CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES,

DECEMBER TERM, 1863.

REPORTED BY

JOHN WILLIAM WALLACE.

VOL. I.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. ROGER B. TANEY.

ASSOCIATES.

HON. JAMES M. WAYNE,
HON. SAMUEL NELSON,
HON. NATHAN CLIFFORD,
HON. SAMUEL F. MILLER,
HON. JOHN CATRON,
HON. ROBERT COOPER GRIER,
HON. NOAH H. SWAYNE,
HON. DAVID DAVIS,
HON. STEPHEN J. FIELD.

ATTORNEY-GENERAL.

HON. EDWARD BATES.

CLERK.

DANIEL WESLEY MIDDLETON, ESQUIRE.

GENERAL RULES.

MADE 18TH APRIL, 1864.

IN suits in equity for the foreclosures of mortgages in the Circuit Courts of the United States, or in any of the courts of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

The third paragraph of the twenty-fourth rule of this court is amended, so that it will read as follows:

In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, as the case may be, unless otherwise ordered by the court.

The costs of the transcript of the record from the court below shall be a part of such costs.

MEMORANDA.

The Chief Justice was indisposed during a portion of this term, and did not sit.

By Act of Congress of March 3d, 1863, a Tenth Judicial District was established; and the Honorable STEPHEN J. FIELD, of California, having, on the 10th of the same month, been appointed one of the Justices of this court, a new allotment of circuits was made, and he assigned to the Tenth.

PREFACE.

No volume of reports with whose history I am acquainted, can claim more full indulgence, so far as the reporter's work is concerned, than the one here put forth. With the exception of half a dozen cases—cases, too, of inferior importance,—it has been prepared without the reporter's having heard what he attempts to present, and generally speaking without any knowledge of what passed in court beyond that which, after the adjournment of the court itself, and when separated from the judges and the counsel, he has been able to put together from judicial records, and from briefs of argument.

The reporter's appointment dates from the 21st March, 1863. On that day, being in a very private station, and engaged in studies having but slight relation to the law, he was gratified, quite unexpectedly to himself, by an invitation from the Supreme Court of the United States, to become the reporter of the decisions of that august tribunal. An invitation thus flattering it was not easy to resist. He repaired, with but little delay, to the seat of Government. Four months, however, of the judicial term then current, had already passed away; leaving fifteen or sixteen days only as a residue for the argument of causes.

It was his expectation that all cases heard *prior* to the date of his entering into office would be prepared by the Honorable Mr. Black, the former reporter; a gentleman whose fine mind, extensive knowledge in the law, and elegant literary taste qualified him above the common—if his engagements had allowed such a disposal of his talents—to this special department of legal labor. With Mr. Black's retirement, however, in 1861, from

the first law office of the Executive Government, an impression had gone forth that he might continue to reside during a portion of the year at least, at the capital. And the importunities of clients from all quarters of the country, which at once placed him in the front ranks of private counsel at the Federal bar—as he had just previously been its official head—rendered it impossible for him, with the new accumulation of duty thus forced upon him, to report these cases at all. Mr. Black had, in fact, with the kindest expressions of regard from the court, completely taken leave of the office. It was necessary, therefore, that the late decisions should either remain unreported, or be reported by the new appointee. Conceiving that as a general thing it is indispensable that a reporter should at least *hear* that which he attempts to present, the office of reporting past decisions was one repugnant to the author's inclination. But it was undesirable that the decisions of a whole term, and that of a term characterized by many important adjudications, should be left without report at all. He resolved, accordingly, to present them in a volume of the usual form, but to present them without his name. This intercalation, however, within a range of reports distinguished, in general, by long and regular successions, of one interposited and unacknowledged book, was distasteful wherever mentioned. Indeed, except as disconnecting his name from a book of his own, but which from its nature was certain to dissatisfy even that one person whom most books are sure to please—the author—he could not much approve of it himself. The remaining resource was that which is indicated in the form and title of the present work.

Besides the great disadvantage of not having heard the cases, the reporter has been driven by a necessity to publish the volume within a given time. Congress, indeed, at the kind instance of the judges, and on the recommendation of the Judiciary Committees of both houses, was good enough, in view of the difficulties of the case, to enlarge by six months the term usually allowed for the appearance of these reports, and to agree to a delivery

at any time before May, 1865.* But except in so far as it relieved the reporter of a consciousness of obligation to deliver his work by a near and stated day, the kindness was not of practical value; since, at the expiration of the *usual* term, the court would be again convened, and the reporter, if remaining in office, would be fully occupied with the duties of the *new* session, the session, to wit, of December, 1864. The volume has accordingly been written, stereotyped, and printed within the old and usual term of six months; two of those months having been months of summer, and months, therefore, which, in the latitude and city of the reporter's residence are hardly months for work at all. This has been accomplished, too, at a time when, as is known, great difficulties have existed in regard to all agencies of the printing-house, and even more in the departments of paper manufacture. One or two cases of a certain interest, decided during the term, are necessarily omitted from this volume; among them *Fossat* v. *United States*. A full report was prepared and partially printed; but the case being one of boundary simply, a map was found to be indispensable to convey to the reader any understanding of the case. This necessary map, it would seem, did not accompany the copy of the record left with the clerk for the reporter; and though a copy was ultimately sent, it did not arrive in time to be used in this first volume.

The late eminent Mr. Justice STORY,† in a letter to a former reporter of this court, has expressed certain views—his own undoubtedly, and, from the extent to which they were acted upon by Mr. Wheaton, I presume the views of the court of that day—as to the mode of preparing books of reports. That learned justice thus writes:

"In respect to the duty of a reporter, I have always supposed that he was not a mere writer of a journal of what occurred, or of a record of *all* that occurred, or of the manner and time in which it occurred. This duty appears

* See Joint Resolution No. 26, of April 22d, 1863; 13 Stat. at Large, 405.

† Story's Life and Letters, vol. ii, p. 231.

to me to involve the exercise of a sound discretion as to reporting a case; to abridge arguments, to state facts, to give the opinions of the court substantially as they are delivered. As to the order in which this is to be done, I have supposed it was a matter strictly of his own taste and discretion, taking care only that all that he states is true and correct, and that the arrangement is such as will most readily put the profession in possession of the whole merits of the case, in the clearest and most intelligible form.

"In regard to the statement of facts, I have always thought the best method to be, where it could conveniently be done, *to give the facts at the beginning of the case*, so that the reader might at once understand its true posture.

"If the court state the facts, the true course is to copy that very statement, because it is the ground of the opinion, and to remove it from the place in the opinion which it occupied (taking notice that it is so removed and used), and then proceed to give *the rest* of the opinion in its proper order, *after* the argument. Upon any other plan, either the reporter must make a statement of facts of his own, which it seems to me would be improper, or *repeat* the statement of facts by the court, which would be wholly useless, and burden the volume with mere repetitions. This course has been constantly adopted by the reporter of my Circuit Court opinions, and I have always approved it. I believe that it is adopted by all the *best* reporters, both in England and America. If I were a reporter, I should think it my duty to adopt it, unless expressly prohibited from so doing. Whenever it is not done, there is (to be sure) a much easier labor for the reporter, *but his reports always wear a slovenly air.*"

This extract expresses, in the main, my own ideas; and the views it enforces have the approval, I see, of one of the first law journals of our country, which has lately given to them currency with expressions of its commendation.* Almost the first thing, therefore, which I did, after my reaching Washington, was to seek an interview with each member of the court, in relation to what I deemed a matter necessary to be attended to in the style of reporting, and without an attention to which I apprehend we can never have clean and satisfactory reports. I was able, however, from the lateness of my arrival in Washington prior to the adjournment and separation of the court, to have less full

* The Law Reporter, vol. xxv, p. 693.

conferences with the judges on this matter than I could have desired. Certain of the reports are not in as clean a form as others.

In all cases, however, where, after an interview with the judge, I deemed my authority clear, I have acted on the principle asserted as the true one by Judge STORY and continually adopted by that good reporter, Mr. Wheaton. I have taken, I mean, the *facts* stated by the court, in the opening or narrative parts of the opinion, as either the substantial basis or the very form of my own statement, leaving them off in the opinion itself. And I have in every case—whether facts are or are not subsequently repeated in the opinion—presented what is meant to be a complete statement of the case; making such statement the first thing in the report, and a matter separated from both arguments and opinion. Indeed, if the arguments of counsel are given at all, I can conceive of no good reporting in which the "case," as the old books call it,—by which I mean the whole statement of facts on which the controversy turned,—is not presented in this primary and fundamental form. Hereafter, should I remain in office, my hope is to have the manuscript of each report completed soon after the opinion is given, and so to be able to confer frequently, and as I go along, with the respective judges as to the exact *form throughout* which the *report* is to take; and also as to what cases or parts of cases can be properly omitted altogether; so that decisions of value, or decisions on points of value shall not, as they now too much are, both in England and with us, be overlaid and buried by reports of matter, sometimes often previously decided, and sometimes so perfectly plain as not to be worthy of either litigation or report at all. In no other way, I think, can the *class* of cases reported secure, for any term of years, a distinguishing reputation and authority; and in no other way,—except by the reporter's exercise of a discretion which he may not find it perfectly agreeable to assume, even when allowed,—can the reporter's work, and the superior labors of the court—his statement of facts, I mean, and

their more valuable *opinion* upon them—be, as they ought to be, correlates only, and not repetitions; and the whole report—statement, arguments, and opinion—go forth to the profession, as, in the departed STORY'S idea, they ought to go forth, and "in all the *best* reporters, both in England and America," as he asserted, do go forth, separate in form, as distinct in nature, each from the other; each completed in itself, but having, one with all, exact and reciprocal adaptation, and presenting *so* a full, harmonious, consecutive, but never redundant whole.

I have given the names of the cases in as short a form as possible. The title of the case is, after all, only designed for facility of reference, and the shorter it is the more convenient I think it proves. The older books frequently do nothing but *number* the cases. Certainly all writers or annotators of text-books will admit that, in the present effusion of citations, cases having long titles are very unwelcome to the pen; especially if it be a hastened or an impatient pen. I presume that it is not much better for judges. Indeed we constantly find authors, counsel and judges alike seeking refuge from these long names in the use of initial letters only, or in a citation of part only of the name; sometimes the first part, sometimes the last; producing, so, a citation of the same case in ways so different that the quotation cannot at all times be recognized as pointing to the same authority.*

I have given the arguments occasionally at a certain length; not, I hope, at too great a length. It is considerable chiefly in cases of a certain kind, in *Cross* v. *De Valle*,† for example, where

* I have seen one case—that, to wit, of "*Philadelphia, Wilmington and Baltimore Railroad Company* v. *Philadelphia and Havre de Grace Steam Towboat Company*" (23 Howard, 209), cited in the same suit in almost as many ways as it has words in its title; not quite as many, indeed, for only twelve varieties could be counted in the form of quotation. In some of the English books the names of cases are still longer, and the inconvenience, of course, greater.

† Page 1.

it seemed desirable to show that if we sometimes follow an English case, itself unsupported, we do not do so without a severe examination of the precedent brought up; OR in *Clearwater* v. *Meredith*,* where a principle of pleading—a sort of principle not often discussed in this court—was involved; and where, for the benefit of the junior bar, it seemed well enough to have the learning of the case exfoliated; OR in *Bridge Proprietors* v. *Hoboken Company*,† where a great question of jurisdiction and of constitutional law was concerned; matters always fittingly exhibited, when fully; OR in *Gelpcke* v. *The City of Dubuque*,‡ where high moral duties were enforced upon a whole community, seeking apparently to violate them; OR in *Niswanger* v. *Saunders*,§ in which a vast power given to this court was called into exercise, and the decision of a tribunal, supreme, for ordinary, within a State, reversed and made of no effect. The space which the arguments occupy in each case is, however, marked by running titles which arrest the eye. Readers who care for no full discussion can therefore readily pass them all. Those more interested will find in them, as the record of preceding studies, I hope, a source of profit. The whole volume, however, as already stated, has been prepared under unpropitious circumstances; and if I shall find any one whose estimate of it, as now completed, is lower than mine, I promise him, here in advance, that I will exchange my opinion when I meet him and hear it, for his. In reporting cases which he did not hear, any man's ambition may be satisfied if he escape having committed serious errors; errors, serious in their results. "A few wild blunders, or risible absurdities," incident, says Dr. Johnson, to every work of multiplicity, are equally to be expected in one of haste; a work where "copy" was prepared in the morning to be corrected as "proof" at night. In some respects of the mechanical arrangement, wherein this volume differs from preceding reports in this court, the book is experimental merely. All suggestions from the

* Ib. 26. † Ib. 116. ‡ Ib. 175. § Ib. 424.

judges about these or about anything will be happily and most respectfully received; while of course any intimation which comes from the court in its corporate capacity will be of controlling influence.

