be seized and divided among the seizors, the master also paying into the national treasury a fine of one-half their value, besides the customary duties thereon.

Where the master of a vessel omitted to enter a part of the cargo upon his manifest, and in consequence thereof the boxes were seized and confiscated, the vessel and her owners were responsible to the consignees upon a libel filed in the District Court of New York, where the contract of affreightment was made.

A delivery into the custom-house under the order of the officers, and the payment of duties by the consignees, did not discharge the contract of the owners. The delivery contemplated by the contract was a transfer of the property into the power and possession of the consignees.

The evidence upon the amount of damages is not such as to justify this court in reversing the decree of the court below.

THIS was an appeal from the Circuit Court of the United States for the southern district of New York.

It was a libel filed in the District Court, sitting in admiralty, against the barque Griffin and her owners, by Greenway and Dickson, on a contract of affreightment. The circumstances are stated in the opinion of the court.

The District Court passed the following decree:

This cause having been heard on the exceptions to the commissioner's report, and argued by the advocate for the respective parties—

On reading the report of George F. Betts, Esq., United States commissioner, to whom the above matters were referred, by which there is reported due the libellant, on the bill of lading referred to in the libel, the sum of sixty-nine hundred and eleven dollars and fifty-two cents, on motion of Messrs. Weeks & De Forrest, proctors for the libellants, it is ordered that the report be in all things confirmed, and that the libellants recover in this action against the barque Griffin, her tackle, &c., the amount reported due, with interest thereon from the date of the report, together with their costs to be taxed, and that the said barque, her tackle, &c., be condemned therefor. And on like motion it is further ordered, that out of the proceeds of the stipulations of the claimants for cost and value, when paid into the registry of this court, the clerk of this court pay to the libellants or their proctor the amount reported due, together with their taxed costs. And on like motion of Messrs. Weeks & De Forrest, proctors for the libellants, it is further ordered, that unless an appeal be taken to

this decree, with the time limited and prescribed by the rules and practice of this court, that on payment into the registry of the court of the amount of the stipulations for costs and value, that the clerk distribute the proceeds in satisfaction of this decree.

This decree was affirmed by the Circuit Court, and the owners of the barque appealed to this court.

It was argued by *Mr. Halstead* for the appellants, and by *Mr. Gifford* for the appellees, upon which side there was also a brief filed by *Mr. De Forrest.*

The bill of lading stated that the boxes were to be delivered at the ship's tackles to Greenway & Co., at Rio de Janeiro, or their assigns. Abranches was in Rio, a partner in a commercial house there, who purchased the goods. Being examined as a witness, he said that he knows that the said one hundred and thirty-two boxes did form part of the "Griffin's" cargo, as he, witness, saw them when discharged from the vessel into the custom-house; that said boxes contained furniture, and were addressed to his house, and each package bearing the mark of the firm, M. O. Abranches & Co., and the countermark G. & Co., and were also numbered.

The counsel for the appellants insisted that the testimony shows that the omission of the boxes in the open manifest was observed by Greenway & Co., in time to supply the omission, and avoid all difficulty; and (so far as it may have any bearing upon a view of the whole case) that the same is true in reference to Abranches & Co. The consignees failed to notify the master of the omission. It could then have been supplied by the master, and all difficulty avoided. The supplying it then would be the same in effect as if it had been supplied by the master before delivering the manifests to the custom-house officers. On this open manifest the master could then have supplied the omission. It was on this only that he could have ever before supplied it. The other was sealed. The omission by the consignees, after discovering the error in time to have it corrected, to notify the master of it, was a gross failure of duty as consignees, and is proof of intended fraud.

The boxes were sold by order of the custom-house.

We are nowhere told when and how the omission first came to the knowledge of the custom-house, nor when the goods were seized, nor when they were sold.

They were purchased by Abranches & Co. We are nowhere told how they were sold, whether all in a lump at one bidding, or how; and are nowhere told the amount of Abranches's bid on which they were struck off to him.

The end was, that the consignees refused to pay the master any freight at all collected by them, on any of the cargo; and besides that, have brought this libel to the whole value of the one hundred and thirty-two boxes.

What could more strongly give the character of fraud to the omission of the consignees to notify the master of the omission at the time when it could have been supplied by him?

One other fact in this connection. The consignment to Greenway & Co. was changed.

As to the value of the goods at Rio, the only evidence is, the answer of Magalhaen, the shipping clerk, and the answer of Abranches.

There was a regular invoice of the goods sent to Greenway & Co.; that invoice contained a list of the goods and invoice price.

We submit that this testimony of the value was insufficient. It was, in the nature of things, impossible for us to give any proof whatever of the value. The chairs and furniture were enclosed in boxes; how many boxes contained chairs, and what kind of chairs; and how many contained tables, and what kind; and how many other furniture, and what kind, it was impossible for us to show. The boxes contained 2,613 cubic feet, freight fifteen cents per foot. A space eighteen feet square by eight feet high would contain 2,592 cubic feet, within twenty-one feet of the cubic feet in these boxes. How could chairs and furniture, that could be in these boxes, be worth $5,000 or $6,000? There is no evidence that the chairs and furniture contained in the boxes were worth that. Abranches says the boxes were seized, &c. But in his answer to

the fifteenth interrogatory he says the contents of the boxes were purchased, &c.; and in his answer to the sixteenth interrogatory he says the value of the contents of the cases (boxes) was, &c. And Magalhaen, in his said answer to interrogatory sixteen, "value of the contents of the boxes." The invoice, spoken of by this witness, in his said answer, and by Edward T. Davison, in his deposition, and by Abranches, was not put in evidence.

As to damages. This libel is in a cause of contract; and the libel prays damages for the non-delivery of the goods, near end of libel. The actual damage to the libellants is the measure of damages to be awarded.

If they had bought the boxes at the sale, and then delivered them to Abranches, the only damage they would have sustained would be the amount they bid them off at, and that amount reduced by the amount of freight on the boxes, for they paid no frieght on them.

But they were struck off to Abranches. This fact proves that there was an understanding between them. It is not supposable that Greenway & Co. would permit Abranches to get the boxes at what they might be struck off for at such a kind of sale, and hold them without paying Greenway & Co. the cost of the goods, (if they were bought in New York with the money of Greenway & Co.,) less the amount paid by Abranches at the sale by the custom-house. So that, in either of those cases, the damage to Greenway & Co. would be the amount given to get the goods from the custom-house by buying them at such a sale. Hence, the care taken not to let it appear what the boxes were bought for at the sale.

If the chairs and furniture were bought in New York with the money of the Abranches, the effect would be that Greenway & Co. would lose nothing but commissions.

If the libellants have presented their case in such a way that they cannot recover on the only proper ground on which a recovery can be had, and if they have not given to the court the means of ascertaining what should be recovered on that proper ground, they cannot recover anything.

By the 155th article it is provided, that when it is found

that the vessel brought more goods than is specified or contained in the manifest, and not declared by the captain, such goods will be seized and divided among the seizors, &c. How did it happen that the boxes were not opened by the seizors, to see what was to be divided among them; and that the boxes and contents were sold, without opening the boxes, and sold all to one man, and, as we have a right to say from the testimony, sold at one bidding? It is proof of the fraud, before stated, at the beginning, and of collusion between the consignees and the custom-house officers, and (if it were necessary to say so) proof that Abranches was a party to the collusion.

The court, we trust, will not permit these consignees to make a speculation out of a case such as the testimony shows this to be, and where no fraud could have been intended, the boxes and every article of cargo being actually delivered into the custom-house.

Again, the charge in the libel, that the said boxes or goods were confiscated by the Brazilian Government to its use, is wholly unsustained. There is no evidence that they were subject to such confiscation, and if they were so subject, there is no proper evidence of any act of confiscation by the said Government.

The laws of the port of Rio do not authorize the seizure of goods after they have been discharged into the custom-house for omission of entry in the manifest.

The goods were bought by Leland & Davison, of New York, for account of Abranches & Co., and were marked to Abranches & Co., and the duties were to be paid by Abranches & Co., as is shown by their actually paying a portion of the duties, and they got the goods by paying what they were struck off to them for. That amount, less the freight and duties, (for he says, in the answer to the same interrogatory, that the duties which had been paid were afterwards returned, and it is clear that no freight was paid,) would be all the damage they could have suffered.

In this view, we submit that Abranches & Co. were the persons to bring an action, and not Greenway & Co.

The counsel for the appellees made his points partly dependent upon the law, and partly upon the facts, as they are taken from the brief of *Mr. De Forrest.*

I. The ship was bound by the bill of lading to deliver the goods to the consignees.

The general rule is, that the delivery must be to the consignee in person; and this rule is always applicable, unless some other mode of delivery is sanctioned by the usage of trade or express contract.

Angell on Carriers, secs. 297, 298.

1 Parsons Mar. Law, p. 153.

3 Comstock, 325, Price *v.* Powell, et cases cited.

17 Wendell, 305, Gibson *v.* Culver.

II. In the case of sea-going vessels, the usages of most ports make a delivery on the wharf, with reasonable notice to the consignee, a sufficient delivery. If the consignee cannot be found, or declines to receive the property, the carrier is not justified in leaving it on the wharf, even after notice. It is his duty in such a case to place it in a proper and safe place, where the consignee can obtain it.

15 Johnson, 42, Ostrander *v.* Brown.

1 Denio, 45, Fisk *v.* Newton.

Angell on Carriers, sec. 300.

1 Pars. Mar. Law, p. 155, note.

III. In the present case, the goods were never delivered to the consignees.

1. It does not appear that Greenway & Co. ever received notice from the master that the goods were being discharged, or that they were ever invited to receive them. On the contrary, the testimony shows that the goods were landed on the custom-house wharf, and deposited in the custom-house, and were there seized before any attempt was made by the master to make delivery, and while they were still in the custody of the officers.

2. It does not appear that Greenway & Co. had any information from any quarter that the goods were being discharged. The first notice given to them was that of the seizure.

3. The partial payment of the duties was made by Abranches

& Co., who had agreed with Greenway & Co. to pay the invoice cost, with freight, commissions, and duties, and under the expectation that no obstacle was in the way of the delivery of the goods.