The reporter must not conclude without expressing his grateful sense of the kindness received from every member of the court during the very short time of the December Term, 1863, that he occupied his place in their tribunal. To the learned justice of the California Circuit he was largely indebted for assistance in preparing several of the California cases; cases which, with the peculiar system of original titles prevailing in regions obtained by us from the Mexican republic, would otherwise have been unintelligible in the first instance to him. The difficulties of any one not bred to the California law comprehending this class of cases is indeed strikingly set forth by Mr. Justice MILLER in this very volume.* To the Senior Associate, Mr. Justice WAYNE, who exercised the office of Presiding Justice during a portion of the Term from which temporary indisposition withheld the official Chief, he is under particular obligations and of another kind. It was not possible to think of any matter which could contribute to the reporter's external comfort in connection with his office, or which could be agreeable to a stranger, that did not seem to have been previously the subject of provision from this eminent person; and it was all directed with an elegant grace which was equalled only by the substantial service.

PHILADELPHIA, September 30, 1864.

* Rodrigues *v.* United States, *infra*, 582.

TABLE OF CASES.

DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1863.

Cross *v.* De Valle.

1. The well-settled principle, that aliens may take land by deed or devise, and hold against any one but the sovereign until office found, exists in Rhode Island as elsewhere; not being affected by that statute which allows them to hold land "*provided*" they previously obtain a license from the Probate Court.
2. Although equity will, in some cases, interfere to assert and protect future rights,—as *Ex.* Gr. to protect the estate of a remainder-man from waste by the tenant for life, or to cut down an estate claimed to be a fee to a life interest only, where the language, rightly construed, gives but an interest for life; or will, at the request of trustees asking protection under a will, and to have a construction of the will and the direction of the court as to the disposition of the property,—yet it will not decree *in thesi* as to the future rights of parties not before the court or *in esse*.
3. *Langdale* v. *Briggs* (39 Eng. Law and Equity Reps. 194), followed and approved; distinguished, also, from *Lorillard* v. *Coster*, and *Hawley* v. *James* (5 Paige, 172, 442).
4. A "cross-bill" being an auxiliary bill simply, must be a bill touching matters in question in the original bill. If its purpose be different from that of the original bill, it is not a cross-bill even although the matters presented in it have a connection with the same general subject. As an original bill it will not attach to the controversy unless it be filed under such circumstances of citizenship, &c., as give jurisdiction to original bills; herein differing from a cross-bill, which sometimes may so attach.

Halsey devised real estate in Rhode Island to trustees there, in trust for the benefit of his natural daughter, Maria

De Valle, a married woman, during her life, for her separate use; and upon her decease the trustees were directed to convey in fee one-half of the estate to the eldest son of the said daughter living at her decease, if of age, and one-half part to her other children living at her decease, and in default of male issue to her daughters equally. Mrs. De Valle, who was born in 1823, was a native and resident of Buenos Ayres, and had five children born there. After a certain time she came to Rhode Island, and had one child born *there*.

The trustees were directed not to convey the real estate to his grandchildren, unless they should, within five years after being duly informed of his decease, have their permanent residence in the United States, and adopt and use the name of Halsey.

In case his daughter should die without issue living, or with issue who should neglect or refuse to comply with the conditions, the trustees were directed to pay two legacies out of the estate, and convey the residue to a certain Cross, the complainant, if then living, and if he should adopt and use the name of Halsey; or if said complainant should not then be living, or if he should refuse to adopt the name of Halsey, then to a nephew of Cross, upon condition that *he* should adopt the name of Halsey.

Cross now filed his bill in the Circuit Court of the United States for *Rhode Island* against the trustees and the beneficiaries of the trust, setting forth that the trusts in favor of Mrs. De Valle and her children had failed by reason of her and their alienage and incapacity to hold real estate in Rhode Island, and that the trust for the benefit of the complainant was hastened in enjoyment by such failure; claiming that the devise over to him took effect upon the probate of the will, *or*, that it took effect in favor of the heirs at law, *or* of the State of Rhode Island as sovereign, and praying that the estate should be conveyed to him by the trustees, *or* to the heirs at law, *or* to the State.

A cross-bill, or bill purporting to be so, was also filed *in the same court* by heirs at law of Halsey against this complain-

ant, Cross, the trustees, and other parties in interest,—the parties in both bills being the same, but being partially reversed,—for the purpose of more distinctly asserting and putting in issue the rights of the heirs at law, as against Mrs. De Valle, Cross, and those other devisees, and so of having the limitations on Mrs. De Valle's life-estate declared void, as tending to a perpetuity: and generally of having the rights of the heirs at law declared and protected by the court in its exercise of equitable jurisdiction. The complainants were citizens either of *Massachusetts*, or of *Wisconsin*, or of *Ohio*, or of *New York*. The defendants were all, with one exception, either citizens of *Rhode Island*, or *aliens commorant* there. The excepted defendant, Cross, complainant in the original bill, was a citizen of *Louisiana*, and not *commorant* in Rhode Island.

On the subject of alienage, it is necessary to mention that no special enactment had been made in Rhode Island, giving to aliens more ability to hold real estate than they had by the common law. On the contrary, rather, by a statute in force at Halsey's death, it had been enacted as follows:*

"Courts of Probate shall have power to grant petitions of aliens for leave to purchase, *hold* and dispose of real estate within their respective towns, *provided* the alien petitioning shall, at the time of his petition, be resident within this State, and shall have made declaration, according to law, of his intention to become a naturalized citizen of the United States."

On demurrer the Circuit Court dismissed the bill, and dismissed also the cross-bill. On appeal here, along with other questions argued—including the one whether the remainders were void as tending to perpetuities—were the following, the only ones considered by the court:

1. Was the equitable life-estate given by the will to Mrs. De Valle void in consequence of her alienage, so that persons who have interests in remainder have a right to be hastened in the enjoyment of the estate?

* Revised Statutes of R. I., 1857, page 351, § 21.

2. If not, did the court err in dismissing the cross-bill, and refusing to declare the future rights of the parties?

Mr. Jenkes in support of the Will:

1. Unless there be something special in the law of Rhode Island, alienage is no sufficient cause to declare the life-estate, *ipso facto*, void; however voidable the estate may be by the sovereign power, if such power is brought into action. This is familiar law. But Rhode Island herself interposes not. The statute relied on does but give the means by which an alien can acquire real estate, so that even the commonwealth has no rights of office found against it.

2. The application to declare future rights is made by what is called a cross-bill. But the bill is no proper cross-bill. It brings up new matter not touched on by the original parties. The bill of Mr. Cross asked nothing about future rights, nor did it seek to avoid anything as tending to perpetuity. This so-called cross-bill is, therefore, an original bill; and being so there was no jurisdiction. Cross was a citizen of Louisiana; all the defendants, therefore, were not citizens of Rhode Island, while all the complainants were citizens of States other than Rhode Island. Each of the complainants, therefore, could not, under the Judiciary Act, sue each of the defendants.* But supposing that bill rightly brought as respects form,—

3. Will this court decree, as asked by the heirs, on future rights? If it will not, it is unimportant whether the limitations over are void for remoteness or not. The question proposed was deeply considered so lately as 1856, in an English case, in the Court of Appeals in Chancery;† a case which is in point, and which we believe this court will follow. Lord Justice Turner there said, that long as he had known the court, he had always considered it to be settled that it did not declare future rights, but would leave them to be determined when they came into possession. He

* Connelly *v.* Taylor, 2 Peters, 564; Moffat *v.* Soley, 2 Paine, 103; Kitchen *v.* Strawbridge, 4 Washington, 84.

† Langdale *v.* Briggs, 39 English Law and Equity, 194.

added, that in *all* cases within his experience, where there had been tenancies for life with the remainder over, the course had been to provide for the interests of the tenants for life, reserving liberty to apply upon their deaths. Various considerations were urged before him in support of the proposition, which will be pressed by the other side, here, and among them the convenience and advantage it would be to parties to have their future rights ascertained and declared. To all arguments of this kind the judge replied, in effect, that the question was not one of discretion, but deeply affected the law of the court; that the course and practice in such cases constituted the law of the court; and added: "I cannot agree to break through that law upon any mere ground of convenience. If the law is productive of inconvenience, it is for the legislature to alter it." In *Jackson* v. *Turnley*,* the Vice-Chancellor would not entertain a suit for the purpose of declaring that a person who claims to have a right which may arise hereafter has no such right.

Messrs. Curtis and Curry on the other side:

1. The Rhode Island statute shows the only mode by which an alien can hold land in *that* State. He may hold it, "provided" he gets previous license. It declares, in effect, that without license from the Courts of Probate no one can hold it at all. It gives an increased severity to the already hard rule of the common law, never previously modified in the least in Rhode Island. On the contrary, as opposite counsel will admit, before its enactment, aliens were obliged always to have recourse by petition to the General Assembly for the privilege of taking or holding, or disposing of real property in that State. Will this court, by its decision of this cause, uphold our local immemorial law, or disregard it, and make another law for us?

2. If the second bill was an original one, the objection to the jurisdiction would be well taken as respects Cross. But it is a true cross-bill; a bill by some of the defendants to a former bill, touching the same matters and still depending,

* 21 English Law and Equity, 13.

against the other defendants and the plaintiff to the former bill, which plaintiff is the party on account of whose citizenship the objection is made that it cannot stand as an original bill. All the parties to both bills are the same, only that they are partially reversed. The subject-matter is the same; but the plaintiffs in the cross-bill assert rights to the property different from those allowed to them in the original bill, claiming an affirmative decree upon those rights, which the forms of pleading might deny to them as defendants to the former suit. The jurisdiction of the court having once attached to the controversy and the parties, it is coextensive, by the settled law of the court, with all the equities of the cause for every purpose properly arising in its progress, and especially as regards the original mover.

3. The general preventive power of equity; its capacity to treat vested estates in remainder as present interests to be protected; its habit of declaring a scheme of trusts, and so of deciding whether limitations over tend, or do not tend, to perpetuities, are all supposed to be shut off from exercise in a case *apparently* one for their application, by *Langdale* v. *Briggs*, decided in an English court. We believe that case to have been wrongly decided even upon English authorities. It is notoriously not in accordance with Scotch ones. Turner, L. J., though he said that *during* the hearing he had been surprised at the length to which the argument had been carried in favor of that view which *we* now take, yet adds: "But having looked into the cases since the argument, I feel bound *now* to say that I have been not less surprised to find how *little authority* is to be found upon the subject." He consoles himself by remarking, that "authority, however, is not *wholly* wanting;" and makes good his assertion by citing a book of no more modern and no more full character than "Equity Cases Abridged." His lordship also declared: "I am far from thinking that, to some extent, the legislature might not usefully interpose and provide some remedy for the ascertainment of future rights." Certainly, when a case decided in the face of expressions like these is pressed upon an American tribunal of supreme authority in limitation of *its* powers, we may pause before we adopt it. Space beyond

that usually allowed to argument will be pardoned in favor of an examination of the case itself, and of the precedents upon which it professes to be founded. The discussion will be dry to readers generally, but it may prove valuable to any future investigator of the limits upon general chancery jurisdiction.

In the case so much relied on, the testator had settled estates during his life in strict settlement, remainder to himself in fee. He afterwards made a will, devising all his estates, freehold, leasehold and copyhold, to his eldest daughter, the complainant, Lady Langdale, for life, remainder to her first and other sons, in tail male, remainder to his other daughters, &c., in strict settlement. Afterwards, upon the birth of a daughter to Lady Langdale, he made a codicil, by which he devised all his real estates (without mention of leasehold and copyhold), subject to Lady L.'s life-estate, to her daughter for life, remainder to the sons, &c., of said daughter, in tail male, remainder over, &c. One of the questions raised at the hearing of the cause, *though not apparently by the pleadings*, was upon the demand by the remainder-man in tail, under the will, to have the question decided as between himself and Lady L.'s daughter, *they being both parties defendant*, whether under the language in the codicil, the leasehold and copyhold estates would, upon Lady Langdale's death, pass to her daughter, or would go according to the will. Upon the refusal of the Vice-Chancellor to decide this point, as well as from the remainder of the decree, the remainder-man appealed, and upon the appeal the decision of the Vice-Chancellor was affirmed; *one of the Lord Justices declining to give any opinion upon this particular point*, the other, Turner, L. J., giving the opinion relied on.

The first case cited by the Lord Justice is *Hitchcock* v. *Sedgwick*,* or rather a case cited in a note to the report of that case. In the case cited (*Seyborne* v. *Clifton*),† plaintiff and defendant had both purchased a reversion, and plaintiff brought a bill to have his right declared and to perpetuate his testimony, and his bill was dismissed, so that he finally

* 1 Equity Cases Abridged, 234; or, 8vo. edit. 354, Dublin, 1792.

† Reported in Nelson's Chancery Reports, 125. REP.

lost his reversion for want of the testimony. The report of the case is loose; but it is clear that the principal question was upon the equity to perpetuate testimony, and it is clear that upon that point the decision was wrong, as Turner, L. J., admits.* As to the refusal to determine the title to the reversion, it probably was right, as the title appears to have been a purely *legal* one. The case is slight as authority here and now. In *Thellusson* v. *Woodford*,† next cited, the point does not seem to have been raised. *Wright* v. *Atkyns*‡ is the case on which the Lord Justice chiefly relies. That belongs to a large class of cases, those namely in which words of *recommendation* in a devise are construed to create a *trust.* The testator devised lands to defendant, his mother, in the fullest confidence that after her decease she would devise the property to the testator's family. Plaintiff, who was heir at law, *and also mortgagee*, brought his bill to have an account of the amount due on the mortgages, and that defendant be decreed to pay the same, if entitled to the *fee;* or, if she were only entitled to a life estate that the amount should be raised by sale. *There was no prayer for a decision of plaintiff's claim as heir at law to the reversion upon the life-estate of the defendant.* Sir William Grant, however, decided that she was entitled only to a life-estate, and that plaintiff would be entitled in fee upon her death. Consequently, that the mortgages should be raised by sale, she being made personally accountable only for the interest accrued during her possession. Lord Eldon confirmed this decree, and also issued an injunction against cutting timber upon the estate by defendant. The House of Lords, upon appeal, reversed so much of Sir William Grant's decree as declared the defendant to be merely tenant for life, and all declarations consequent thereon; from which it would seem that they must have decreed the whole of the mortgage to be chargeable upon the defendant, personally, as well as the land. Thus far it only appears that the House of Lords did not think it necessary to decide the question of the tenancy for life in order to provide

* 39 English Law and Equity, 214. † 4 Vesey, 227. ‡ 17 Id. 255.

for the mortgages; that consequently the question was not raised by the bill, and should not be passed upon.

The House of Lords reversed the decree for an injunction, on the ground that, whatever might be the claims of the heir at law after the death of the tenant for life, she was entitled, during her life, to the full enjoyment of the land. Upon this view of her rights, of course they could not decide the question, whether she was tenant in fee or for life upon a bill not specifically seeking any such decision.

Now, in this case we have the authority of Sir Wm. Grant and Lord Eldon, that Chancery may declare that an equitable remainder exists, pending the life-estate of the owner of the legal fee; while the House of Lords do not appear to have decided anything more than that in the particular case before them such a declaration was not called for.

But *Wright* v. *Atkyns* does not stand alone. There are many cases in which a bill has been brought to obtain a decree that precatory or advisory words in a devise in fee, constituted a trust, reducing the fee to a life-estate; and in several of these cases it appears that the bill was filed and the decree made pending the life-estate. So that all these cases must be wrong, as well as that of *Wright* v. *Atkyns*, if the position of L. J. Turner is sound. Let us examine the cases.

(A.D. 1801.) In *Brown* v. *Higgs*,* Lord Eldon plainly intimates, that if the bill had called for a decision of the question it might have been made, though the tenant for life was still alive.

(A.D. 1813.) *Lord Dorchester* v. *The Earl of Effingham*.† Lord D. settled certain estates in strict settlement, reserving a power of new appointment by deed or will. He made a will with this clause: "All my landed estates to be attached *to my title* as closely as possible." Upon bill brought *by the tenant in tail*, under the settlement to have his estate tail established under the will also, Sir Wm. Grant *held* that by the direction in the will all the estates tail under the settlement were cut down to life-estates. Upon the view of L. J.

* 8 Vesey, 561.

† 3 Beavan, 180, *n.*

Turner it would have been improper to decide this question during the life of the complainant.

(A. D. 1816.) *Prevost* v. *Clarke*.* Testatrix bequeathed *personal property* to her daughter, Anne Clarke, and added that, trusting in the honor of Edward Clarke, husband of Anne, she entreated him, in case he survived his wife and had no children by her, he would leave the property, at his decease, to the testator's children and grandchildren. Upon bill brought by the children and grandchildren, during the life of both Edward and Anne Clarke, to have their right to the property, in case of the death of defendants without issue, declared, it was held that, upon the authority of *Brown* v. *Higgs* (*supra*), their prayer must be granted.

(A. D. 1840.) *Knight* v. *Knight*† was a devise in fee with request as to disposition by devisee, and bill brought by claimant of remainder, to have his right declared during life of devisee. The devisee died pending the bill, and it was decided that he took an absolute fee. But no question was raised as to the power of the court to decide the question before the death of the devisee, although this must have been long after the final decision, in the House of Lords, of the case of *Wright* v. *Atkyns*. So far, then, as *Langdale* v. *Briggs* rests upon that case, it wants authority.

The next case cited, *Ferrand* v. *Wilson*,‡ has no bearing upon the question,—the admission by Sir James Wigram, that a *legal* right cannot be determined before some injury thereto, being true enough, but not to the purpose.

The only other cases cited by the Lord Justice§ are two decided by V. C. Wood, both meagrely reported.‖ Both were *special cases made up under the provisions of an act of Parliament*,¶ permitting rights to be declared in certain cases by the court upon a statement of facts and questions. It does not appear upon what grounds the decision of the point was urged, and the cases rest upon the single authority of Vice-Chancellor Wood.

* 2 Maddock, 458.
† 3 Beavan, 148.
‡ 4 Hare, 385.
§ 10 Hare app. pp. xii and xiv.
‖ Greenwood *v.* Sutherland; Garlick *v.* Lawson.
¶ 13 and 14 Vic., c. 35.

Now, in the United States we have the New York cases of *Lorillard* v. *Coster*, and *Hawley* v. *James*.* In the former, the trustees of Lorillard, who had left property to be divided among collateral relatives, brought their bill to have the trusts of the will established, and for guidance by the court. Among other provisions in the will was one requiring the trustees to convert all the residue of the testator's property into real estate in New York; the income to be paid in equal parts to such of the nephews and nieces as should from time to time be living; and two years after the death of the last of them the property remaining was to be divided among their surviving children and grandchildren *per stirpes*. The heirs at law, who were parties defendant to the bill, contended that the limitations, after the death of the nephews and nieces, were void, and that they were entitled to the remainder. The complainants contended that this question was not ripe for settlement, because the life-estates were pending, and because the proper parties were not yet all *in esse*. But the court held that the heirs at law were entitled to a settlement of the question, giving as a reason that the trustees could only be authorized to invest the property as required by the will, so far as the trusts were valid, and if the ultimate limitations were void, the investment must be made in such a way as to secure the rights of all parties. It was said that the trustees must be regarded as representing the parties not *in esse*. The other case, *Hawley* v. *James*, gave rise to a similar question, which received a similar decision.

It is impossible to reconcile these decisions with the views of Lord Justice Turner. Moreover, the reason given by him for the rule he lays down is insufficient. The difficulty in the way of equitable jurisdiction, in such cases, is not that the court cannot deal with *future rights*. A right in remainder is not a *future* right. It is a *present* right to a future enjoyment. It is recognized at Law and in Equity as an *estate*, and is protected as such just as an estate in possession. Even in *Langdale* v. *Briggs*, so much relied on, Turner, L. J.,

* 5 Paige, 172, 442.

says that the appellant whose rights he refused to declare, might bring his bill for a receiver, if the mortgages upon the estates were not kept down.* Of course the court would have to begin, in such a case, by deciding that he had an interest in the estates.

Davis v. *Angel*, decided by the Master of the Rolls, and on appeal by the Lord Chancellor, so lately as 1862,† would indicate that the opinion of Lord Justice Turner is not law in Westminster Hall. It was a bill by a remainder-man to have his rights declared. It was held that he could not maintain the bill, because he had *no vested interest*, and it was *contingent if he would ever acquire any*. And the Lord Chancellor says, that if the complainant had had *any* vested interest, *however future and remote it might be*, it would have been sufficient.

In the case at bar, the property was devised to trustees, and if the limitations of the equitable estates are void for remoteness,—as we think they are,—the heirs at law have present vested interests by way of resulting trusts; and the trustees are accountable to them now, as the owners of those interests, as entitled to have their rights admitted by the trustees, and all investments so made as to protect those interests, and so as to enable the trustees to pass over the property to the heirs at law, on the termination of the life-estate, if that be valid. It is one of the duties of trustees *to admit the existence of the trust;* a duty not dependent on the right of the *cestuis que trust* to present possession. A vested interest in remainder is a subject of sale, and the denial of the trust throws a cloud upon that title, which the trustee cannot properly do. These trustees deny the title of the heirs as *cestuis que trust* under this will. And for this reason, if there were no others, equity may entertain this bill.

Mr. Justice GRIER delivered the opinion of the court:

The bill alleges that the trusts declared in the will are all void, because of the alienage of Mrs. De Valle and her children, and prays that the trustees may be ordered to convey

* P. 219.

† 8 Jurist N. S. 709, and on appeal, 8 Id. N. S. 1024.

to the complainant as one of these numerous contingent remainder-men who is not an alien; *or* that the estate be conveyed to the heirs at law of the testator. As it is not alleged that the complainant is one of these heirs, it is not easy to apprehend on what grounds he claims as an alternative *remedy* that the court should decree in favor of those who claim adversely to himself. Perhaps it was to favor the attempt to give jurisdiction to the court to declare the future rights of the parties by converting an original into a cross-bill.

That an alien may take by deed or devise, and hold against any one but the sovereign until office found, is a familiar principle of law, which it requires no citation of authorities to establish. Nor is it affected by the fact that a statute of Rhode Island will permit aliens to take a license to purchase, which will protect them even as against the State; nor by the fact that a chancellor may not entertain a bill by an alien to enforce a trust, which, if conveyed to him, might immediately escheat to the crown.

Now, as the court rightly decided that Mrs. De Valle took an equitable life-estate by the will, defeasible only by action of the sovereign, Cross was in no situation to call upon the court to declare the fate of these numerous contingent remainders.

1. For if the remainders were void because of remoteness and tending to a perpetuity, his own remainder fell with the others.

2. And if declared to be valid, not only the six children of Mrs. De Valle, who are parties to the suit, but possibly and before her death there might be six more, not now *in esse*, who would be entitled to come in before him.

3. The bill demands no such *declaration of future rights*, nor does it suggest how it could be done, or any sufficient reason why the court should pass upon the rights of persons not *in esse*.

4. The bill charges no fault to the devisees except alienage, and before any of the contingencies happen the party entitled to take may be a citizen and capable of taking and holding the estate. In fact, one of the children of defendant was

born in Rhode Island, and therefore is as capable of taking as Cross.

The decree of the court was final and complete as to the case made by the complainant's bill. If the decree had been against Mrs. De Valle, and she had been held incapable of taking, then the heirs might well say, that in such a case the estate should be conveyed to them, and not to Cross, and have their cross-bill for that purpose. But the decree being in favor of Mrs. De Valle, and the bill dismissed, the cross-bill must have the same fate with the original. A cross-bill "is a mere auxiliary suit, and a dependency of the original." "It may be brought by a defendant against the plaintiff in the same suit, or against other defendants, or against both, but it must be touching the matters in question in the bill; as where a discovery is necessary, or as where the original bill is brought for a specific performance of a contract, which the defendant at the same time insists ought to be delivered up and cancelled; or where the matter of defence arises after the cause is at issue, where in cases at law the defence is by plea *puis darrein continuance*." The bill filed by the heirs is for an entirely different purpose from that of Cross. It called upon the court to decree on the future rights of their co-defendants and others not *in esse*, and decree the limitations on the life-estate to be void as tending to a perpetuity. This would be introducing an entirely new controversy, not at all necessary to be decided in order to have a final decree on the case presented by the original bill.

As an original bill the court might properly refuse to consider it. First, on account of the parties, and secondly, on account of the subject-matter.

The bill is filed in Rhode Island. All the complainants are citizens of States other than Rhode Island or Louisiana, while one of the defendants, Cross, is a citizen of the State last named, and not commorant in Rhode Island. It was admitted that this objection was conclusive, if the bill was an original. The second objection is equally conclusive, whether it be called a cross-bill or an original. A chancellor will not maintain a bill *merely to declare future rights*. The

Scotch tribunals pass on such questions by "*declarator*," but the English courts have never assumed such power.* In *Langdale* v. *Briggs*,† Lord Justice Turner remarks: "As long as I have known this court, now for no inconsiderable period, I have always considered it to be settled that the court does not declare future rights, but leaves them to be determined when they may come into possession. In all cases within my experience, where there have been tenancies for life with remainders over, the course has been to provide for the interests of the tenants for life, reserving liberty to apply upon their death."

A remainder-man may have a decree to protect the estate from waste, and have it so secured by the trustee as to protect his estate in expectancy. The court will interfere under all needful circumstances to protect his rights, but such cases do not come within the category of mere declaratory decrees as to future rights.

There is also a class of cases in which recommendations or requests in a will to a devisee or legatee have been construed as cutting down an absolute fee into an estate for life, with an equitable remainder to the person indicated by the testator in his request. In such cases the court will entertain a bill during the life of the first taker to have the right of the claimant in remainder established. Nor do these cases infringe upon the doctrine we have stated as to mere declaratory decrees concerning future contingent executory estates.

But there is a class of cases which are exceptions to this rule, and being *exceptional*, only tend to prove the rule. The New York cases of *Lorillard* v. *Coster*, and *Hawley* v. *James*,‡ cited by the counsel of the heirs at law, are of this character. There the bills were filed by the executors or trustees for their protection, and that they might have a construction of the will, and the direction of the court as to the disposition of the property. In such cases, from necessity, and in order to protect the trustee, the court are compelled to settle questions as to the validity and effect of contingent limita-

* Grove *v.* Bastard, 2 Phillips, 621. † 39 English Law and Equity, 214.
‡ 5 Paige, 172, 442.

tions in a will, even to persons not *in esse*, in order to make a final decree and give proper instructions in relation to the execution of the trusts.* It is this necessity alone which compels a court to make such cases exceptions to the general rule. But in the present case no such necessity exists. The court is not called upon to make a scheme of the trusts, nor could they anticipate the situation of the parties in the suit, or those who may be in existence at the death of Mrs. De Valle. The court has no power to decree *in thesi*, as to the future rights of parties not before the court or *in esse*.