This prepayment, in anticipation of an expected delivery, was certainly no waiver of the right to demand it, and in any event the acts of Abranches cannot prejudice the rights of Greenway & Co.

4. The proceedings taken by the master to obtain the release of the goods made it very manifest that he did not at that time think of charging Greenway & Co. with the consequences of his neglect, or of claiming that the delivery had been consummated.

5. Finally, the witnesses all concur in asserting that the goods were never delivered to Greenway & Co. The onus of showing the contrary is on the ship.

IV. The clause in the bill of lading, stating that the goods were "to be delivered at the ship's tackles," does not vary the obligation of the carrier to make such a delivery as shall give to the consignee the actual possession of the property.

1. The object of this clause is to indemnify the vessel against possible expenses incurred beyond the ship's side, and before actual delivery to the consignee—*e. g.*, lighterage, expenses of permits to discharge, wharfage, &c.

2. A deposit on the wharf, alongside the ship, certainly would not be a good delivery, without notice.

The clause in question cannot control the explicit contract to deliver to the consignees.

V. The non-delivery of the goods not having been occasioned by the expected perils, the ship and owners are clearly liable for their value.

1. Even if the seizure had been the arbitrary and merely capricious act of the Brazilian Government, the failure to deliver would not have been excused.

1 Campbell, 451, Gosling *v.* Higgins.

10 Q. B. R., 517, Spencer *v.* Chadwick.

10 Ad. and Ell., N. S., S. C.

4 Mann and G., 954, Evans *v.* Hatton.

2. But the seizure was directly occasioned by the culpable neglect and omission of the master. He first omitted to make up a correct manifest at the port of starting; and though having all the leisure of a long voyage to review his papers, and full opportunity on his arrival at Rio to make known the omissions, he neglects to do so, and thus insures the seizure and confiscation.

VI. Even if the goods had come into the possession of Greenway & Co., the ship would not have discharged herself. Her duty was to deliver possession clear of all claims and liens incurred by the fault of her master and owners. Anything short of this would not have been the delivery contracted for under the bill of lading.

VII. The commissioner did not err in his computation of the damages.

The value of the property at Rio was sworn by Abranches to be $6,000, and the invoice value at New York was stated by Magalhaen to be between $5,000 and $6,000, which, with the addition of freight, &c., harmonizes the testimony.

The claimants had the opportunity of cross-examining Mr. Davison, who purchased the goods in New York, but they deliberately refrained from doing so.

VIII. This court will not on this hearing consider any exception as to the admissibility of any of the depositions or exhibits.

IX. The decree of the Circuit Court should be affirmed, with costs.

Mr. Justice CAMPBELL delivered the opinion of the court.

This was a libel, in the District Court of the United States for the southern district of New York, against the barque Griffin and her owners, on a contract of affreightment by the appellees. The libel stated, that in November, 1852, at New York, there was shipped on that barque, of which the appellants are owners, one hundred and thirty-two boxes of chairs and furniture, to be delivered at the ship's tackles at the port of Rio de Janeiro, to the appellees, according to the terms of a bill of lading. That the regulations of the port of Rio de

Janeiro require the owner or master of a vessel arriving there, to submit to the officers of the customs a manifest of the cargo on board; and that cargo not mentioned in the manifest cannot be passed through the custom-house, but is liable to seizure and confiscation for that omission.

That the master of the barque omitted to enter the said consignment on the manifest rendered by him on his arrival, and in consequence the boxes were seized and confiscated, and so were lost to the consignees. The libellees answer that the goods referred to in the libel were discharged in accordance to the bill of lading, under the laws and regulations of the port, and under the order of the proper Government officers, and went into the custom-house under the direction of the libellants, they paying the duties thereon.

That after the delivery at the ship's tackles of the said shipment, the consignees became responsible for their safety; and that they were not confiscated or forfeited to the Government, nor abandoned by the consignees to the owners of the ship. Upon the pleadings and proofs, a decree was rendered against the libellees in the District Court, which was affirmed in the Circuit Court, on appeal.

It appears from the testimony that it is the duty of a master of a foreign vessel, upon her arrival at the port of Rio de Janeiro, to deliver to the proper officer, (Guarda Mor,) upon his visit to the vessel, his passport, manifest, and list of passengers. He is required, "at the end of the manifest," to make such "declarations or statement for his security by adding any packages that may be omitted or exceeded in his manifest, giving his reason for such omissions; no excuse will afterwards be admitted for any omissions or error."

That, "when it is proved that the vessel brought more goods than are specified or contained in the manifest, and not declared by the master, such goods will be seized, and divided among the seizors, the master also paying into the national treasury a fine of one-half their value, besides the customary duties thereon." It further appears, that the Griffin reached the port of Rio de Janeiro in January, 1853, and that her master rendered her passport, manifest, and list of passengers,

and was required to make any statement or declaration in addition, and informed that no other opportunity would be afforded to him. The master answered, that he had no addition to make or declaration to record. The goods were discharged according to the custom of the port, under the direction and orders of the revenue officers, into the custom-house, and while there, and before the entry had been completed, they were seized and confiscated under the regulation before stated. In a petition by the master to the Brazilian Government for a remission of the forfeiture and penalty he had incurred, he says: "That on the last voyage of the vessel a seizure was made of one hundred and thirty-two packages of furniture, more or less, on the ground that they were not entered in the manifest, and, although the petitioner acknowledges that the custom-house officers have acted according to the instructions of the department, still there are reasons of equity which render this seizure contrary to law."

These reasons were, that the Brazilian consul at New York was a novice in his office, and had failed to give him accurate information, and had approved of a manifest full of mistakes; and that the master had acted in good faith, and was obviously free from any suspicion of a design to defraud the revenue. This petition was referred to the director general of the revenue, who returned for answer: "That taking into consideration the quantity of the packages seized, (130 cases,) and the quality of the goods therein contained, (furniture,) and more particularly the circumstances which occurred before the seizure thereof, (the packages having been landed, and the duties paid,) there is no plausible reason to ascribe to fraud or bad faith the omissions of the said packages in the manifest of the vessel in which they were imported; but, on the other hand, the circumstance of the proof of fraud, or even of its presumption, is not essential in order to render the seizure a legal one in the present hypothesis. It is expressed in the case before mentioned, in the articles 155, 156, of the general regulations of the 22d June, 1836, that the simple fact of finding either more or less packages is punishable with the penalties therein decreed; and the seizure to which the petition

refers having been made and adjudged in conformity with the provisions of the said article 155, I am of opinion that the decision of the custom-house ought to be confirmed." The decree was entered accordingly. The testimony shows that the packages were sold by the inspector of the customs as forfeited, and that the consignees sustained a total loss. There is no testimony to show that they contributed to produce this result. It was the duty of the master of the barque to acquaint himself with the laws of the country with which he was trading, and to conform his conduct to those laws. He cannot defend himself under asserted ignorance, or erroneous information on the subject. It is the habit of every nation to construe and apply their revenue and navigation laws with exactness, and without much consideration for the hardship of individual cases. The magnitude and variety of the interests depending upon their efficient administration compel to this, and every ship-master engaged in a foreign trade must take notice of them.

The Vixen, 1 Dod., 145; the Adams, Edwards, 310. In the case before us, the master was informed of his duties upon his arrival at the port of destination by the officers of the customs, and his embarrassment and loss can be attributed to nothing but his inattention. The question arises, whether the appellants are responsible for the miscarriage of their master and agent. Their contract is an absolute one to deliver the cargo safely, the perils of the sea only excepted. Under such a contract, nothing will excuse them for a non-performance, except they have been prevented by some one of those perils, the act of the libellants, or the law of their country. No exception of a private nature, which is not contained in the contract itself, can be engrafted upon it by implication as an excuse for its non-performance. Atkinson *v.* Ritchie, 10 East., 533. In Spencer *v.* Chadwick, 10 Q. B. R., 516, the defendants pleaded, "that the ship, in the course of her voyage to London, called at Cadiz; and while there, the goods were lawfully taken out of the ship by the officers of the customs on a charge of being contraband under the laws of Spain, without default on the part of the officers of the ship. The

court affirm the rule, that when a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." It was for the libellees to furnish the evidence to discharge themselves for the failure to perform their contract.

They insist that the delivery of the cargo into the custom-house under the order of the officers, and the payment of duties by the consignees, was a right delivery, and that the consignees are responsible for their safety afterward. We do not concur in this opinion. The delivery contemplated by the contract was a transfer of the property into the power and possession of the consignees. The surrender of possession by the master must be attended with no fact to impair the title or affect the peaceful enjoyment of the property. The failure to enter the property on the manifest was a cause of confiscation from the event, and rendered nugatory every effort subsequently to discharge the liability of the ship and owners.

The appellants complain that the proof does not support the decree in respect of the damage assessed. One witness testifies to the market value of the packages in Rio de Janeiro, and another approximates their cost in New York, and upon this testimony the assessment was made. It was competent to the appellants to introduce testimony in the Circuit Court, or in this court, upon that subject, but none has been submitted.

We should not be justified in concluding the decree to be erroneous under the circumstances.

Decree affirmed.

EDWARD KILBOURNE AND OTHERS *v.* THE STATE SAVINGS INSTITUTION OF ST. LOUIS, IN THE STATE OF MISSOURI.

Where no question was raised upon the trial of the case in the court below for the consideration of this court, nor did the plaintiff in error, by counsel or otherwise, make one here, the judgment will be affirmed with costs and interest at the rate of ten per cent. per annum.

Kilbourne et al. v. *State Savings Institution of St. Louis.*

THIS case was brought up by writ of error from the District Court of the United States for the district of Iowa.

It was an action brought by way of petition by the State Savings Institution in Missouri, against Edward Kilbourne, R. B. Foote, Coleman & Foote, Anson L. Deming, and Henry K. Love, citizens of the State of Iowa, upon a bill of exchange for $1,410.37, drawn by Coleman & Foote upon Edward Kilbourne, payable to the order of R. B. Foote, one hundred and twenty days after date, and which passed, by endorsement, to the State Savings Institution of St. Louis; afterwards, there were consolidated with this suit two others, one upon a bill for $1,526.23, and a third upon a bill for $3,000. The judgment of the court was as follows:

It is therefore considered by the court that plaintiffs recover of said Coleman & Foote and Edward Kilbourne, as principals, and R. B. Foote, A. L. Deming, and H. K. Love, sureties, the sum of $6,440 aforesaid, with their costs in this behalf expended, to be taxed by the clerk.