DECREE AFFIRMED WITH COSTS.

WRIGHT *v.* ELLISON.

1. To constitute an equitable lien on a fund there must be some distinct appropriation of the fund by the debtor. It is not enough that the fund may have been created through the efforts and outlays of the party claiming the lien.
2. A power of attorney drawn up in Spanish South America, and by Portuguese agents, in which throughout there is verbiage and exaggerated expression, will be held to authorize no more than its primary and apparent purpose. Hence a power to prosecute a claim in the Brazilian courts will not be held to give power to prosecute one before a Commissioner of the United States at Washington; notwithstanding that the first named power is given with great superfluity, generality, and strength of language.

IN 1827, the American brig Caspian was illegally captured by the naval forces of Brazil, and condemned in the prize courts of that country. There being nothing else to be done in the circumstances, her master, one Goodrich, instituted legal proceedings to recover the brig, and gave to Zimmerman, Frazier & Co., an American firm of the country, a power of attorney with right of substitution, to go on with matters. The power was essentially in these words:

"I authorize, &c., in my name and representing me, to appear in and prosecute the cause I am this day prosecuting before the

* See Bowers *v.* Smith, 10 Paige, 200.

tribunal of justice, &c., in which this vessel is interested; said vessel has been detained by force of the blockade of Buenos Ayres, and that they make petitions, request, and protests, here and before all tribunals, superior and inferior, before whom it is customary to appeal; that they present all the documents favorable to my rights; that they except to and decline jurisdiction; that they give and refuse terms; that they submit written evidence and proof; that they retort and contradict everything unfavorable; that they challenge jurisdiction; that they express the causes of accusation, if it be necessary so to do; that they take cognizance of all decrees and interlocutory as well as final sentences; that they admit the favorable and appeal from the adverse; that they *prosecute the appeal before his Imperial Majesty* in the superior tribunals of war and justice, that in right they can and ought to do; *that they insinuate where and against whom they may deem advisable, doing in effect everything requisite and necessary that I, being present, would or could do;* that they make transactions and obligations, name arbitrators and mediators, demanding damages or adjusting them amicably with the opposite parties, receiving in my name the said brig Caspian and her cargo; that they give all receipts right and proper to be given in faith of delivery and acquittance; and after the restitution of said vessel they may name, in my absence, any other captain and crew to navigate her if they deem it advisable, and if not, they may sell her per account of her legitimate owners, and they may receive amount of said sale. And as to the necessary power referred to, with all *incidental and resulting* powers, I give it to and confer it upon my aforesaid attorney, *with free, frank, and general administration without limit*, in order that there be no clause or special expression which would destroy the effect of it, because I gave them full power to substitute another, to revoke the appointed one's authority, and to name again substitutes, all of whom I exonerate from costs."

Under the power of substitution thus given to them, Zimmerman, Frazier & Co. substituted in their place Mr. Wright, the consul of the United States, and a merchant of standing at Rio; whose official influence, it was apparently supposed, might be more potential than their own private efforts. Wright prosecuted the case diligently through the

Brazilian courts, but without success. He afterwards came to the United States and urged our Government to demand indemnity for this as for other wrongs of a like kind. He spent money, removed difficulties, advanced proof, and furnished information. The result of his or of other efforts was that our Government finally made a demand for indemnity, and obtained it in this case, as in many others, under a treaty subsequently made. A commissioner was appointed to hear claims and decide them. But it was probable that, except for Wright's knowledge, effort and outlay, this result would not have been had, and neither this claim nor any other been asserted by our Government as they all were.

After the labor of Wright had been undergone by him, and when the money was open for claim, one Ellison, an executor of a part owner, applied to the commissioner, proved his case, and received his share of the indemnity. Wright now instituted, in the court below,—the Circuit Court for the District of Columbia,—this proceeding, *a bill* in equity, against this same Ellison and others interested, to have a commission out of this fund. The bill set forth Wright's long and effective services, his large outlays, and insisted that, "by the general maritime law and law of the place where the contract was made," he was entitled to compensation, and "that such compensation should be retained and received by him *out of the fruits of his said labors, services and expenses;*" and it set forth further, "that as well by agreements as by reason of the premises, and by force of the maritime law and the principles of equity, and the law and established usage of the place of said contract, he had *a lien upon the fruits and proceeds of the claim, in whatever form of proceeding the same was realized, through or by reason of his labors, advances, or services performed, advanced and rendered.*"

It did not appear that the owners of the vessel had, in form, ever ratified what Wright did; but the evidence apparently was that they were cognizant, to a greater or less degree, of what he was doing, though he himself was the promoter of what was done everywhere.

Argument for the claim.

The chief question now, therefore, was, Whether the complainant, Wright, had an equitable lien upon the fund? and a preliminary question, Whether the power of attorney authorized him to do anything more than prosecute the case effectively through the Brazilian courts, and dispose of the vessel afterwards, if he should prosecute it successfully?

Messrs. Carlisle and Cox for the appellant, Wright:

1. The power gives authority to manage the suit, on behalf of the owners, and to prosecute an appeal *before his Imperial Majesty* in the superior tribunals, to do whatever he, being present, could or would do, to make compromises, name arbitrators and mediators, demand and adjust damages, to receive the vessel and cargo, and give receipts, and after restitution to appoint a captain and crew to navigate her if they deem advisable, or, if not, to sell her on account of the owners and receive the proceeds, with *free, frank, and general administration, without limit*, and power of substitution, &c. What can be more comprehensive than the complete control given over the vessel and its proceeds, with *general administration, without limit?* Would not the right to receive the vessel, and convert her into money, involve the right to receive the proceeds, if the former were impossible? And is it possible, that with *all incidental and resulting powers*, and right of *general administration*, or *management, without limit*, the attorneys would not be entitled to apply to and receive indemnity from the Imperial Government at Rio, on the failure of a suit in the Superior Court, at that place?

2. Slight circumstances suffice to establish an equitable lien upon a pecuniary fund. An order drawn by A. on B., in favor of C., for a valuable consideration, indorsing and delivering a bond to an assignee, or *any order, writing, or act whatever*, intended as an appropriation of a fund, or part of it, would constitute an assignment, and give a lien on it in equity. An authority to an agent to prosecute a money claim and receive the proceeds, and deduct his compensation from them, is of the same character. And this agreement may be expressed or implied. Indeed, in every authority to

prosecute and receive a money claim, there is implied an authority to deduct the agent's expenses and compensation from the fund. Attorneys, solicitors and collectors have this right, just as all persons dealing with any subject-matter in their hands, have a lien upon it for their work and labor.

In the matter of the Brazilian claims, there was no room for misunderstanding. Merchants of high standing had been engaged for many years in prosecuting them. Many had been settled under a previous convention; and it had always been understood that the agent's compensation was to be retained out of the fund. This is matter of common knowledge.

To establish the agency of the appellant is sufficient, therefore, to make good his claim upon this specific fund.

Messrs. Bradley and Chetwood contra:

1. The power, filled as it is with the verbiage of a Portuguese legal document, and with exaggerated generalities, has a purpose which is expressed in few words. It authorizes,—

1st. The attorney to continue in, appear in, and prosecute the cause which the captain, Goodrich, is then himself prosecuting before the Brazilian Prize Court.

2d. To appeal from an adverse judgment, and prosecute the appeal in the superior tribunals.

3d. In case of success, to receive the vessel and cargo, adjusting damages.

4th. After restitution, to despatch her with crew and captain, or sell her on account of the owners.

After thus expressing its purpose, it repeats the gift of the *necessary power* to do these things; and this specified, qualified necessary power is what the constituent gives with *free, frank, and general administration without limit.*

These words, upon which the appellant lays stress, as conveying unlimited power, are, in truth, only an exaggerated mode of expressing what has already been expressed, and of giving what has already been given in a specified and definite manner: mere "*style de notaire.*"

2. The appellant asks, in fact, to be paid for having helped

the Government of the United States to effect a treaty. If he have any claim against Ellison under the treaty, he must have a similar claim against every party in whose favor the commissioner awarded. He does not set up a *contract* with the owners of the vessel, or either of them directly, or through any agent, other than has been stated, but relies on the services he has thus rendered as imposing a *lien* upon the awards. If there is no lien, he has no case in equity at all. The assertion of the opposite counsel as to what gives an equitable lien is perhaps correct. But it does not apply to Mr. Wright's case. He has no "order or writing," nor does he show any "act intended as an appropriation of the fund."

Mr. Justice SWAYNE delivered the opinion of the court.

The determination of the case depends upon the solution of the question whether the complainant has shown himself entitled to an equitable lien upon the fund, to which the controversy relates.

The instrument executed by Goodrich, the master of The Caspian, to Zimmerman, Frazier & Co., we think it quite clear, contemplated only judicial proceedings, and the disposition of the vessel, after those proceedings were successful. Zimmerman, Frazier & Co., in substituting the complainant in their place, did not attempt to give, nor could they have given, any greater authority than they themselves were clothed with. The acquiescence of the owners whose rights are here in question may be properly held to have ratified the acts of Goodrich in their behalf, but it cannot be held to enlarge the powers conferred by the instrument which he executed, beyond what is expressed, and the objects in the minds of the parties at the time of the transaction.

The services of the complainant in bringing into activity the diplomatic agencies of the United States, and otherwise, at Rio, and subsequently in prosecuting the claim in this city, were outside of his original authority. Nevertheless they were beneficial to the claimants, and the approval of the defendants may be fairly implied from their silence and inac-

tion. When the defendant, Ellison, interposed, the fruit was ripe and ready to fall into the hands of those entitled to receive it. We regard the case as a proper one for compensation, and in an action at law the complainant could hardly fail to recover.

But this is a suit in equity. The rules of equity are as fixed as those of law, and this court can no more depart from the former than the latter. Unless the complainant has shown a right to relief in equity, however clear his rights at law, he can have no redress in this proceeding. In such cases, the adverse party has a constitutional right to a trial by jury. The objection is one, which though not raised by the pleadings nor suggested by counsel, this court is bound to recognize and enforce.*

The evidence in the case is wholly silent as to any agreement touching the compensation of the complainant. It is nowhere intimated what he was to receive, or when or how he was to be paid. No established usage is shown. The matter seems to have been left to rest upon the principle of *quantum meruit*, and to be settled by the agreement of the parties when the business was brought to a close. The doctrine of equitable assignments is a comprehensive one, but it is not broad enough to include this case. It is indispensable to a lien thus created, that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it.† This case is wholly wanting in these elements.

DECREE AFFIRMED WITH COSTS.

* Hipp et al. *v.* Babin et al., 19 Howard, 278; Parker *v.* Winnipiseogee Company, 2 Black, 551.

† Morton *v.* Naylor, 1 Hill, 583; Hoyt *v.* Story, 3 Barbour, S. C., 262; Burn *v.* Carvalho, 4 Mylne & Craig, 690; Watson *v.* The Duke of Wellington, 1 Russell & Mylne, 602.

POMEROY'S LESSEE *v.* THE STATE BANK OF INDIANA.

Where the charter of a bank provided that the bank should itself continue till January 1, 1859; with a proviso that all *banking powers* should cease after January 1, 1857, "*except* those *incidental and necessary* to collect and *close up business;*" a motion, in 1862, to dismiss a writ of error in which the bank was defendant was refused.

A STATUTE of Indiana passed in 1834, enacted as follows: "That there shall be and is hereby created and established a State Bank, to be known and styled the 'State Bank of Indiana,' *and shall continue as such until the first day of January, eighteen hundred and fifty-nine.*" The charter further provided, that all *banking powers* should cease *after the first day of January*, 1857, "*except* those *incidental and necessary to collect* and *close up its business.*"

In 1849, the bank being in possession of certain real estate, was sued in ejectment, and the suit, in December, 1862, being still pending on writ of error, in this court, which writ had been allowed in December, 1861, *H. W. Chase, Esquire*, signing himself *Attorney for the State Bank of Indiana, in the Circuit Court for the District of Indiana*, asked for the abatement of the writ upon the following suggestion, to wit: "That since the trial of the above entitled cause in the Circuit Court for the District of Indiana, and before the prosecution of the writ of error in this behalf—to wit, on the first day of January, A.D. 1859,—the said State Bank of Indiana, named as defendant in error in said cause, being a corporation created and organized in the State of Indiana by the authority of an Act of the Legislature thereof, was dissolved and ceased to exist as such corporation, by reason of the expiration of the charter granted to said State Bank of Indiana."

In support of this motion, he argued: The dissolution of the bank by expiration of its charter leaves no defendant; and the writ *must* abate. Angell and Ames* state it as text law that "upon the dissolution of a corporation *in any mode*," "all suits pending for or against it, abate." They cite, in

* On Corporations, § 779.

support of this statement, various cases* which sustain the position. *Lindell* v. *Benton*,† referred to in the note by them, as announcing a contrary doctrine, merely decides that the dissolution of a corporation after an attachment against it has been sued out, *and its debtor garnished*, will not operate to deprive the attachment plaintiff of a vested right in the money in the hands of the garnishee to satisfy his debt. In this case the bank itself expires in 1859. *Banking powers* may exist indefinitely for the purpose of closing up business. But the capacity to defend a suit is not a *banking* power. The expression has reference to the renewal of notes, &c., the payment of outstanding bank bills and the like.

The writ of error here is an *original* writ, issuing, in effect, out of this court, to bring up the record of a cause that alleged errors may be examined, and the judgment affirmed or reversed as the law may require.‡ The parties in the inferior court, or their heirs or representatives, must be parties here,—and to that end must be duly cited. It is true, that an attorney cannot withdraw his name from a cause, after final judgment, so as to avoid the service of the citation. But the death of his client revokes his authority to appear, and the service of a citation upon him thereafter is a nullity.

A rule of this court§ provides against the abatement of causes in error or on appeal between natural persons, by authorizing the heirs or legal representatives, as the character of the subject-matter of the litigation may require, to be made parties. But here is a corporation, civilly dead, leaving no heirs or representatives—no party upon whom process can be served, or to whom notice can be given, or on whom the judgment can operate. This is not the first instance where parties have failed to obtain the aid of this court to correct alleged errors, because there was no provision of law whereby the cause could be brought properly before the court.‖

* Merrill *v.* Suffolk Bank, 31 Maine, 57; Saltmarsh *v.* Planters' &c. Bank, 17 Alabama, 761; and Greeley *v.* Smith, 3 Story, 657.

† 6 Missouri, 361. ‡ 2 Tidd's Practice, 1134; Conkling's Treatise, 686.

§ Rule 15. ‖ Hunt *v.* Palao, 4 Howard, 589.

Messrs. Traphagen, *Brady*, and *Carlisle*, *contra.*

Mr. Justice WAYNE delivered the opinion of the court:

I am instructed by the court to announce it to be its opinion that there can be no abatement of the case upon the counsel's suggestion, as it is declared in the charter of the bank, that though its charter should continue as such until the first day of January, 1859, and that all its banking powers should cease after the first day of January, 1857; that it should have all the "necessary and incidental powers to collect and close up its business," within which we deem the rights of the plaintiff in this court to be comprehended.

MOTION REFUSED.

CLEARWATER *v.* MEREDITH ET AL.

1. The statute of Indiana, passed February 23, 1853, which authorizes connecting railroad corporations to merge and consolidate their stock, and make one joint company of the roads thus connected, causes, when the consolidation is effected—as is declared by the Supreme Court of the State, in *McMahon* v. *Morrison* (16 Indiana, 172)—a dissolution of the previous companies, and creates a new corporation with new liabilities derived from those which have passed out of existence. Hence, where the declaration avers that the defendant had agreed that stock of a particular railroad in Indiana should be worth a certain price at a certain time and in a certain place, and the plea sets up that under the above mentioned statute of February 23, 1853, the stock of the railway named was merged and consolidated *by the consent of the party suing*, with a second railway named; so forming "one joint stock company of the said two corporations," under a corporate name stated, such plea is good, though it does not aver that the consolidation was done without the consent of the defendants. And a replication which tenders issue upon the destruction of the first company and upon the fact that its stock is destroyed, rendered worthless, and of no value, traverses a conclusion of law, and is bad.
2. Such a plea as that just mentioned contains two points, and two points only, which the plaintiff can traverse,—the fact of consolidation and the fact of consent; and these must be denied separately. If denied together, the replication is double, and bad.
3. When a plaintiff replies to a plea, and his replication being demurred to, is held to be insufficient, and he withdraws that replication and substitutes a new one—the substituted one being complete in itself, not referring to or making part of the one which preceded—he waives the right

to question in this court the decision of the court below on the sufficiency of what he had first replied. The same is true when he abandons a second replication, and with leave of the court files a third and last one.

4. On demurrer to any of the pleadings which are in bar of the action, the judgment for either party is the same as it would have been on an issue in fact joined upon the same pleading, and found in favor of the same party; and judgment of *nil capiat* should be entered, notwithstanding there may be also one or more issues of fact; because, upon the whole, it appears that the plaintiff had no cause of action. This rule of pleading declared and applied.

UNDER the provisions of a statute of Indiana, passed May 11, 1852, for the *incorporation* of railroads, the Cincinnati, Cambridge & Chicago Short Line Railway Company—frequently entitled throughout the case, for brevity, "The Short Line Railway"—was created and made a "corporation" in that State.* This act contained no provision by which any railroad company incorporated under it could consolidate its stock with the stock of any other corporation. In February of the year following, however, the legislature did pass an act† allowing any railway that had been organized, to intersect with any other road, and to merge and consolidate their stock; an act whose privileges, on the 4th of the month following, were extended to railroad companies which should afterwards be organized. The language of the act was: "Such railroad companies are authorized to merge and consolidate the stock of the respective companies, *making* ONE JOINT STOCK COMPANY *of the two railroads thus connected.*"

With these statutes in force, Clearwater, on the 12th July, 1853, sold a tract of land to Meredith and others for $10,000, taking 200 shares of the already mentioned Short Line Railway Company's stock in payment; Meredith and they, however, by written contract, guaranteeing to Clearwater, that the stock should be worth par, that is to say, $50 a share, in Cincinnati, on the 1st October, 1855.

The 1st October, 1855, having arrived and passed, and Clearwater, considering that the stock was not worth par at Cincinnati, brought assumpsit in the Circuit Court for the

* Revised Statutes of Indiana, ed. 1860, p. 504.

† Act of 23d February, 1853; ib. 526.

Indiana District, against Meredith and his co-guarantors, on the contract. The declaration set forth the sale, acceptance of the stock, and guaranty; that Clearwater still held possession of the stock; and it assigned for breach, that the stock was not worth par at the time and place stipulated, but on the contrary, was of no value at all.

To this declaration there were six pleas. Issues, in fact, were joined on the first and fourth, and demurrers sustained to the second, third, and sixth.

The fifth plea set forth substantially, that after the execution of the guaranty, and before the 1st of October, 1855, to wit, &c., the stock of the said Short Line Railway was merged and consolidated with the stock of a second railway company named;* making one joint stock company of the two, under a new corporate name, which was given;† that the said corporations were organized and formed under the already mentioned act of May 11, 1852, to provide for the incorporation of railroad companies; that the roads were connecting and intersecting roads; that the *consolidation* was made with the consent of the stockholders and directors of both companies; that afterwards, in August, 1854, the said newly formed joint company was merged and consolidated with a *third* railway corporation of the State of Indiana, whose name was also given;‡ which company was constructing a road that intersected with the said already mentioned newly formed joint company; that by the said consolidation, the stock of the said two companies was merged and consolidated, "forming *one joint stock company out of said two companies;*" that the said consolidation was made with the consent of the directors and stockholders of said two companies, *and with the consent of said plaintiff;* that the said consolidated company assumed a third corporate name, which was stated;§ and that, *by reason of the said consolidation*, the stock of the Short Line Railway Company in said agreement specified, was destroyed,

* The Cincinnati, New Castle & Michigan Railroad Co.

† The Cincinnati & Chicago Railroad Co.

‡ The Cincinnati, Logansport & Chicago Railway Co.

§ The Cincinnati & Chicago Railroad Co.

and rendered wholly worthless and of no value. A demurrer was interposed to this plea, which was overruled.

Then the plaintiff filed a replication. To this a demurrer was put in by the other side, and the court having sustained it, an amended or rather a substituted replication was put in. To this a demurrer was also sustained. Whereupon, on motion and by leave of the court, the plaintiff withdrew his joinder in demurrer, and filed the following second amended replication:

"And the plaintiff, as to the plea of the defendants fifthly above pleaded, says that he ought not, by reason of anything therein alleged, to be debarred or precluded from having and maintaining his aforesaid action against the defendants, because he says that the said stock of the Cincinnati, Cambridge & Chicago Short Line Railway Company *was not destroyed, either in whole or in part*, nor *was the same rendered worthless and of no value*, in *manner and form as the defendants by their said plea have alleged.* And this he prays may be inquired of by the country."

This replication was also demurred to, and the demurrer sustained. The plaintiff now saying nothing further, and choosing to abide by his last-named amended replication, judgment was rendered for the defendant.

The question presented on error here was this: Did the court below commit error when it sustained a demurrer to the last replication, and gave judgment against the plaintiff, Clearwater, as it did?

Mr. Pugh for Clearwater, the plaintiff in error: The demurrer asserts, of course, that the replication is bad, and the reasons which will be assigned to show that it is so are, that it is double, and also that it traverses matter of law.

1. *Is the replication double?* It cannot be supposed that the fifth plea intended to allege the three facts stated, namely, the consolidation, the plaintiff's consent, and the destruction of the stock, as three *separate* matters of defence. It means that the defendants were excused from their agreement because the stock of the plaintiff had been destroyed, and that the destruction resulted from a consolidation to which the

plaintiff had consented. Now all three facts constitute (together) but a single point of defence; and that point, including all its elements, the plaintiff, by settled rule of pleading, had a right to put in issue. Sergeant Stephen thus illustrates the rule:*

"In an action of trespass for breaking the plaintiff's close and depasturing it with cattle, the defendant pleaded a right of common in the close for the said cattle, being his own commonable cattle, levant and couchant upon the premises. The plaintiff, in the replication, traversed 'that the cattle were the defendant's own cattle, and that they were levant and couchant upon the premises, and commonable cattle.' On demurrer for duplicity, it was objected that there were three distinct facts put in issue by this replication, any one of which would be sufficient by itself; but the court held that the point of the defence was that the cattle in question were entitled to common; that this point was single, though it involved the three several facts that the cattle were the defendant's own, that they were levant and couchant, and that they were commonable cattle; that the replication traversing these facts, in effect, therefore, only brought in issue the single point whether the cattle were entitled to common, and was, consequently, not open to the objection of duplicity."

The rule itself was neatly declared by Lord Mansfield, who says:† "It is true you must take issue upon a single point, but it is not necessary that this single point should consist of a single fact." It received application stronger than any we ask for in the late English case of *Selby* v. *Bardons*.‡ The action was replevin. The defendants avowed the taking; Bardons as collector of the rates, and the other defendant as his bailiff. The avowry alleged that the plaintiff was an inhabitant of the parish, and ratable in respect of his occupancy of a certain tenement: it then alleged the making of a rate, publication thereof, demand of payment

* Stephen on Pleading, 298 (5th Lond. ed. 1843).

† Robinson *v.* Rayley, 1 Burrow, 316.

‡ 3 Barnewall & Adolphus 2; affirmed in the Exchequer Chamber, 3 Tyrwhitt, 430.

and refusal, summons of the plaintiff before the petty sessions, judgment against him, warrant of distress, &c. The plaintiff pleaded in bar, *de injuria*, &c.; to which the defendant demurred, for that the plea tendered issue of several distinct matters. But Parke, J., says:

"It is true that these pleas in bar put in issue a great number of distinct facts, and it is also true that the general rule is that where any pleading comprises several traversable facts or allegations, the whole ought not to be denied together, but one point alone disputed; and I am fully sensible that the tendency of such a rule is to simplify the trial of matters of fact, and to save much expense in litigation. But it is quite clear that from a very early period in the history of the law, an exception to this general rule has been allowed with respect to all actions of trespass on the case, in the plea of the general issue, and with respect to some actions of tort in the replication *de injuria sua propria absque tali causa*. This replication, where it is without doubt admissible, generally—indeed, it may be said, always—puts in issue more than one fact, and often a great number."

Other cases illustrate the distinction.*

2. *Does the replication traverse matter of law?* These parties did not bargain with each other upon a question of names, but upon a matter of values. Assuming the consolidated company to be a corporation—a matter which we speak of hereafter—it was the successor, in law, of the Short Line Railway, and bound by the contracts of that company as if no consolidation had occurred.† So complete would be the identity, in such a case, that an action of covenant might be maintained against the new company, by name, upon a deed sealed with the corporate seal of any one of its constituent bodies.‡ The mere fact of consolidation, therefore, with or without the plaintiff's consent, is not material to the performance of this agreement on the part of the defendants.

* O'Brien *v.* Saxon, 2 Barnewall & Creswell, 908; Isaac *v.* Farrar, 1 Meeson & Welsby, 69.

† Lancashire Railway Co. *v.* East Lancashire Railway Co., 5 Clark, 792.

‡ Philadelphia Railroad Co. *v.* Howard, 13 Howard, 333.

It may be that the Short Line Railway Company acquired, by means of it, additional property, or facilities of some other description for enhancing the value of its stock. So, on the other hand, the consolidation may have involved its affairs in ruin. This, however, *is a question of fact*, to be tried by a jury, and upon evidence. The plaintiff took issue in regard to it; but he was not allowed any trial of that issue. And so it stands upon record, as the judgment of the Circuit Court in this case, that (although the stock of the Short Line Railway was not destroyed, "either in whole or in part," by means of consolidation, as alleged in the plea) the defendants are excused, nevertheless, from performing their contract.