The defendants sued out a writ of error, and brought the case up to this court.

Mr. Blair and *Mr. Polk*, for the defendants in error, moved to dismiss the writ, upon the ground that it was merely sued out for delay.

Mr. Justice WAYNE delivered the opinion of the court.

No question was raised upon the trial of this case in the court below, for the consideration of this court, nor have the plaintiffs in error, by counsel or otherwise, made one here. The writ of error was obviously sued out for delay. We direct the affirmance of the judgment and ten per cent. damages.

ORDER.

It is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be and the same is hereby affirmed with costs and interest at the rate of ten per cent. per annum.

INDEX

OF THE

PRINCIPAL MATTERS.

ADMINISTRATOR.

1. Where a sale was made by an administrator under the authority and pursuant to an order of the Probate Court of the county where the land laid, and the proceedings were regular except that no guardian was appointed to represent the heirs, the Supreme Court of Wisconsin decided that this defect was not sufficient to prevent the title from vesting in the purchaser, and this court adopts their decision. *Parker* v. *Kane*, 1.

ADMIRALTY.

1. In a collision which took place between a steamboat and a flat-boat on the Yazoo river, more than two hundred miles from its mouth where it falls into the Mississippi river, both vessels were in fault—the flat-boat, because it had not one or more steady and fixed lights on one or more conspicuous parts of the boat, and because of its erroneous position in the river; and the steamboat, because the master, seeing a light ahead, did not stop his boat, and reverse her wheels, until the locality of the light was clearly ascertained. *Nelson* v. *Leland*, 48.
2. The collision took place within the admiralty jurisdiction of the courts of the United States. *Ibid.*
3. Upon a motion to dismiss an appeal, upon the ground of a want of jurisdiction originally in the District Court, the question of jurisdiction in that court is a proper one for appeal to this court, and for argument when the case is regularly reached. This court have jurisdiction on such an appeal. The motion to dismiss, upon that ground, must therefore be overruled. *Ibid.*
4. Where a steamboat was built at Louisville, in Kentucky, and the persons who furnished the boilers and engines libelled the vessel in admiralty in the District Court of the United States for the eastern district of Louisiana, that court had no jurisdiction of the case. *Roach* v. *Chapman*, 129.
5. A contract for building a ship, or supplying engines, timber, &c., is not a maritime contract. This court so decided in 20 Howard, 400, and now reaffirms that decision. *Ibid.*
6. The State law of Kentucky, which creates a lien in such a case, cannot confer jurisdiction on the courts of the United States; and the prece

ADMIRALTY, (*Continued.*)

ding decisions of this court do not justify an inference to the contrary *Ibid.*

7. Where there was a contract for raising a sunken vessel upon certain stipulations, the party who raised the vessel cannot abandon it, and claim salvage in a court of admiralty. *Bondies* v. *Sherwood*, 214.
8. This court does not now decide whether, in suits for salvage, the suit may be in personam and in rem jointly. The question is still an open one. *Ibid.*
9. Nor does it decide whether the maritime law of salvage applies to a vessel engaged in the internal trade of a State, proceeding from a port in the same, up a river wholly within the same. *Ibid.*
10. Where certain parties joined together to carry on an adventure in trade for their mutual benefit—one contributing a vessel, and the other his skill, labor, experience, &c.—and there was to be a communion of profits on a fixed ratio, it was a contract over which a court of admiralty had no jurisdiction. *Ward* v. *Thompson*, 330.
11. In a collision which took place in the river Delaware, between a steamship and a barge which was in tow of a propeller, the latter was in fault. *N. Y. and Balt. Trans. Co.* v. *Phila. and Savannah Steamship Co.*, 461.
12. The lookout was not properly stationed, being in a place where his view was obstructed; and the propeller violated the rule which requires steamers approaching each other from opposite directions to port their helms, and pass each other on the larboard side. *Ibid.*
13. A propeller with a barge in tow is not within the rule which applies to sailing vessels, and which requires steamships to keep out of their way. Propellers have nearly the same speed as side-wheel steamers, and quite as much power, and must be subject to the same rules of navigation. *Ibid.*
14. The regulations at the port of Rio Janeiro require the master of a foreign vessel, upon her arrival at the port, to deliver to the proper officer, upon his visit to the vessel, his passport, manifest, and list of passengers. He is also required, at the end of the manifest, to make such declarations or statement for his security, by adding any packages that may be omitted or exceeded in the manifest, giving his reason for such omissions; no excuse will afterwards be admitted for any omissions or error. *Howland et al.* v. *Greenway et al.*, 491.
15. The regulations further declare that, when it is proved that the vessel brought more goods than are specified or contained in the manifest, and not declared by the master, such goods will be seized and divided among the seizors, the master also paying into the national treasury a fine of one-half their value, besides the customary duties thereon. *Ibid.*
16. Where the master of a vessel omitted to enter a part of the cargo upon his manifest, and in consequence thereof the boxes were seized and confiscated, the vessel and her owners were responsible to the consignees upon a libel filed in the District Court of New York, where the contract of affreightment was made. *Ibid.*
17. A delivery into the custom-house under the order of the officers, and the

ADMIRALTY, (*Continued.*)

payment of duties by the consignees, did not discharge the contract of the owners. The delivery contemplated by the contract was a transfer of the property into the power and possession of the consignees. *Ibid.*

18. The evidence upon the amount of damages is not such as to justify this court in reversing the decree of the court below. *Ibid.*

AGENTS.

1. Where an agent was employed to sell an estate in Louisiana, and the owner refused, without sufficient reasons, to fulfil an agreement which the agent had made, a right to demand compensation accrued to the agent, the amount of which is to be settled by established usage. *Kock* v. *Emmerling*, 69.

APPEAL.

1. Although the laws of the Territory abolished the distinction between cases at law and cases in equity, and required all cases to be removed from an inferior to a higher court by writ of error, and not by appeal, yet such laws cannot regulate the process of this court; and the present case, being in the nature of a bill in equity, is properly brought up by appeal. *Brewster* v. *Wakefield*, 118.
2. The parties who acquired liens on the mortgaged property subsequent to the mortgage in question were not necessarily parties to this appeal; and if they had appeared to the suit in the court below, one defendant, whose interest is separate from that of the other defendants, may appeal without them. *Ibid.*
3. No appeal can be taken from the final decision of a State court of last resort, under the 25th section of the judiciary act, to the Supreme Court of the United States. A writ of error alone can bring up the cause. *Verden* v. *Coleman*, 192.

ATTORNEY, POWER OF.

1. Although under a power of attorney, authorizing a conveyance of lands, the legal title does not pass when the attorney executes a deed, unless the sale was made in accordance with the requirements of the power, yet in this case, where the deed executed by the attorney was apparently within the scope of his power, and admitted the payment of the consideration, it was *prima facie* evidence of the conveyance of the legal title. *Morrill* v. *Cone*, 75.
2. The evidence offered to show that the power of attorney had not been complied with, was not sufficient in an action of ejectment to recover the lands after a long period of time had elapsed, and the lands had been repeatedly sold. *Ibid.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See Commercial Law.

BOUNTY LANDS.

See Lands, Public.

CALIFORNIA, LANDS IN.

1. Where the clear weight of the proof is against the possession or occupation by the grantee of land in California, the date of the grant was altered without any explanation of the alteration, and the genuineness of the

CALIFORNIA, LANDS IN, (*Continued.*)

signature of the Governor to a certificate of approval of the Departmental Assembly doubted, this court will reverse the decree of the court below confirming the claim, and remit it for further evidence and examination. *United States* v. *Galbraith*, 89.

2. Where a grant of land in California describes it by name and boundaries, and then states that the land of which donation is made is one league in length and three-quarters of a league in breadth, a little more or less, as shown by the map which goes with the expediente, with the usual reservations of the sobrante or overplus to the use of the nation, the grant will be confirmed to the extent of one league in length and three-quarters of a league in breadth, without extending it to the boundaries mentioned. *Gonzales* v. *United States*, 161.
3. Where there was a grant of land in California included within certain boundaries laid down on a map, and the grant said it was made for two square leagues, but the map and the evidence clearly show that the intention was to give to the grantee a rancho of at least two leagues on each side line, the equity of the claim requires that it should be confirmed to that extent, situate within the given out-boundary. *United States*, v. *Pacheco*, 225.
4. It is for the United States to grant the legal title. *Ibid.*
5. Where there was an an order from the Governor allowing a claimant to search for land in California, and the claimant subsequently petitioned the Governor for a grant, who referred the petition to the alcalde by a marginal order, and the alcalde reported that the land did not belong to any private individual, this does not amount to a vested interest in the land, binding on the Government. *United Sates* v. *Garcia*, 274.
6. The law of Mexico, passed in 1824, directs that it shall not be permitted to unite in one hand, as property, more than one league of irrigable land, four leagues of farming land, and six for stock raising. *United States* v. *Hartnell's Executors*, 286.
7. Therefore, where a person had obtained a grant of five leagues in Lower California, and another grant of eleven leagues in Upper California, and the Departmental Assembly held the law to be, that the Governor could not unite in the same hand more than eleven leagues, although it might be in different tracts, the grant in Upper California must be restricted to six leagues. *Ibid.*
8. It was necessary to its being definitively voted, that the grant of the Governor should have the concurrence of the Departmental Assembly; and as they reduced it, taking off five leagues, this was the state of the title, as respected quantity, when the treaty with Mexico was made. *Ibid.*
9. The 12th section of the act of 31st of August, 1852, providing for an appeal from the board of land commissioners in California to the District Court, directs that notice of an intention to appeal shall be filed within six months; and on failure to file such notice, the appeal shall be regarded as dismissed. *Yturbide's Executors* v. *United States*, 290.
10. This language is mandatory on the court, and admits of no discretion. In case of such failure, the appeal must be dismissed. *Ibid.*

CALIFORNIA, LANDS IN, (*Continued.*)

11. This case distinguished from those in which a court can relax its own rules. *Ibid.*
12. Where property in California has been in the undisturbed possession of the claimant and his heirs for sixteen years, without any other person claiming or exercising a possession or right of possession, and it appears that the grant was originally made by Governor Alvarado during his term of office, the claim will be confirmed. *United States* v. *D. Haro's Heirs*, 294.
13. Where a grant of land in California was genuine, and issued by the proper authority, a fraudulent attempt to alter it by erasures and interlineations for the purpose of enlarging the quantity, made after California had been ceded to the United States, will not vitiate the original grant. *United States* v. *West's Heirs*, 315.
14. The book called Jimeno's Index is not an authoritative proof of grants enumerated in it, or as a conclusive exclusion of grants not so registered, but may be referred to as an auxiliary memorandum made by Jimeno officially while he was secretary. *Ibid.*
15. Where none of the preliminary steps required by the act of 1824 and regulations of 1828 have been observed or shown, as there required, previous to the grant, and no record of the title, as also there required, and but slight evidence of possession, either as to value or permanency, the proof of the genuineness of the official signatures to the grant is not sufficient. Evidence, under the circumstances of grants in California, should be given so as to make the ante-dating of the grant irreconcilable with the weight of the proof; otherwise, there can be no protection against imposition and fraud. *United States* v. *Teschmaker*, 392.
16. The record of the title must be shown, or its absence accounted for to the satisfaction of the court. *Ibid.*
17. Where the preliminary proceedings to a grant of land in California were not produced, and the grant and certificate of approval came from the hands of the claimants, no record of them being found among the Mexican archives or in any book, nor is there any evidence of possession or occupation deserving notice or consideration, the case will be remanded to the court below for further evidence. *United States* v. *Pico*, 406.
18. Where neither the grant of land in California, nor the certificate of approval by the Departmental Assembly, are found among the Mexican archives, nor the record of them upon any book of records, but both papers came from the hands of the claimants, the case will be remanded for further evidence. *United States* v. *Vallejo*, 416.
19. Where the objection to a grant of land in California was, that the grantee was a foreigner, and therefore not entitled to hold land, this court is of the opinion that the testimony of conversations of admissions, relied upon to prove that fact, ought not to be received to outweigh the *prima facie* (if not conclusive) presumptions arising from the expediente and definitive title. *United States* v. *Dalton*, 436.
20. A petition was presented to the board of commissioners in California, claiming the confirmation of a title to land, which petition alleged—

CALIFORNIA, LANDS IN, (*Continued.*)

1. That a grant had been issued by Micheltorena, and delivered in June, 1843.
2. That it was recorded.
3. That it was not to be found in the archives, because the record had been burned.
4. That the grant was approved by the Departmental Assembly, but that the record of such approval had been burned.
5. That therefore the claimant could not produce any evidence that the grant had been so approved. *United States* v. *Fuentes*, 443.

21. The secondary evidence offered does not prove the existence of such records, nor there destruction. The recital in the grant is not sufficient evidence of this. *Ibid.*
22. The paper produced by the claimant, purporting to be a grant, must therefore be judged by itself. There was no evidence that it had been preceded by the usual formalities, such as a petition, an examination, an inquiry into the character of the applicant, an order for a survey, a reference to a magistrate for a report, a transmission of the grant to the Departmental Assembly, nor was there an expediente on file. *Ibid.*
23. Where these requirements do not appear, a presumption arises against the genuineness of the grant, making it a proper subject of inquiry before that fact can be admitted. *Ibid.*
24. The evidence produced in this case does not establish the genuineness of the grant. *Ibid.*
25. There is also an absence of all proof that the grant had been delivered to the grantee, then a minor, or to any one for him. If the grant was genuine, and not delivered until after the cession of California to the United States, it would not give the grantee any right to claim the land. *Ibid.*
26. A recital in the paper or grant, that the pre-requisites had been complied with, is not sufficient ground for a presumption that they had been observed. The cases decided heretofore by this court do not support the position. *Ibid.*
27. These cases examined. *Ibid.*
28. If the conditions imposed by the grant were conditions subsequent, yet the grantee allowed years to pass without any attempt to perform them until a change of circumstances had taken place, which amounts to evidence of an abandonment. *Ibid.*

CHANCERY.

1. Where the complainant set up in his bill that a deed, power of attorney, and other writings, all which, as alleged, were executed in contemplation of a suit for the recovery of his patrimonial inheritance of which he had been unjustly deprived, were obtained by imposition and fraud, and also that a deed, executed by him in the adjustment of the estate among the parties participating in the litigation to recover it, was obtained by like fraud and imposition, held, that upon the pleadings and proofs, the allegations are not sustained; on the contrary, the transactions in both respects referred to were fair, open, and unexceptionable. *Collins* v. *Thompson*, 246.

CHANCERY, (*Continued.*)

2. Where a bill of review was filed, alleging that the decree was obtained by fraud, which allegations were denied in the answer, and it appeared by the evidence that the complainant had lost the suit by his own neglect, the bill of review was properly dismissed by the court below. *McMicken's Executors* v. *Perin*, 282.

3. The Real Estate Bank of Arkansas was established on a loan by the State of Arkansas of its bonds, which the bank sold to form its capital. The stockholders gave their bonds and mortgaged their lands to the extent of their subscriptions. Notrebe subscribed for three hundred shares, and mortgaged his land for thirty thousand dollars. *Refeld* v. *Woodfolk*, 318.

4. Notrebe sold the land with a covenant of warranty, and then died. The purchaser paid all the money, and the widow and heir at law of Notrebe offered to convey the land by a deed, with a covenant of warranty of title. *Ibid.*

5. The Circuit Court, sitting as a court of equity, decreed that the executors should remove the encumbrance whenever it could be done, and in the mean time they should deposit with the clerk of the court bonds of the State of Arkansas to an amount sufficient to pay Notrebe's subscription, with interest, in case the bank should prove a total loss. *Ibid.*

6. This decree was erroneous. *Ibid.*

7. The purchaser must rely upon his remedy at law under the covenant of warranty. He can either take the deed offered by the widow and heirs at law, or retain the original agreement. *Ibid.*

8. The cases examined upon the point, how far a court of chancery will interfere in such a case. *Ibid.*

9. In a bill by judgment creditors against an incorporated insurance company and its stockholders, to compel the latter to pay up the balance due on their several subscriptions to the stock, they cannot be allowed to defend themselves by an allegation that their subscriptions were obtained by fraud and misrepresentation of the agent of the company. *Ogilvie* v. *Knox Insurance Co.*, 380.

10. It is too late, after the investment is found to be unprofitable, and debts are incurred, for stockholders to withdraw their subscriptions, under such a pretence or plea. *Ibid.*

11. It is not a sufficient objection to the bill, for want of proper parties, that all the creditors or stockholders are not sued. If necessary, the court may, at the suggestion of either party that the corporation is insolvent, administer its assets by a receiver, and thus collect all the subscriptions or debts to the corporation. *Ibid.*

12. This court has never reviewed the judgment of an inferior court of a State, where there was an appeal to the Supreme Court of the State, upon a subject within the jurisdiction of such court, upon the allegation that its proceedings were irregular or illegal, and contrary to the law of the State. *Adams* v. *Preston*, 473.

13. The present is such a case. *Ibid.*

14. The Parish Court of New Orleans had exclusive jurisdiction over property

CHANCERY, (*Continued.*)

ceded by insolvents, and the courts of the United States have no jurisdiction over such insolvencies. *Ibid.*

15. An allegation of fraud in a bill filed to review such proceedings in insolvency, which was afterwards abandoned, is not sufficient to give to the Circuit Court jurisdiction to review the proceedings of the State court. *Ibid.*
16. Moreover, the complainant has no equitable claim to relief, his assignors having no mortgage lien on the property, when the judgments were assigned to the complainant. *Ibid.*

COLLECTORS OF THE CUSTOMS.

1. The act of Congress, passed on the 7th of May, 1822, (3 Stat. at L., 695,) enumerated the ports of Boston, New York, Philadelphia, Baltimore, Charleston, Savannah, and New Orleans, in which the collector was allowed to receive more than three thousand dollars a year. In the non-enumerated ports, the maximum rate of annual compensation or salary allowed to the office was three thousand dollars. *United States* v. *Walker*, 299.
2. Mobile was one of the non-enumerated ports, and consequently the salary of the collector at Mobile was not to exceed three thousand dollars, by that act. *Ibid.*
3. This act was not repealed by any of the numerous acts, called additional compensation acts, which were passed from time to time between 1833 and 1841, until one of these temporary acts, viz: the act of 1838, (5 Stat. at L., 265,) was continued in force until otherwise directed by law by the 7th section of the act for the relief of Chastelain and Ponvert, and for other purposes, passed on the 21st of July, 1840. (6 Stat. at L., 815.) *Ibid.*
4. The history and purport given of the several statutes respecting the compensation of collectors, with the reasons which led to the passage of the act of 1841. *Ibid.*
5. Nor was it repealed by the act of 3d March, 1841. (5 Stat. at L., 432.) There is no repugnancy between the acts. Repeal by implication, upon the ground that the subsequent provision upon the same subject is repugnant to the prior law, is not favored in any case; but where such repeal would operate to reopen accounts at the Treasury Department long since settled and closed, the supposed repugnancy ought to be clear and controlling before it can be held to have that effect. *Ibid.*
6. By the true construction of this act of 1841, every collector is required to include in his quarter-yearly accounts all sums received by him for rent and storage of goods, wares, and merchandise, stored in the public stores, for which rent is paid beyond the rent paid by him; and if, from such accounting, the aggregate sums received from that source exceed two thousand dollars, he is directed and required to pay the excess into the Treasury as part and parcel of the public money. When the sums so received from that source in any year do not in the aggregate exceed two thousand dollars, he may retain the whole to his own use; and in

COLLECTORS OF THE CUSTOMS, (*Continued.*)

no case is he obliged to pay into the Treasury anything but the excess, beyond the two thousand dollars. *Ibid.*

7. Collectors of the non-enumerated ports may receive, as an annual compensation for their services, the sum of three thousand dollars from the sources of emolument recognised and prescribed by the act of 7th May, 1822, provided their respective offices yield that amount from these sources, after deducting the necessary expenses incident to the office, and not otherwise; and in addition thereto, they are also entitled to whatever sum or sums they may receive for rent and storage, provided the amount does not exceed two thousand dollars; but the excess, beyond that sum, they are expressly required to pay into the Treasury as part and parcel of the public money. *Ibid.*

COLLISON OF VESSELS.