3. But a new point arises. The question is not only as to the sufficiency of our replication. A demurrer being put on the pleadings it searches the record. The first bad piece of pleading will be laid hold of, and judgment given on it. Now does the plea to which we have replied, itself put in a sufficient defence? The fifth plea does not allege that a new "corporation" was created by the consolidation of the Short Line Railway Company with either or both of the other companies named, but that "*one* JOINT STOCK *company*" was formed by union of the three. And the statute of Indiana, authorizing consolidation, uses that peculiar language.* Upon the other hand, the general act of May 11th, 1852, under which as well the Short Line Railway Company as both the other companies mentioned in the plea were formed, declares that the companies formed under it shall be "corporations" in the proper sense. These two statutes show, therefore, that the Legislature of Indiana *intended to express* the difference between a joint-stock company (as such) and a corporation. It is not only a difference well established, but peculiarly significant in this connection.† The old corporation, therefore, was not drowned, dissolved, nor otherwise destroyed. Decisions of the Supreme Court of Indiana

* See ante, Statement, p. 26.

† Warner *v.* Beers, 23 Wendell, 103; Simpson *v.* Denison, 16 Jurist, 828.

favor, perhaps, this view.* Perkins, J., in the case of *Booe* v. *The Junction Railroad Co.*,† says, speaking of the point before him:

"The question is, Whether two railroad companies, by consent of the legislature, granted subsequently to the subscriptions of stock, but without the consent of the stockholders, can consolidate their separate existences into one? It is admitted that they can do it with such consent. This court has held that they cannot without. A stockholder, not consenting, may withdraw from the corporation. *Such consolidation does not necessarily* DISSOLVE *the corporation*, it seems, *but releases non-consenting stockholders?*"

The act of February 23d, 1853, does not specify *the manner* in which two companies may consent to their consolidation,—whether by a *vote* of the directors only, or of the stockholders as well as of the directors. The plea does not allege that Clearwater *voted* for the consolidation: and construing it, according to the rule of pleading, against the party pleading it, we may assume that his alleged "consent" consisted in the fact that he did not withdraw and renounce the character of a stockholder.

4. But there is another answer. The act of February 23, 1853, was in force when Clearwater made his agreement with the defendants. He was not, therefore, a stockholder entitled to the privilege of withdrawing in the event of consolidation: he had subscribed in view of the possibility of such an event, and that possibility was one of the elements of his contract.‡ This view, supported by English authorities and authorities elsewhere than in Indiana, receives support in Indiana itself. Perkins, J., in the already cited case of *Booe* v. *Junction Railroad Co.*,§ raises the question which

* McCray *v.* Junction Railroad Co., 9 Indiana, 358; Carlisle *v.* Terre Haute Railroad Co., 6 Id. 316.

† 10 Indiana, 93.

‡ Midland Railway Co. *v.* Gordon, 16 Meeson & Welsby, 804; South Bay Meadow Dam Co. *v.* Gray, 30 Maine, 547; Burlington, &c., Railroad Co. *v.* White, 5 Iowa, 409.

§ 10 Indiana, 93.

we have already stated, to wit: "Whether two railroad companies, by consent of the legislature, granted *subsequently* to the subscriptions of stock, but without the consent of the stockholders, can consolidate their separate existences into one?" He makes the question in view of a previous Indiana case,* which decides that one who subscribes *after* the enactment of a law authorizing the company to consolidate, is bound by his subscription, although such consolidation be without his consent or even his knowledge. And are not the principles lately declared by *this* court, in *Sherman* v. *Smith*,† conclusive; especially when we consider that the Short Line Railway Company was formed under the *general* act of May 11th, 1852, relating to railroads,—an act subject to modification by the legislatures at any time?

Yet more: The plea does not allege that the consolidation of the Short Line Railway Company with the second or with the third company, was an act done without the consent, or even contrary to the wishes, of the defendants. The defendants do not allege that the plaintiff discharged them intentionally, or even directly, from their agreement; but only that *in consequence* of an act to which he assented,—not foreseeing or imagining the result,—performance of their stipulation was prevented. Now, if *they* assented to the same act, and, *à fortiori*, if they induced him to assent, with what justice or by what principle of law could they so excuse themselves?

[The counsel further brought before the court the two replications filed previously to that one which was the subject of the preceding discussion before this tribunal; which previous ones, demurred to below by the other side, had been there in fact supplied by the one now considered. He also contended, that even if his last replication was bad, he was still entitled to judgment because the *first* and *fourth* pleas were yet undisposed of.]

Mr. Hendricks, *contra*: There are in fact three causes of demurrer to the replication:

1st. The plea sets up the traversable facts of the consoli-

* Sparrow *v.* Evansville, &c., Railroad, 7 Indiana, 369. † 1 Black, 587.

dation of the stock of the Short Line Railroad Company with the stocks of other railway companies, which are the only traversable facts in the plea which are neither admitted nor denied by a replication.

2d. The plea sets up the consolidations of the stocks therein described, with the consent of the plaintiff, either of which, if correct, is an issuable fact, and the replication is a denial of both, and is therefore double.

3d. The replication is informal, inasmuch as it does not deny some one of the "issuable facts set up in the plea."

If the replication puts in issue only the question whether the stock was destroyed and rendered worthless, then it presents an issue that cannot decide the controversy; "an immaterial issue;" for if the stock was merged with the stock of other companies, and thereby made to represent another interest and a different property, which the defendants had not agreed to guaranty, and that by the consent of the plaintiff, then the defendants were discharged from their contract, although the stock may not have been impaired in its value. By the two consolidations and mergers, the $10,000 of stock in the Short Line Railroad Company came to be 200 shares in the company finally formed; and was evidence of an interest and property in that road of the nominal value of $10,000,—a different corporation or company. The stock of such a company the defendants had not agreed to guaranty; it was not within their contract; and they were as well discharged whether the stock was still of the same market value at Cincinnati, or became of no value at all. The defence rests upon the consolidation and plaintiff's consent, thereby changing and merging the thing guarantied.

The plaintiff claims that his replication is a more general traverse; and puts in issue, first, the consolidation of the companies and the stock; second, the consent of the plaintiff; and third, that the stock was thereby rendered of no value. Thus understanding the replication, it is double; and for that reason the demurrer was properly sustained.

It is not claimed that the traverse must be of a single fact,

but that the traverse must be confined to a single point. The difficulty in practice is to determine what is a single point, as contradistinguished from a single fact. Gould* says:

"The meaning of the rule is, that when the pleading, on one side, consists of several *distinct* and material points, all of which are necessary to its legal sufficiency, the adverse party is allowed to traverse only one of them. For in every such case, a denial of *one* of them is in law a sufficient answer to the whole; and he may traverse which of them he pleases;" and to illustrate, he says: "If therefore, in trespass for false imprisonment, the defendant justifies under a capias directed to the sheriff, and a warrant from the sheriff directed to himself, the plaintiff may traverse either the capias or the warrant, but should not traverse both. For the denial of either of them is a sufficient answer to the plea; since the capias, without the warrant, or the warrant, without the capias, would be no justification; and the traverse of both would, in effect, tender two issues instead of one, upon one and the same plea."

The case given by Stephen, and cited by Mr. Pugh, is considered by Gould.† He says:

"Of this case it may be observed, that the defence to which the traverse applied consisted of three distinct points.

"1. The existence of a prescriptive *right of common.*

"2. The defendant's title to share in that right, as tenant of a manor or lordship.

"3. That the particular beasts in question *were entitled to common.*

"The replication applied to the last point only, viz., that the beasts *were entitled to common.* But to entitle them to common, in the defendant's right, they must have been, as alleged in the plea, his own cattle—and also *levant and couchant* on his tenement—and commonable cattle.

"These last *three* facts, therefore, the plaintiff precisely traversed, and the court held that the traverse was not *double*, inasmuch as it embraced only the *simple point* that the cattle were *entitled to common.*"

* Gould's Pleading, chap. vii, §§ 49 and 50.

† Chap. vii, § 52.

But the facts stated in the plea here do not go to make but one point; they make two material points. 1st, the consolidation of the stock; and 2d, the plaintiff's consent thereto—but both points necessary to "the legal sufficiency of the plea"—both points constituting but one defence. Aptly illustrative is the analogous case, "if the defendant pleads title in a stranger, and justifies as servant to the latter, and by his command, the plaintiff may traverse the *title*, or the *command*, but should not traverse *both*."* The court, in the instance cited, allowed a traverse either of the title in the stranger, or his command to his servant, but not both; and so in this case, the traverse was allowed of the consolidation of the stock, or of the plaintiff's authority or consent, but not both.

In one New York case,† it was held "that a plea that the promise declared on was made by defendants and a third person jointly, and that plaintiff had released the third party, a reply denying the joint promise and the release was bad for duplicity." In another case in that State,‡ that "where to a plea of the statute of limitations the plaintiff replied the suing out of process, and a promise within six years previous to such process, a rejoinder denying both the suing out the process and the alleged promise, was bad for duplicity."

3. But it is said that the fifth plea is itself bad; offering no defence.

What, then, is the defence made by it? It is that after the contract was made and before the time limited for its execution, the *plaintiff consented* to a consolidation of the company with *other* companies, and the consolidation of the stock of the *different* companies. How is it material whether, under the laws of Indiana, a new "corporation," or a "joint-stock company," was the result of the consolidation? The stock was merged in either event: it became mingled; and the identity and separate existence of the plaintiff's 200

* Gould's Pleading, chap. 7, § 50; Crogate's case, 8 Co., 67 b.

† Tubbs *v.* Caswell & Pettit, 8 Wendell, 129.

‡ Tuttle *v.* Smith, 10 Id., 386.

shares became lost: the shares represented a new interest, and different property. Whether worth more or less in its new form and position is not material, nor whether the new organization increased or diminished the means for the enterprise. Nor is it material, although discussed by plaintiff, whether the new organization is reponsible for the debts of the old companies. But it is material that the plaintiff did consent to a change of the subject of the contract, so that it is no longer identified, nor the same property which was guaranteed.

McMahan v. *Morrison et al.** settles this question; for the decision is upon the effect of the consolidations now before *this* court; it is by the Supreme Court of Indiana, and upon the statutes of that State. The court then held that, by the consolidation of the Short Line Railroad Company with the different roads referred to in the fifth plea, pursuant to the act of the legislature, the three corporations were dissolved, and passed out of existence, and a new corporation came into existence, and that the new corporation came into existence "with property, liabilities, and stockholders, derived from" the corporations that then passed out of existence.

The plaintiff claims, moreover, that the plea is defective, because it lacks the averment that the consolidation of the railroads was an act done without the consent of the defendants. But how does that help him? Suppose the consolidation had been with the consent of both plaintiff and defendant, the effect would have been to rescind the contract, for the reason that the contract was no longer applicable to the new stock, and it would require a new contract to bind the defendants.

But were this not so, and were it held that if the defendants consented to the consolidation, they would still be liable on the contract; the fact of such consent is not a matter to be negatived by defendants, but the plaintiffs should reply that fact. It is a general rule of pleading that matter which should come more properly from the other side, need not be

* 16 Indiana, 172.

stated. Each party makes out his own case. Neither is bound to anticipate, and therefore neither is compelled to notice and remove, every possible exception, answer, or objection which may exist.

It is insisted, however, inasmuch as the statute law of Indiana authorized railroads to be consolidated, that therefore the defendants contracted with a view to a possible consolidation, and are bound by it. The authorities cited do not go so far; they establish only the position that where the legislature has reserved the right to amend the charter, the subscribing stockholders, by the act of subscription under such a charter, agree to such increased liabilities as the legislature may impose. It does not follow, however, that whoever contracts with a railroad company, or with a third party in relation to railroad property or stock, is subject to have his liabilities varied by any and all acts, which, according to law, the company may do. Nor does such a principle exist.

The remaining points are feeble. The 1st and 2d replications were withdrawn below and cannot be reinstated here. Neither is there any use of disposing of the 1st and 4th pleas: since judgment in favor of the 5th, which is in bar to the action, ends the case.

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

In order to arrive at a correct solution of this question, it is important to consider whether the *plea* is a good one, for a demurrer, whenever interposed, reaches back through the whole record, and "seizes hold of the first defective pleading." The plea in controversy confesses the original cause of action, but sets up matter, which has arisen subsequent to it, to avoid the obligation to perform it. It acknowledges that the guaranty was given as claimed, but insists that the consolidation of the interests and stock of the three railroad companies necessarily destroyed and rendered worthless and of no value the guaranteed stock, and that Clearwater having consented to the transfer, is in no position to claim redress from Meredith and his co-defendants.