See ADMIRALTY.

COMMERCIAL LAW.

1. A commercial house sent to a correspondent eight bills of exchange, four purporting to be the first and the other four the second of exchange, and the whole eight accepted on their face by that commercial house, and each of the four made payable to the order of their correspondent, but in blank as to the names of the drawers, and the address of the drawees, and as to date and amount and time and place of payment. *Bank of Pittsburgh* v. *Neal*, 96.

2. The correspondent filled up and had discounted the four which were the first of exchange, which were not involved in the present suit. *Ibid.*

3. Two of the four of the second of exchange were filled up, varying from the others, not only in dates and amounts, but also as to time and place of payment. *Ibid.*

4. These bills were discounted by a bank without any knowledge whatever that either had been perfected and filled up by the payee without authority, or of the circumstances under which they had been intrusted to his care, unless the words "second of exchange, first unpaid," can be held to have that import. *Ibid.*

5. The effect of these words was a question of law, and not of fact for the jury. *Ibid.*

6. The bills described above were not parts of sets of bills of exchange. They were perfected, filled up, and negotiated, by the correspondent of the defendants, to whom the blank acceptances had been intrusted as single bills of exchange; and for the acts of their correspondent, in that behalf, the defendants are responsible to a bona fide holder for value, without notice that the acts were performed without authority. *Ibid.*

7. The case falls within the rule, that where one of two innocent parties must suffer, through the fraud or negligence of a third party, the loss shall fall upon him who gave the credit. *Ibid.*

8. Where there was insurance upon the freight of a vessel on a voyage from Charleston to Rio Janeiro, and from thence to a port of discharge in the United States, the insurance was upon the freight of each successive voyage, and is to be applied to the freight at risk at any time, whether

COMMERCIAL LAW, (*Continued.*)
on the outward or homeward voyage, to the amount of the valuation. *Insurance Co. of the Valley of Virginia* v. *Mordecai*, 111.

9. Therefore, where the vessel performed the outward voyage, and was condemned as unseaworthy, and the whole freight of the return voyage lost, the underwriters were not entitled to a deduction of the freight earned on the outward voyage. *Ibid.*

10. Where bills of exchange were drawn by the principal acting partner of a firm in the name of the firm, all the partners were responsible. *Kimbro* v. *Bullitt*, 256.

11. Whenever there are written articles of agreement between the partners, their power and authority, *inter se*, are to be ascertained and regulated by the terms and conditions of the written stipulations. But, independently of any such stipulations, each partner possesses an equal and general power and authority, in behalf of the firm, to transact any business within the scope and objects of the partnership, and in the course of its trade and business. *Ibid.*

12. Where partnerships are formed for the mere purpose of farming, one partner does not possess the right, without the consent of his associates, to draw or accept bills of exchange, for the reason that such a practice is not usual, nor is it necessary for carrying on the farming business. *Ibid.*

13. In the present case, the jury found that this was a trading firm, and their verdict is conclusive. *Ibid.*

14. The right of the acceptors, who had paid the money, to recover from the drawers, cannot be affected by the fact that one of the drawers had applied the money to an unlawful purpose. *Ibid.*

15. An arrangement was made between creditor and debtor houses, that the latter should execute an assignment, and confess judgment, and that the former should give a receipt in full, and agree that the notes of the debtor house should be cancelled. *Clark* v. *Bowen*, 270.

16. The assignment was made, the judgment confessed, and the receipt given. *Ibid.*

17. A solvent partner of the debtor house was absent, and neither consented to the assignment nor to the confession of judgment, and upon his motion the judgment was vacated as to him, as being confessed without authority. *Ibid.*

18. The judgment was then vacated as to all the partners, and the assigned property taken out of the hands of the trustee by a prior claim. Whereupon the creditor house brought suit upon the notes which had not been destroyed. *Ibid.*

19. The whole arrangement to secure the debt being in effect annulled, the original indebtedness stood revived, and judgment was properly rendered upon the notes. *Ibid.*

20. Where an endorsement upon a promissory note was made, not by the payee, but by persons who did not appear to be otherwise connected with the note, and the note thus endorsed was handed to the payee before maturity, a motion to strike out of the declaration a recital of these

COMMERCIAL LAW, (*Continued.*)

facts, and also an allegation that this endorsement was thus made for the purpose of guarantying the note, was properly overruled. *Rey* v. *Simpson*, 341.

21. In Minnesota, where the transaction took place, suitors are enjoined by law, in framing their declarations, to give a statement of the facts constituting their cause of action; which statement is required to be expressed in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. *Ibid.*

22. The facts above recited were a part of the facts constituting the cause of action, and therefore properly inserted in the declaration. *Ibid.*

23. Parol proof of the circumstances under which the endorsement was made was admissible, and the weight of authority is in harmony with this principle. *Ibid.*

24. The judgment against these endorsers was properly given, upon the ground that they were original parties to the note. *Ibid.*

25. The declaration was sufficient, under the system of pleading which prevails in Minnesota. *Ibid.*

26. The regulations at the port of Rio Janeiro require the master of a foreign vessel, upon her arrival at the port, to deliver to the proper officer, upon his visit to the vessel, his passport, manifest, and list of passengers. He is also required, at the end of the manifest, to make such declarations or statement for his security, by adding any packages that may be omitted or exceeded in the manifest, giving his reason for such omissions; no excuse will afterwards be admitted for any omissions or error. *Howland et al.* v. *Greenway et al.*, 491.

27. The regulations further declare that, when it is proved that the vessel brought more goods than are specified or contained in the manifest, and not declared by the master, such goods will be seized and divided among the seizors, the master also paying into the national treasury a fine of one-half their value, besides the customary duties thereon. *Ibid.*

28. Where the master of a vessel omitted to enter a part of the cargo upon his manifest, and in consequence thereof the boxes were seized and confiscated, the vessel and her owners were responsible to the consignees upon a libel filed in the District Court of New York, where the contract of affreightment was made. *Ibid.*

29. A delivery into the custom-house under the order of the officers, and the payment of duties by the consignees, did not discharge the contract of the owners. The delivery contemplated by the contract was a transfer of the property into the power and possession of the consignees. *Ibid.*

30. The evidence upon the amount of damages is not such as to justify this court in reversing the decree of the court below. *Ibid.*

CONSTITUTIONAL LAW.

1. A law of the State of Alabama, passed in 1854, requiring the owners of steamboats navigating the waters of the State, before such boat shall leave the port of Mobile, to file a statement in writing, in the office of the probate judge of Mobile county—setting forth, first, the name of the

CONSTITUTIONAL LAW, (*Continued.*)

vessel; second, the name of the owner or owners; third, his or their place or places of residence; fourth, the interest each has in the vessel—is in conflict with the act of Congress passed on the 17th of February, 1793, so far as the State law is brought to bear upon a vessel which had taken out a license, and was duly enrolled under the act of Congress for carrying on the coasting trade, and plied between New Orleans and the cities of Montgomery and Wetumpka, in Alabama. *Sinnot* v. *Davenport*, 227.

2. The State law, in such a case, is therefore unconstitutional and void. *Ibid.*
3. An act of Congress, passed in pursuance of a clear authority under the Constitution, is the supreme law of the land, and any law of a State in conflict with it is inoperative and void. *Ibid.*
4. The principle established in the preceding case extends also to a steamboat employed as a lighter and towboat, sometimes towing vessels beyond the outer bar of the bay, and into the gulf to the distance of several miles. *Foster* v. *Davenport*, 244.
5. The character of the navigation and business in which this boat was employed cannot be distinguished from that in which the vessels it towed or unloaded were engaged. The lightering or towing was but the prolongation of the voyage of the vessels assisted to their port of destination. *Ibid.*
6. The charter of the Ohio and Mississippi Railroad Company, passed by the Legislature of Indiana in 1848, and a supplement in 1849, authorized the county commissioners of a county through which the road passed to subscribe for stock and issue bonds, provided a majority of the qualified voters of the county voted, on the 1st of March, 1849, that this should be done. *Aspinwall* v. *Commissioners of the County of Daviess*, 364.
7. The election was held on the appointed day, and a majority of the voters voted that the subscription should be made. *Ibid.*
8. But before the subscription was made, the State adopted a new Constitution, which went into effect on the 1st November, 1851. One of the articles prohibited such subscriptions, unless paid for in cash, and prohibited also a county from loaning its credit or borrowing money to pay such subscriptions. *Ibid.*
9. In 1852, the county commissioners of Daviess county subscribed for stock in the railroad company, and issued their bonds for the amount. *Ibid.*
10. The provisions of the railroad charter, authorizing the commissioners to subscribe, conferred a power upon a public corporation or civil institution of Government, which could be modified, changed, enlarged, or restrained, by the legislative authority, the charter not importing a contract, within the meaning of the clause of the Constitution prohibiting a State from passing a law impairing the obligation of contracts. *Ibid.*
11. The mere vote to subscribe did not, of itself, form such a contract with the railroad company as would be protected by the 10th section of the 1st article of the Constitution of the United States. Until the subscription was actually made, the contract was unexecuted. *Ibid.*

CONSTITUTIONAL LAW, (*Continued.*)

12. The bonds were issued in violation of the Constitution of Indiana, and are therefore void. *Ibid.*

CONTRACT.

1. In the case of Slater *v.* Emerson, 19 Howard, 224, this court held that where there was a contract to finish a railroad by a given day, the parties to which were the contractor with the railroad company of the one part, and a stockholder in the company of the other part, time was of the essence of the contract; and there could be no recovery on the written agreement without showing performance within the time limited; but added, that a subsequent performance and acceptance by the defendant would authorize a recovery in a *quantum meruit*. *Emerson* v. *Slater*, 28.
2. This court now holds that the promise of the stockholder contained in the written agreement was an original undertaking, on a good and valid consideration moving between the parties to the instrument, and not a special promise for the debt, default, or misdoings, of another. Consequently, it is not within the operation of the statute of frauds. *Ibid.*
3. The cases upon this point examined. *Ibid.*
4. Being an original contract, parol evidence was admissible to show that the parties had, subsequently to the date of the contract, and before a breach of it, made a new oral agreement, on a new and valuable consideration, enlarging the time of performance, and varying its terms. *Ibid.*

DEEDS.

1. Where a deed for land in Wisconsin was voluntarily destroyed by the parties without its being recorded, and adverse parties were bona fide purchasers without notice, (according to the decision of the Supreme Court of Wisconsin,) the destroyed deed was inoperative under the statutes of Wisconsin in relation to the registry of deeds. *Parker* v. *Kane*, 1.
2. A deed which conveyed "an undivided fourth part of the following described parcel or tract of land, viz: lots number one and six, being that part of the northeast quarter lying east of the Milwaukee river," conveys only lots one and six, and not that part of the northeast quarter which is not included within the lots one and six. *Ibid.*

DUTIES.

See COLLECTORS OF THE CUSTOMS.

EVIDENCE.

1. In the case of Slater *v.* Emerson, 19 Howard, 224, this court held that where there was a contract to finish a railroad by a given day, the parties to which were the contractor with the railroad company of the one part, and a stockholder in the company of the other part, time was of the essence of the contract; and there could be no recovery on the written agreement without showing performance within the time limited; but added, that a subsequent performance and acceptance by the defendant would authorize a recovery in a *quantum meruit*. *Emerson* v. *Slater*, 28.

EVIDENCE, (*Continued.*)

2. This court now holds that the promise of the stockholder contained in the written agreement was an original undertaking, on a good and valid consideration moving between the parties to the instrument, and not a special promise for the debt, default, or misdoings, of another. Consequently, it is not within the operation of the statute of frauds. *Ibid.*
3. The cases upon this point examined. *Ibid.*
4. Being an original contract, parol evidence was admissible to show that the parties had, subsequently to the date of the contract, and before a breach of it, made a new oral agreement, on a new and valuable consideration, enlarging the time of performance, and varying its terms. *Ibid.*

INSURANCE.

1. Where there was insurance upon the freight of a vessel on a voyage from Charleston to Rio Janeiro, and from thence to a port of discharge in the United States, the insurance was upon the freight of each successive voyage, and is to be applied to the freight at risk at any time, whether on the outward or homeward voyage, to the amount of the valuation. *Insurance Co. of the Valley of Virginia* v. *Mordecai*, 111.
2. Therefore, where the vessel performed the outward voyage, and was condemned as unseaworthy, and the whole freight of the return voyage lost, the underwriters were not entitled to a deduction of the freight earned on the outward voyage. *Ibid.*

INSURANCE COMPANY.

1. In a bill by judgment creditors against an incorporated insurance company and its stockholders, to compel the latter to pay up the balance due on their several subscriptions to the stock, they cannot be allowed to defend themselves by an allegation that their subscriptions were obtained by fraud and misrepresentation of the agent of the company. *Ogilvie* v. *Knox Insurance Co.*, 380.
2. It is too late, after the investment is found to be unprofitable, and debts are incurred, for stockholders to withdraw their subscriptions, under such a pretence or plea. *Ibid.*
3. It is not a sufficient objection to the bill, for want of proper parties, that all the creditors or stockholders are not sued. If necessary, the court may, at the suggestion of either party that the corporation is insolvent, administer its assets by a receiver, and thus collect all the subscriptions or debts to the corporation. *Ibid.*

INTEREST.

1. Whilst Minnesota was a Territory, the following statute was passed:

   Sec. 1. Any rate of interest agreed upon by the parties in contract, specifying the same in writing, shall be legal and valid.

   Sec 2. When no rate of interest is agreed upon or specified in a note or other contract, seven per cent. per annum shall be the legal rate. *Brewster* v. *Wakefield*, 118.
2. Where a party gave two promissory notes, in one of which he promised to pay, twelve months after the date thereof, a sum of money, with interest thereon at the rate of twenty per cent. per annum from the date thereof,

INTEREST, (*Continued.*)

and in another promised to pay another sum, six months after date, with interest at the rate of two per cent. per month, the mode of computing interest under the statute was to calculate the interest stipulated for up to the time when the notes became due, and after that time at the rate of seven per cent. per annum. *Ibid.*

JUDGMENT.

1. Where proceedings were had in Minnesota for the sale of property mortgaged to secure a debt, and the judgment of the court below was, that the property should be sold, there appears to be no error in the judgment, and it must therefore be affirmed. *Lawler* v. *Claflin*, 23.
2. Where streets were opened in New Orleans, a sum of money, as indemnity, was allowed to G, as being the supposed owner of the property condemned. *City of New Orleans* v. *Gaines*, 141.
3. D claimed to be the owner of the property, and brought a suit against the city for the money, in which suit G was cited for the purpose of having the question decided, to whom the property belonged, and judgment was rendered against the city in favor of D. *Ibid.*
4. Afterwards, G brought a suit in the Circuit Court of the United States, and the city pleaded the former judgment in bar. *Ibid.*
5. But, as these facts were not given in evidence upon the trial, nor did the judge make any statement of facts found by him, the record presents only the judgment against the city in favor of G, and there is no ground of error upon which this court can reverse the judgment. *Ibid.*
6. Where the matter in controversy was the right to the mayoralty in Georgetown, and there was a judgment of ouster in the Circuit Court, if the defendant filed the necessary bond and sued out a writ of error to this court, this amounts to a supersedeas upon the judgment. *United States ex relatione Crawford* v. *Addison*, 174.
7. An arrangement was made between creditor and debtor houses, that the latter should execute an assignment, and confess judgment, and that the former should give a receipt in full, and agree that the notes of the debtor house should be cancelled. *Clark* v. *Bowen*, 270.
8. The assignment was made, the judgment confessed, and the receipt given. *Ibid.*
9. A solvent partner of the debtor house was absent, and neither consented to the assignment nor to the confession of judgment, and upon his motion the judgment was vacated as to him, as being confessed without authority. *Ibid.*
10. The judgment was then vacated as to all the partners, and the assigned property taken out of the hands of the trustee by a prior claim. Whereupon the creditor house brought suit upon the notes which had not been destroyed. *Ibid.*
11. The whole arrangement to secure the debt being in effect annulled, the original indebtedness stood revived, and judgment was properly rendered upon the notes. *Ibid.*
12. Where no question was raised upon the trial of the case in the court below for the consideration of this court, nor did the plaintiff in error, by

JUDGMENT, (*Continued.*)

counsel or otherwise, make one here, the jugdment will be affirmed with costs and interest at the rate of ten per cent. per annum. *Kilbourne et al.* v. *State Savings Institution of St. Louis*, 503.

JURISDICTION.

1. Where a decree for the partition of lands was made by a State court having jurisdiction over the subject matter and the parties, which decree was affirmed by the Supreme Court of the State, this court cannot inquire, in a collateral action, whether errors or irregularities exist in the proceedings. *Parker* v. *Kane*, 1.
2. Where the question decided by the Supreme Court of Louisiana was, that the introduction of a judgment obtained in Mississippi for the same cause of action which was then before the court of Louisiana was not such an alteration of the substance of the demand as was forbidden by the code of practice, this is not a question which can be revised by this court under the twenty-fifth section of the judiciary act; it being merely a question of pleading and evidence in support of a new allegation, arising according to the practice in Louisiana so as to reach the merits of the case. *White* v. *Wright*, 19.
3. Upon a motion to dismiss an appeal, upon the ground of a want of jurisdiction originally in the District Court, the question of jurisdiction in that court is a proper one for appeal to this court, and for argument when the case is regularly reached. This court have jurisdiction on such an appeal. The motion to dismiss, upon that ground, must therefore be overruled. *Nelson* v. *Leland*, 48.
4. Where a steamboat was built at Louisville, in Kentucky, and the persons who furnished the boilers and engines libelled the vessel in admiralty in the District Court of the United States for the eastern district of Louisiana, that court had no jurisdiction of the case. *Roach* v. *Chapman*, 129.
5. A contract for building a ship, or supplying engines, timber, &c., is not a maritime contract. This court so decided in 20 Howard, 400, and now reaffirms that decision. *Ibid.*
6. The State law of Kentucky, which creates a lien in such a case, cannot confer jurisdiction on the courts of the United States; and the preceding decisions of this court do not justify an inference to the contrary. *Ibid.*
7. Where the matter in controversy was the right to the mayoralty in Georgetown, the salary of which office was $1,000 per annum, payable monthly, and the duration of which office was two years, this court has jurisdiction of a case coming up by writ of error from the Circuit Court of the United States for the District of Columbia. *United States ex relatione Crawford* v. *Addison*, 174.
8. The fact that the salary is payable monthly makes no difference; the appropriation, when made, being made for the whole sum. *Ibid.*
9. Where the decision of a State court was against the validity of an entry of land which had been allowed by the proper officers of the United States, this court has jurisdiction, under the 25th section of the judiciary act, to revise that judgment, whether the invalidity was decreed upon a question of fact or of law. *Lytle* v. *State of Arkansas*, 193.