If Clearwater was a consenting party to a proceeding which, of itself, put it out of the power of the defendants to perform their contract, he cannot recover, for "promisors will be discharged from all liability when the non-performance of their obligation is caused by the act or the fault of the other contracting party." *

The Cincinnati, Cambridge and Chicago Short Line Railway Company, whose stock was guaranteed, was, as stated in the pleadings, organized under a general act of the State of Indiana, providing for the incorporation of railroad companies. This act was passed May 11, 1852, and contained no provision permitting railroad corporations to consolidate their stock. It can readily be seen that the interests of the public, as well as the perfection of the railway system, called for the exercise of a power by which different lines of road could be united. Accordingly, on the 23d February, 1853, the General Assembly of Indiana passed an act allowing any railway company that had been organized, to intersect and unite their road with any other road constructed or in progress of construction, and to merge and consolidate their stock, and on the 4th of March, 1853, the privileges of the act were extended to railroad companies that should afterwards be organized.

The power of the legislature to confer such authority cannot be questioned, and without the authority, railroad corporations organized separately, could not merge and consolidate their interests. But in conferring the authority, the legislature never intended to compel a dissenting stockholder to transfer his interest, because a majority of the stockholders consented to the consolidation. Even if the legislature had manifested an obvious purpose to do so, the act would have been illegal, for it would have impaired the obligation of a contract. There was no reservation of power in the act under which the Cincinnati, Cambridge & Chicago Short Line Railway was organized, which gave authority to make material changes in the purposes for which the corporation was created, and without such a reservation, in no event could a dissenting stockholder be bound.

* 2 Parsons on Contracts, 188.

When any person takes stock in a railroad corporation, he has entered into a contract with the company, that his interests shall be subject to the direction and control of the proper authorities of the corporation to accomplish the object for which the company was organized. He does not agree that the improvement to which he subscribed should be changed in its purposes and character, at the will and pleasure of a majority of the stockholders, so that new responsibilities, and it may be, new hazards, are added to the original undertaking. He may be very willing to embark in one enterprise, and unwilling to engage in another; to assist in building a short line railway, and averse to risking his money in one having a longer line of transit.

But it is not every unimportant change which would work a dissolution of the contract. It must be such a change that a new and different business is superadded to the original undertaking.* The act of the legislature of Indiana allowing railroad corporations to merge and consolidate their stock, was an enabling act—was permissive, not mandatory. It simply gave the consent of the legislature to whatever could lawfully be done, and which without that consent could not be done at all. By virtue of this act, the consolidations in the plea stated were made. Clearwater, *before* the consolidation, was a stockholder in one corporation, created for a given purpose; after it he was a stockholder in another and different corporation, with other privileges, powers, franchises, and stockholders. The effect of the consolidation "was a dissolution of the three corporations, and at the same instant, the creation of a new corporation, with property, liabilities, and stockholders, derived from those passing out of existence;" *McMahan* v. *Morrison.*† And the act of consolidation was not void because the State assented to it, but a non-consenting stockholder was discharged.‡ Clearwater could have prevented

* The Hartford, &c., R. R. Co. *v.* Croswell, 5 Hill, 383; Banet *v.* The Alton, &c., R. R., 13 Illinois, 510.

† 16 Indiana, 172.

‡ McCray *v.* Junction Railroad Co., 9 Id. 358.

this consolidation had he chosen to do so; instead of that he gave his assent to it and merged his own stock in the new adventure. If a majority of the stockholders of the corporation of which he was a member had undertaken to transfer his interest against his wish, they would have been enjoined.* There was no power to force him to join the new corporation, and to receive stock in it on the surrender of his stock in the old company. By his own act he has destroyed the stock to which the guaranty attached, and made it impossible for the defendants to perform their agreement. After the act of consolidation the stock could not have any separate, distinct market value. There was, in fact, no longer any stock of the Cincinnati, Cambridge & Chicago Short Line Railway.

Meredith and his co-defendants undertook that the stock should be at par in Cincinnati, if it maintained the same separate and independent existence that it had when they gave their guaranty. Their undertaking did not extend to another stock, created afterwards, with which they had no concern, and which might be better or worse than the one guaranteed. It is not material whether the new stock was worth more or less than the old. It is sufficient that it is another stock, and represented other interests.

But it is said that the plea is defective because it does not aver that the consolidation was an act done without the consent of the defendants. The pleadings do not aver that the defendants were stockholders in any of the roads whose interests were merged, and if they were not, it is not easy to see what right they had to interpose objections to consolidation, nor how their consent was necessary to carry out the object contemplated. If the plaintiff consented because they did, and it is meant to be argued on that account, they would still be liable on their contract; the answer is, that this is not a matter to be negatived by the defendants, but the plaintiff should reply the fact.†

* Lauman *v.* Lebanon Valley Railroad, 30 Pennsylvania State, 46.

† 1 Chitty's Pleading, 222.

It follows that the fifth plea presented a complete defence in bar of the action.

In this plea there were two points, and two only, which the plaintiff had the right to traverse. He could deny *either* the act of consolidation, or that he gave his consent to it. He could not deny both, for that would make his replication double. And if either fact was untrue, the defence was destroyed. The truth of both was essential to perfect the defence. But traverse can only be taken on matter of fact, and it is always inadmissible to tender an issue on mere matter of law.*

The last replication *does* traverse a conclusion of law. Whether the stock of the Cincinnati, Cambridge & Chicago Short Line Railway Company was destroyed and rendered worthless and of no value, was not a question for a jury to try. If the roads were consolidated, with the consent of the plaintiff, then it followed, as a conclusion of law, that the stock was destroyed and of no value. The stock passed out of existence the very instant the new corporation was created. The issue, therefore, tendered by the plaintiff in his last replication, was an immaterial one, and the court did not err in sustaining a demurrer to it.

But the plaintiff claims the right to have the decision of the court below on the sufficiency of his previous replications reviewed here. This he cannot do. Each replication in this cause is complete in itself; does not refer to, and is not a part of what precedes it, and is new pleading. When the plaintiff replied *de novo*, after a demurrer was sustained to his original replication, he waived any right he might have had, to question the correctness of the decision of the court on the demurrer. In like manner he abandoned his second replication, when he availed himself of the leave of the court, and filed a third and last one.

But the plaintiff insists that even if his replication was bad, that still upon the whole record he was entitled to judgment, because the first and fourth pleas were undisposed of.

* 1 Chitty's Pleading, 645.

If an issue in fact had been joined on the fifth plea, and found for the defendants, judgment was inevitable for them, because the plea was *in bar* of the action, and the other pleas would then have presented immaterial issues. If the plea was true, being a complete defence, it would have been useless to have tried other issues, for no matter how they might terminate, judgment must still be for the defendants. The state of pleading leaves the fifth plea, precisely as if traverse had been taken on a matter of fact in it, and determined against the plaintiff. "On demurrer to any of the pleadings which go to the action, the judgment for either party is the same as it would have been on an issue in fact, joined upon the same pleading and found in favor of the same party." (*Gould's Pleading*, ch. ix, § 42.) "And when the defendants' plea goes to bar the action, if the plaintiff demur to it and the demurrer is determined in favor of the plea, judgment of *nil capiat* should be entered, notwithstanding there may be also one or more issues in fact; because, upon the whole, it appears that the plaintiff had no cause of action." (*Tidd's Practice*, *4th American Edition*, 741–2.)

There is no error in the record.

JUDGMENT AFFIRMED WITH COSTS.

COMMANDER-IN-CHIEF.

1. Parties excepting to a report of a commissioner in admiralty proceedings, should state, with reasonable precision, the grounds of their exceptions, with the mention of such other particulars as will enable the court to ascertain, without unreasonable examination of the record, what the basis of the exception is. *Ex. Gr.* If the exception be that the commissioner received "improper and immaterial evidence," the exception should show what the evidence was. If, that "he had no evidence to justify his report," it should set forth what evidence he did have. If, that "he admitted the evidence of witnesses who were not competent," it should give their names, and specify why they were incompetent, what they swore to, and why their evidence ought to have been rejected.
2. This same necessity for specification it is declared—though the case was not decided on that ground, the point not having been raised on argument—exists in a high degree in regard to an *answer* put in to an admi-

ralty claim, which answer ought to be full, explicit, and distinct; and hence a defence to a libel for collision, which sets forth that the injured vessel "lay in an improper manner, and in an improper place," without showing in any respect wherein the manner, or why the place was improper, is insufficient, *it seems*, as being too indefinite.

3. Objections to want of proper parties being matter which should be taken in the court below, a party cannot, in an admiralty proceeding by the owners of a vessel, to recover damages for a cargo lost on their ship by collision, object here, for the first time, that the owners of the vessel were not the owners of the *cargo*, and therefore that they cannot sustain the libel. Independently of this, as vessels engaged in transporting merchandise from port to port are "carriers"—if not exactly "common carriers"—and as carriers are liable for its proper custody, transport and delivery, so that nothing but the excepted perils of the sea, the act of God, or public enemies, can discharge them—it would seem that they might sustain the action within the principle of the *Propeller Commerce* (1 Black, 582).

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York in a cause of collision, the case being thus:

La Tourette & Butler, appellees in the case, were owners of the schooner William Clark, and filed their libel in the District Court of the United States for that district, alleging, among other things, that on the 26th of January, 1860, the schooner of the claimants, called the Commander-in-chief, while *their* schooner lay safely at anchor to the north and east of Little Egg Harbor, and about a half a mile from the New Jersey shore, came down, under full sail, and ran into her, cutting her through, abreast of the main chains. The allegation was, that the William Clark sank within fifteen minutes after the collision, and the claim was for a total loss *both* of the vessel *and the cargo*. The collision occurred about ten o'clock in the evening. The libellants alleged that it was a clear, moonlight night; that their schooner was properly anchored, and had a competent watch on deck, and a bright light set in the rigging, and that the collision occurred in consequence of the negligence, mismanagement and unseamanlike conduct of those in charge of the vessel of the respondents, and without any fault on the part of those in charge of their own vessel.

Statement of the case.

The answer of the claimants, in general terms, denied the material matters alleged in the libel. A separate denial of each article was interposed, and the substance of the defence was, that the collision, if it occurred at the time and place alleged in the libel, was occasioned through the fault of the officers and crew of the vessel of the *libellants;* the respondents alleging, in the *general terms quoted*, that the vessel of the libellants "*lay in an improper manner and in an improper place*, without a light or other necessary precautions, and that the collision, so far as *their* vessel was concerned, was unavoidable."

Testimony was taken by both parties. It showed that the schooner of the libellants, bound from Indian River, in Delaware, to the city of New York, anchored a mile or two to the northward of Little Egg Harbor light (*a place where vessels frequently sail*), in consequence of the severity of the cold, and because it was blowing so heavily that those in charge of her did not deem it safe to proceed on the voyage. It was proved, however, that the anchorage was not an improper one, and that a number of vessels were anchored still further in the general track, towards the south. The master of the Commander-in-chief swore it was a moonlight night—very cold. "There was a vapor on the water. Anything above the vapor you could see a good way; but a vessel's hull you could not see beyond a short distance. *You could see a light half a mile.*" He then proceeded to state some facts from which the conclusion was inferrible that there was no light: but the proofs of the other side were full *that there was a light*, and that it was suspended in the rigging of the injured vessel, some twelve feet above the deck; and moreover, that the mate was on deck as a lookout.

After a full hearing, an interlocutory decree was entered in favor of the libellants and the cause referred to a commissioner to ascertain and compute the amount due to the libellants for the actual damages to the vessel and cargo occasioned by the collision. The commissioner having made and returned his report, by which he gave a specific sum as the value of the vessel, and an additional specific sum *as the value*

of the cargo, the respondents filed nine exceptions to the report, as follows:

1. "That the commissioner allowed improper and immaterial evidence to be put in by libellant;" the exception, however, not stating what the evidence was.

2. "That he had no evidence to justify his report;" the exception not setting forth what evidence he did have.

3. "That he reported more than the evidence warranted;" the exception stating nothing further.

4. That he had "failed to report the principle of the decree."

5. That he "admitted evidence of witnesses as to the value of the vessel on the part of the libellant, who were not competent as to that fact, and whose evidence should have been rejected;" no names of witnesses being given, nor any specification of the reasons why they were incompetent; nor what they swore to; nor why their evidence should have been rejected.

6. That he "*reported the value of the cargo as part of the damage*," *when the libellant is not entitled to recover therefor.*

7. That the evidence showed the vessel to be of far less value than the report made it.

8. That the loss of the vessel was not the necessary or actual results of the injury to the vessel.

9. That the loss is shown to have been incurred by the fault of the libellant or his agents.

The court, after full argument, overruled these exceptions, including the sixth, and entered a final decree in favor of the libellants for the amounts reported. Appeal was then taken by the respondents to the Circuit Court, where the parties were again fully heard, and the decree of the District Court affirmed; whereupon the respondents appealed to this court, and now sought to reverse the last-named decree.

Mr. Haskett for the libellants: The answer is in some respects too indefinite. It does not specify as it ought to have done wherein the ship was lying improperly at anchor, if she was lying so at all. The exceptions, also, to the commissioner's

report are for the most part far too indefinite. Certainly this is true as respects the first, second, third, fourth, and fifth exceptions. They would impose upon the judges of this court the labor of hunting in the most minute way, throughout the record, to see wherein the alleged error of the commissioner consisted; leaving them in the end to guess at it only. This is irregular. The sixth exception is without foundation in law. The evidence shows that the collision was through the fault of the respondents alone. If this is so, the libellants are entitled to damages for her cargo. The collision was the cause of the loss, and the owners of the vessel as common carriers are liable to the owners of the cargo. The *Propeller Commerce*, decided lately,* in this court, is in point.