JURISDICTION, (*Continued.*)

10. The adjudication of the register and receiver is subject to revision in the courts of justice, on proof, showing that the entry was obtained by fraud and the imposition of false testimony on those officers, as to settlement and cultivation. This court has so decided heretofore. *Ibid.*
11. Over the questions raised in the court below, of the effect of a bona fide purchase and of the statute of limitations, this court has no jurisdiction. *Ibid.*
12. But the evidence shows that the entry was obtained by false affidavits as to residence and cultivation. The judgment of the Supreme Court of Arkansas is therefore affirmed. *Ibid.*
13. Where there was a contract for raising a sunken vessel upon certain stipulations, the party who raised the vessel cannot abandon it, and claim salvage in a court of admiralty. *Bondies* v. *Sherwood*, 214.
14. This court does not now decide whether, in suits for salvage, the suit may be in personam and in rem jointly. The question is still an open one. *Ibid.*
15. Nor does it decide whether the maritime law of salvage applies to a vessel engaged in the internal trade of a State, proceeding from a port in the same, up a river wholly within the same. *Ibid.*
16. Where certain parties joined together to carry on an adventure in trade for their mutual benefit—one contributing a vessel, and the other his skill, labor, experience, &c.—and there was to be a communion of profits on a fixed ratio, it was a contract over which a court of admiralty had no jurisdiction. *Ward* v. *Thompson*, 330.
17. Where the decision of the Supreme Court of a State was against the validity of a title to land derived from a confirmation by the board of commissioners sitting under the act of March 3, 1807, this court has jurisdiction, under the 25th section of the judiciary act, to review that decision. *Berthold* v. *McDonald*, 334.
18. Where the controversy was between two claimants to land, both of whom held equitable titles only under confirmation by the board of commissioners above mentioned, the court had a right to go behind the *prima facie* title resulting from the confirmation, and to instruct the jury as to such facts as would tend to establish the superior equity of one of the claimants. *Ibid.*
19. Where a mortgage of land and slaves, in Louisiana, was made to the Bank of Louisiana, the property sold in the manner pointed out by the charter of the bank, the purchasers applied to the District Court, (State court,) under a statute of Louisiana, for a monition, citing all persons who objected to the sale to make their objection known; that court decided that the sale was null and void, but the Supreme Court reversed the judgment as to the widow, and those claiming under her; this judgment cuts off all the objections that apply to the manner of conducting the sale, and to the form of the judgment in the court below. *Jeter* v. *Hewitt*, 352.
20. The Supreme Court of the State decided that the courts below had jurisdiction of the case, and that decision is binding upon this court. The

JURISDICTION, (*Continued.*)

whole matter now in controversy has therefore been legally adjudicated by the courts of the State. *Ibid.*

21. This court has never reviewed the judgment of an inferior court of a State, where there was an appeal to the Supreme Court of the State, upon a subject within the jurisdiction of such court, upon the allegation that its proceedings were irregular or illegal, and contrary to the law of the State. *Adams* v. *Preston*, 473.
22. The present is such a case. *Ibid.*
23. The Parish Court of New Orleans had exclusive jurisdiction over property ceded by insolvents, and the courts of the United States have no jurisdiction over such insolvencies. *Ibid.*
24. An allegation of fraud in a bill filed to review such proceedings in insolvency, which was afterwards abandoned, is not sufficient to give to the Circuit Court jurisdiction to review the proceedings of the State court. *Ibid.*
25. Moreover, the complainant has no equitable claim to relief, his assignors having no mortgage lien on the property, when the judgments were assigned to the complainant. *Ibid.*

LANDS IN CALIFORNIA.

See CALIFORNIA.

LANDS, PUBLIC.

1. Congress reserved the sixteenth section of the public lands in all the new States for the support of schools, for the benefit of the inhabitants of the township. *Springfield Township* v. *Quick*, 56.
2. So that the funds arising from this section are applied to the use of the inhabitants of the township, the State has a right to apply funds raised from other sources, according to its discretion, for the purposes of education throughout the State. *Ibid.*
3. In an action of ejectment for the Hot Springs in Arkansas, wherein one party claimed title through a pre-emption claim which they were allowed to enter by the register and receiver, and the other party through a New Madrid certificate, (the title of the United States not being drawn into question,) the former party had the better title. *Hale* v. *Gaines*, 144.
4. There was no regular survey and location of the New Madrid certificate until 1838, a prior application for a public survey in 1818, and certificate of a private survey in 1820, being irregular. *Ibid.*
5. The act of Congress of April, 1822, required these locations to be made within one year from the date of its passage. Consequently, the right to locate the New Madrid certificate expired in April, 1823. *Ibid.*
6. Nor does the act of 1843 support the survey of 1838, because it is not included within the provisions of the act. *Ibid.*
7. Whether or not the title acquired under the pre-emption is valid, is a question not now before this court; because the case is brought up from the Supreme Court of Arkansas under the twenty-fifth section of the judiciary act, and the decision of that court was in favor of the validity of the action of the register and receiver; and, moreover, the opposing party cannot set up an outstanding title in the United States. In order

LANDS, PUBLIC, (*Continued.*)
to bring himself within the rule of that section, he must have a personal interest in the subject in litigation. *Ibid.*

8. The claim set up under a prior pre-emption was of no value, the land having been reserved from sale when an offer to locate the pre-emption right was made. *Ibid.*

9. An act of Congress, passed in 1812, (2 Stat. at L., 729,) gave a bounty of 160 acres of land to every regular soldier of the army, and made void all sales or agreements by the grantee before the patent issued. *Maxwell* v. *Moore*, 185.

10. Another act, passed in 1826, (4 Stat. at L., 190,) permitted the soldier, under certain circumstances, to surrender his patent, and select other land. This act did not contain the avoiding clause contained in the first act. *Ibid.*

11. These acts have no necessary connection in this particular, and an agreement to convey, made after the first patent was surrendered, and before the second was issued, held to be valid and binding. *Ibid.*

12. Where the decision of a State court was against the validity of an entry of land which had been allowed by the proper officers of the United States, this court has jurisdiction, under the 25th section of the judiciary act, to revise that judgment, whether the invalidity was decreed upon a question of fact or of law. *Lytle* v. *State of Arkansas*, 193.

13. The adjudication of the register and receiver is subject to revision in the courts of justice, on proof, showing that the entry was obtained by fraud and the imposition of false testimony on those officers, as to settlement and cultivation. This court has so decided heretofore. *Ibid.*

14. Over the questions raised in the court below, of the effect of a bona fide purchase and of the statute of limitations, this court has no jurisdiction. *Ibid.*

15. But the evidence shows that the entry was obtained by false affidavits as to residence and cultivation. The judgment of the Supreme Court of Arkansas is therefore affirmed. *Ibid.*

16. Where the decision of the Supreme Court of a State was against the validity of a title to land derived from a confirmation by the board of commissioners sitting under the act of March 3, 1807, this court has jurisdiction, under the 25th section of the judiciary act, to review that decision. *Berthold* v. *McDonald*, 334.

17. Where the controversy was between two claimants to land, both of whom held equitable titles only under confirmation by the board of commissioners above mentioned, the court had a right to go behind the *prima facie* title resulting from the confirmation, and to instruct the jury as to such facts as would tend to establish the superior equity of one of the claimants. *Ibid.*

LOUISIANA.

1. Where, according to the practice in Louisiana, the facts of the case are stated by the court below in the nature of a special verdict, an objection that the contract sued upon could not be proved by one witness only,

LOUISIANA, (*Continued.*)

comes too late when made for the first time in this court. *Cucullu* v. *Emmerling*, 83.

2. According to that practice, the judge below finds facts, and not evidence of those facts. *Ibid.*
3. Where a mortgage of land and slaves, in Louisiana, was made to the Bank of Louisiana, the property sold in the manner pointed out by the charter of the bank, the purchasers applied to the District Court, (State court,) under a statute of Louisiana, for a monition, citing all persons who objected to the sale to make their objection known; that court decided that the sale was null and void, but the Supreme Court reversed the judgment as to the widow, and those claiming under her; this judgment cuts off all the objections that apply to the manner of conducting the sale, and to the form of the judgment in the court below. *Jeter* v. *Hewitt*, 352.
4. The Supreme Court of the State decided that the courts below had jurisdiction of the case, and that decision is binding upon this court. The whole matter now in controversy has therefore been legally adjudicated by the courts of the State. *Ibid.*

MANDAMUS.

1. Where the matter in controversy was the right to the mayoralty in Georgetown, the salary of which office was $1,000 per annum, payable monthly, and the duration of which office was two years, this court has jurisdiction of a case coming up by writ of error from the Circuit Court of the United States for the District of Columbia. *United States ex relatione Crawford* v. *Addison*, 174.
2. The fact that the salary is payable monthly makes no difference; the appropriation, when made, being made for the whole sum. *Ibid.*
3. A judgment of ouster being rendered in the Circuit Court, and the defendant having filed the necessary bond, and sued out a writ of error to this court, this amounts to a supersedeas upon the judgment. *Ibid.*
4. The case is not a proper one for a mandamus from this court to the judges below, or for a rule upon them to show cause why they should not carry out the judgment of ouster. *Ibid.*
5. The fact that the term of office will be about to expire when the writ of error is returnable, viz: December term, 1860, is not a sufficient reason for the interposition of this court at the present stage of the proceedings. *Ibid.*

MINNESOTA.

1. Whilst Minnesota was a Territory, the following statute was passed:

   Sec. 1. Any rate of interest agreed upon by the parties in contract, specifying the same in writing, shall be legal and valid.

   Sec 2. When no rate of interest is agreed upon or specified in a note or other contract, seven per cent. per annum shall be the legal rate. *Brewster* v. *Wakefield*, 118.
2. Where a party gave two promissory notes, in one of which he promised to pay, twelve months after the date thereof, a sum of money, with interest thereon at the rate of twenty per cent. per annum from the date thereof,

MINNESOTA, (*Continued.*)
and in another promised to pay another sum, six months after date, with interest at the rate of two per cent. per month, the mode of computing interest under the statute was to calculate the interest stipulated for up to the time when the notes became due, and after that time at the rate of seven per cent. per annum. *Ibid.*

PAROL EVIDENCE.
See EVIDENCE.
1. Parol proof of the circumstances under which an endorsement was made upon a promissory note was admissible. *Rey* v. *Simpson*, 341.

PARTIES.
1. The parties who acquired liens on the mortgaged property subsequent to the mortgage in question were not necessarily parties to this appeal; and if they had appeared to the suit in the court below, one defendant, whose interest is separate from that of the other defendants, may appeal without them. *Brewster* v. *Wakefield*, 118.

PARTITION.
1. Where a decree for the partition of lands was made by a State court having jurisdiction over the subject matter and the parties, which decree was affirmed by the Supreme Court of the State, this court cannot inquire, in a collateral action, whether errors or irregularities exist in the proceedings. *Parker* v. *Kane*, 1.

PARTNERS AND PARTNERSHIP.
See COMMERCIAL LAW.

PATENT RIGHTS.
1. The patent of the Tathams, for an improvement upon the machinery used for making pipes and tubes from lead or tin, when in a set or solid state, explained and sustained. *Le Roy* v. *Tatham*, 132.
2. Where a patentee, whose patent had been extended according to law, conveyed all his interest to another person, and the assignee brought suit against certain parties for an infringement of the patent, and these parties claimed, under a license granted by the original patentee before the assignment, it was necessary to show a connected chain of title to themselves, in order to justify their use of the improvements secured by the patent. *Chaffee* v. *Boston Belting Co.*, 217.
3. Having omitted to do this, the judgment of the court below, which was in favor of the defendants, must be reversed, and the case remanded for another trial. *Ibid.*
4. Whether the patent was for a process or a machine, is not decided in the present case. *Ibid.*

PLEAS AND PLEADINGS.
1. Where a bill of review was filed, alleging that the decree was obtained by fraud, which allegations were denied in the answer, and it appeared by the evidence that the complainant had lost the suit by his own neglect, the bill of review was properly dismissed by the court below. *McMicken's Executors* v. *Perin*, 282.
2. Where the question decided by the Supreme Court of Louisiana was, that the introduction of a judgment obtained in Mississippi for the same

PLEAS AND PLEADINGS, (*Continued.*)

cause of action which was then before the court of Louisiana was not such an alteration of the substance of the demand as was forbidden by the code of practice, this is not a question which can be revised by this court under the twenty-fifth section of the judiciary act; it being merely a question of pleading and evidence in support of a new allegation, arising according to the practice in Louisiana so as to reach the merits of the case. *White* v. *Wright*, 19.

3. Where an endorsement upon a promissory note was made, not by the payee, but by persons who did not appear to be otherwise connected with the note, and the note thus endorsed was handed to the payee before maturity, a motion to strike out of the declaration a recital of these facts, and also an allegation that this endorsement was thus made for the purpose of guarantying the note, was properly overruled. *Rey* v. *Simpson*, 341.
4. In Minnesota, where the transaction took place, suitors are enjoined by law, in framing their declarations, to give a statement of the facts constituting their cause of action; which statement is required to be expressed in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. *Ibid.*
5. The facts above recited were a part of the facts constituting the cause of action, and therefore properly inserted in the declaration. *Ibid.*
6. Parol proof of the circumstances under which the endorsement was made was admissible, and the weight of authority is in harmony with this principle. *Ibid.*
7. The judgment against these endorsers was properly given, upon the ground that they were original parties to the note. *Ibid.*
8. The declaration was sufficient, under the system of pleading which prevails in Minnesota. *Ibid.*
9. Where a patentee, whose patent had been extended according to law, conveyed all his interest to another person, and the assignee brought suit against certain parties for an infringement of the patent, and these parties claimed, under a license granted by the original patentee before the assignment, it was necessary to show a connected chain of title to themselves, in order to justify their use of the improvements secured by the patent. *Chaffee* v. *Boston Belting Co.*, 217.
10. Having omitted to do this, the judgment of the court below, which was in favor of the defendants, must be reversed, and the case remanded for another trial. *Ibid.*
11 Whether the patent was for a process or a machine, is not decided in the present case. *Ibid.*

PRACTICE.

1. Where a writ of error was allowed in open court, in the Circuit Court, but this writ had no seal, and was not returned to this court with the transcript of the record, and two terms afterwards a paper was filed in the clerk's office, in form of a writ of error, but without a seal, and having no authenticated transcript annexed, the cause must be dismissed on motion. *Overton* v. *Cheek*, 46.

PRACTICE, (*Continued.*)

2. Where, according to the practice in Louisiana, the facts of the case are stated by the court below in the nature of a special verdict, an objection that the contract sued upon could not be proved by one witness only, comes too late when made for the first time in this court. *Cucullu* v. *Emmerling*, 83.
3. According to that practice, the judge below finds facts, and not evidence of those facts. *Ibid.*
4. A writ of error cannot be amended in this court. *Hodge* v. *Williams*, 87.
5. Therefore, where the party who was really the plaintiff in error, and sought to reverse the judgment, was made the defendant, and the party in whose favor the judgment in the court below was rendered was made plaintiff in error in the writ, it cannot be amended in this court, but must be dismissed. *Ibid.*
6. Whether the underwriters were discharged in consequence of the condemnation of the vessel as unseaworthy, was a question not made on the trial or presented to the court for decision, and therefore cannot be entertained here; neither can the question whether the policy was an open or valued one, as no exception was the taken to ruling of the court below that it was a valued policy. *Insurance Co. of the Valley of Virginia* v. *Mordecai*, 111.
7. Although the laws of the Territory abolished the distinction between cases at law and cases in equity, and required all cases to be removed from an inferior to a higher court by writ of error, and not by appeal, yet such laws cannot regulate the process of this court; and the present case, being in the nature of a bill in equity, is properly brought up by appeal. *Brewster* v. *Wakefield*, 118.
8. The parties who acquired liens on the mortgaged property subsequent to the mortgage in question were not necessarily parties to this appeal; and if they had appeared to the suit in the court below, one defendant, whose interest is separate from that of the other defendants, may appeal without them. *Ibid.*
9. Where streets were opened in New Orleans, a sum of money, as indemnity, was allowed to G, as being the supposed owner of the property condemned. *City of New Orleans* v. *Gaines*, 141.
10. D claimed to be the owner of the property, and brought a suit against the city for the money, in which suit G was cited for the purpose of having the question decided, to whom the property belonged, and judgment was rendered against the city in favor of D. *Ibid.*
11. Afterwards, G brought a suit in the Circuit Court of the United States, and the city pleaded the former judgment in bar. *Ibid.*
12. But, as these facts were not given in evidence upon the trial, nor did the judge make any statement of facts found by him, the record presents only the judgment against the city in favor of G, and there is no ground of error upon which this court can reverse the judgment. *Ibid.*
13. No appeal can be taken from the final decision of a State court of last resort, under the 25th section of the judiciary act, to the Supreme Court of the United States. A writ of error alone can bring up the cause. *Verden* v. *Coleman*, 192.

PRACTICE, (*Continued.*)

14. Where no question was raised upon the trial of the case in the court below for the consideration of this court, nor did the plaintiff in error, by counsel or otherwise, make one here, the judgment will be affirmed with costs and interest at the rate of ten per cent. per annum. *Kilbourne et al.* v. *State Savings Institution of St. Louis*, 503.

SHIPS AND VESSELS.

See ADMIRALTY.

STOCKHOLDERS, LIABILITY OF, TO PAY UP.

See INSURANCE COMPANY.

SUPERSEDEAS.

1. Where the matter in controversy was the right to the mayoralty in Georgetown, and there was a judgment of ouster in the Circuit Court, if the defendant filed the necessary bond and sued out a writ of error to this court, this amounts to a supersedeas upon the judgment. *United States ex relatione Crawford* v. *Addison*, 174.

TAXES IN WASHINGTON.

1. Under the act to incorporate the city of Washington, passed on the 15th of May, 1820, amended by the act of 1824, it is not a condition to the validity of the sale of unimproved lands for taxes, that the personal estate of the owner should have been exhausted by distress. *Thompson* v. *Lessee of Carroll*, 422.
2. The ordinances of the corporation cannot increase or vary the power given by the acts of Congress, nor impose any terms or conditions which can affect the validity of a sale made within the authority conferred by the statute. *Ibid.*

WASHINGTON, CITY OF.

1. Under the act to incorporate the city of Washington, passed on the 15th of May, 1820, amended by the act of 1824, it is not a condition to the validity of the sale of unimproved lands for taxes, that the personal estate of the owner should have been exhausted by distress. *Thompson* v. *Lessee of Carroll*, 422.
2. The ordinances of the corporation cannot increase or vary the power given by the acts of Congress, nor impose any terms or conditions which can affect the validity of a sale made within the authority conferred by the statute. *Ibid.*

WISCONSIN.

1. Where a deed for land in Wisconsin was voluntarily destroyed by the parties without its being recorded, and adverse parties were bona fide purchasers without notice, (according to the decision of the Supreme Court of Wisconsin,) the destroyed deed was inoperative under the statutes of Wisconsin in relation to the registry of deeds. *Parker* v. *Kane*, 1.
2. A deed which conveyed "an undivided fourth part of the following described parcel or tract of land, viz: lots number one and six, being that part of the northeast quarter lying east of the Milwaukee river," conveys only lots one and six, and not that part of the northeast quarter which is not included within the lots one and six. *Ibid.*

WISCONSIN, (*Continued.*)

3. Where a sale was made by an administrator under the authority and pursuant to an order of the Probate Court of the county where the land laid, and the proceedings were regular except that no guardian was appointed to represent the heirs, the Supreme Court of Wisconsin decided that this defect was not sufficient to prevent the title from vesting in the purchaser, and this court adopts their decision. *Ibid.*
4. Where a decree for the partition of lands was made by a State court having jurisdiction over the subject matter and the parties, which decree was affirmed by the Supreme Court of the State, this court cannot inquire, in a collateral action, whether errors or irregularities exist in the proceedings. *Ibid.*

WRIT OF ERROR.

1. Where a writ of error was allowed in open court, in the Circuit Court, but this writ had no seal, and was not returned to this court with the transcript of the record, and two terms afterwards a paper was filed in the clerk's office, in form of a writ of error, but without a seal, and having no authenticated transcript annexed, the cause must be dismissed on motion. *Overton* v. *Cheek*, 46.
2. A writ of error cannot be amended in this court. *Hodge* v. *Williams*, 87.
3. Therefore, where the party who was really the plaintiff in error, and sought to reverse the judgment, was made the defendant, and the party in whose favor the judgment in the court below was rendered was made plaintiff in error in the writ, it cannot be amended in this court, but must be dismissed. *Ibid.*
4. No appeal can be taken from the final decision of a State court of last resort, under the 25th section of the judiciary act, to the Supreme Court of the United States. A writ of error alone can bring up the cause. *Verden* v. *Coleman*, 192.