Mr. Gillet, contra: The injured vessel was anchored, of a very cold night, in a great thoroughfare of navigation. Her light, if any light was on her, was *in* the rigging. There was a mist on the water, and the light was obscured. The case is one of misfortune at worst; for which the respondents are not liable.

The answer and first five exceptions are in sufficient form. The court has the whole record, in a printed shape, before them. Learned in law, and instructed by the evidence in the facts, they can readily see wherein the point of each exception lies.

The sixth exception is well founded. The libellants are not entitled to recover for the value of the cargo. They have neither averred or proved that it belonged to them, nor that they were carriers. The inference is fair that it was taken as freight for third persons. They do not even show that the claim for the loss of the cargo was assigned to them, nor that they became the insurers of it; nor that under the circumstances claimed by libellants in this case, they would be liable over to the shipper. It does not appear whether the libellants or shippers insured, or not; or if insured, whether they have abandoned to the underwriters, so that the claim, if valid, belongs to the latter. It is no answer to say that the

* 1 Black, 574.

libellants are liable to the shippers for it. This may, or may not be so, and depends more upon what is not, than what is to be found in the record. The libellants have no right to impose upon the claimants the chances of double payment for the same thing. They had it in their power to have placed this matter upon proper footing by filing the libel in behalf of themselves and for the benefit of the shippers, or in some other way made the shippers parties, so that a recovery would have enured to their advantage and concluded them, and would have left the proceeds, when collected, in the registry, for them. It is clear, if the libellants could not do this, and thus bind the shippers, they cannot bind them when not named or referred to in the libel; and if they could not thus bind them, they cannot recover for the value of the shippers' property. The case of the *Propeller Commerce*, cited on the other side, does not determine this question. That was a case of common carriers, and this is not. Whether the owners of the cargo were protected by the form of the proceedings, or concurred therein, is not stated. Ordinary shipments, like the present, are upon special agreement, and the freighter is not a common carrier. But even in case of common carriers, the owner of property retains his ownership and right to control and to sue for injury to it.*

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

1. Persons appearing as claimants, or for the purpose of making defence in causes civil and maritime, are required, under all circumstances, to answer on oath or solemn affirmation, and the authorities are unanimous that the answer should be full, explicit, and distinct, to each separate article and allegation of the libel.† Claimants merely allege, in this case, that the vessel of the libellants lay in an improper manner, and in an improper place; but the answer does not set forth, or in any form point out, in what manner she lay, or in what respect the manner was improper, nor is there

* New Jersey S. N. Co. *v.* Merchants' Bank, 6 Howard, 380, 381.

† 3 Greenleaf on Evidence, 398, 435.

any definite description of the place where she lay, or any reasons assigned why it was an improper anchorage. Explanations in that behalf are entirely wanting; nor is it possible to determine from the allegations of the answer whether the respondents intended to set up that the place selected as an anchorage was an usual one, and that those in charge of their vessel were thereby misled, or whether that part of the answer was intended as an averment that she lay too near to or too far distant from the shore, and more or less in the pathway of navigation than was customary or necessary. Such indefinite allegations are hardly sufficient to constitute a valid defence; but as no exception was entered to the answer in the District Court, and inasmuch as this point was not made here in argument, perhaps it is but right that the decision of the case should turn upon the merits of the controversy.

2. Evidence shows that the schooner of the libellants was bound on a voyage from Indian River, in the State of Delaware, to the port of New York; that she anchored a mile or two to the northward of Little Egg Harbor light, in consequence of the severity of the cold, and because it was blowing so heavily that those in charge of her did not deem it safe to attempt to proceed on the voyage. Proofs also show that the anchorage was a proper one, and that a number of vessels were anchored still farther to the south. She had a good light suspended in the rigging, and the mate was on deck as a lookout. Suggestion is made that there was some mist or vapor on the water; but if it were conceded that the testimony establishes that fact, still it could not benefit the respondents as a defence, because the proofs are full to the point that it was a clear, moonlight night, and that the light suspended in the rigging of the schooner was some twelve feet above the deck of the vessel. Witnesses for the respondents, or some of them, testify that they did not see the light until just before the collision occurred, and the inference is attempted to be drawn from that fact, that the light was in an improper place; but the weight of the evidence satisfies the court that it might easily have been seen if there

had been proper vigilance on the part of those in charge of the respondents' vessel. Both the courts below held that the respondents were in fault, and we entirely concur in that opinion.

3. None of the exceptions to the report of the commissioner are entitled to any consideration except the sixth. *First* exception was, that the commissioner allowed improper and immaterial evidence to be introduced by the libellants; but the exception is not accompanied by any report of the evidence objected to, and of course there is no means of determining whether it was proper or improper. *Second* exception was, that the commissioner had no evidence to justify his finding, which, without a report of the facts, is quite too indefinite to be available for any purpose, and the same remark applies to the *third* and *fourth* exceptions, which need not be reproduced. *Fifth* exception was to the effect that witnesses were admitted to testify as to the value of the vessel who were not competent, and whose evidence should have been rejected; but the names of the witnesses are not given, nor is it stated why they were incompetent, nor what their testimony was, nor on what ground it is claimed that the testimony should have been rejected. Suffice it to say, that in the judgment of this court these several exceptions are without merit, and were properly overruled. *Sixth* exception is to the effect that the commissioner improperly reported the value of the cargo as part of the damage, when, in point of fact, the libellants were not entitled to recover therefor. Report of commissioner shows that he estimated the actual damage to the cargo as well as the actual damage to the vessel, and the decree states that the report, as made, was confirmed by the court. Taken together, therefore, the report and decree affirm the principle that the libellants, under the circumstances of this case, were entitled to recover both for the damage to the vessel and cargo. Appellants insist that the action of the court in confirming the report was erroneous, and that the decree on that account should be reversed. Common carriers, however, it is conceded, are liable for the safe custody, due transport, and right delivery

of goods and merchandise intrusted to them to be conveyed from one port or place to another; and where the owners of the ship or vessel damaged by a collision sustain that relation to the cargo, it is admitted that they may recover for its loss or injury in the suit for the collision, if the libel is properly framed and the proofs sustain the charge. Admission to that effect could hardly have been withheld, as it was so decided by this court in the recent case of the *Propeller Commerce*,* to which reference was very properly made. But it is contended that the decision in that case was placed exclusively upon the ground that the lake boat Isabella was a common carrier in the strict technical sense, and the argument is that the schooner of the libellants was not such a carrier, and, therefore, that the rule adopted in that case cannot be applied in the case under consideration. Whether all ships and vessels employed in transporting goods or merchandise from port to port are, strictly speaking, common carriers or not, it is not necessary to determine in this case. Suffice it to say, that they are carriers, and as such are liable for the safe custody, due transport, and right delivery of the goods or merchandise which they receive and undertake to transport, and nothing can discharge them from the obligation of the undertaking, as specified in the bill of lading, but the excepted perils, or the act of God, or the public enemy. Liability, therefore, of the schooner of the libellants as a carrier, was precisely the same as that of the lake boat Isabella, in the case referred to, so that the rule adopted in that case is fully applicable to the case at bar.† Undoubtedly, all persons interested in a cause of collision may be joined in the libel for the prosecution of their own claims and the protection of their own interests. Owners of the vessel and the shippers of the cargo, for example, and all other persons affected by the injury, may be made parties to the suit, or it may be prosecuted by the master as the agent of all concerned. Where it appears that the party or parties named as libellants are competent to prosecute the suit, the nonjoinder of

* 1 Black, 582.

† The Niagara *v.* Cordes, 21 Howard, 26; Clark *v.* Barnwell, 12 Id., 272.

others having an interest in the controversy must be shown by exception, and, if not made to appear in the court below, cannot be made available as an original objection in the appellate tribunal. Objections to parties, or for the want of proper parties, should be made in the court below, where amendments may be granted in the discretion of the court. Parties improperly joined may, on motion, be stricken out, and new parties may be added by a supplemental libel or petition.* Service of regular process is a warning to all parties who have any interest in the cause to come in and protect their interest; and unless they do so, if due notice was given, they are bound by the decree.† Amendments are readily granted in the Admiralty Court, as carrying out the maxim that all the world are parties to the proceeding; and if due notice be given, and any one interested fails to appear, he cannot thereafter have any ground of complaint. Collision suits are frequently prosecuted by the owners of the injured vessel for damages to the cargo as well as to the vessel, and it does not appear that any serious embarrassment has grown out of the practice. Manifestly, where the prosecution is instituted by one or more parties for themselves and others not named, it would be more regular that it should be so averred in the libel; but as there can be only one prosecution for the same collision, it is not perceived that the omission of that averment can operate to the prejudice of the claimant.‡ Persons appearing as claimants may object to the want of proper parties, and it may be that, if the exception is seasonably and properly taken, the proceeding cannot be sustained. On that point, however, we express no decided opinion, but leave the question to be determined when it shall arise. Suit in this case was commenced by the owners of the vessel, and no exception was taken to the nonjoinder of the shippers of the cargo, either in the pleadings or in any stage of the proceedings, prior to the appeal. Under these circumstances, we are all of the

* Dunlap, Practice, 87.

† Benedict, Admiralty, § 364, p. 203; The Mary, 9 Cranch, 144.

‡ The Kalamazoo, 9 English Law and Equity Reports, 557.

opinion that the objection must be overruled.* No inconvenience will result from this rule to the claimants of the other vessel, and there will still be sufficient power in the court to afford protection to the rights of the shipper of the cargo, provided proper measures are taken by him to assert his rights before the controversy is completely ended. Where the suit is commenced by the owners of the injured vessel, it is undoubtedly competent for the owners of the cargo to petition to intervene for the protection of their interests at any time before the fund is actually distributed and paid out of the registry of the court. Our conclusion is, that the suit was well brought, and that it was well and properly prosecuted in the name of the libellants. Case does not show that the libellants are not the owners of the cargo; but if not, the real owners thereof may still intervene.

The decree of the Circuit Court is therefore affirmed with costs. DECREE ACCORDINGLY.

HUTCHINS ET AL. *v.* KING.

1. Growing timber constitutes a portion of the realty, and is embraced by a mortgage of the land. When it is severed from the freehold without the consent of the mortgagee, his right to hold it as a portion of his security is not impaired.
2. When the amount due according to the stipulation of the mortgage is paid, the lien of the mortgage upon the timber thus severed is discharged, and the property reverts to the mortgagor, or any vendee of the mortgagor. Any sale of the timber by the mortgagee, or assignee of the mortgage, after such payment, is a conversion for which an action will lie by the mortgagor or his vendee.
3. By the law of New Hampshire, the interest of a mortgagee is treated as real estate only so far as it may be necessary for his protection, and to

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* The Steamboat Narragansett, Olcott Adm. R., 255; The Iron Duke, 9 Jurist, 476; The Monticello *v.* Mollison, 17 Howard, 155; Fretz et al. *v.* Bull et al., 12 Id., 466; Sedgwick on Damages, 3d ed., 469; Mer. Shipp. by Maclachlan, 280; Hay *v.* Le Leve, 2 Shaw's Appeal Cases, 395; The Petersfield, MS. Cs. temp. Marriott.

give him the full benefit of his security: he holds the timber growing on the land as a portion of the security only, and does not become its absolute owner when it is severed from the land.

THIS was a writ of error to the Circuit Court for New Hampshire; the case being thus:

In September, 1853, Dunn and his partner having bought timber land in New Hampshire, of Goodall, mortgaged it back to him, as security for the payment of the purchase-money; the purchasers having given their notes for the money; and the mortgage being intended to secure their payment. One of the notes was payable September 1st, 1854; another, September 1st, 1855; and a third, September 1st, 1856: all of them with interest from an anterior date, to wit, from June, 1853. The first note was paid at maturity, but the second was not paid until five months after maturity; while neither on it nor on the third note, was any interest paid until two years after it became due. *It was then collected by process of law.*

The mortgage contained a stipulation that the mortgagors might enter and cut timber to the value of ten hundred dollars, and afterwards as fast as they made the several payments designated in the mortgage, but if they failed to make any one of the payments designated, they were "to cease cutting, and to yield possession" until the amount was paid; "*we to cut timber*"—was the language of one part of the mortgage—"*as fast as we pay the notes, and no faster.*" During the time that the mortgagors were thus in default by non-payment of the second note, and of interest on both it and the third, they entered and cut timber, and in June, 1856, sold it to one King. In September, 1856, two persons, named Hutchins and Woods, who had succeeded by assignment to the rights of Goodall, the mortgagee, took possession of the timber thus cut, sold it, and appropriated to themselves the proceeds; *the sale of the timber by them being, as it appeared, after the unpaid interest had been collected.*

In 1859, King, who had purchased from the mortgagors, brought an action on the case against Hutchins and Woods, to recover the value of the timber which they had thus taken

possession of and sold. And among several questions raised on the trial was this—the only one considered by this court—whether the assignees of the mortgage, Hutchins and Woods, were liable to King, the vendee of the mortgagors, for the value of the timber which they had sold after they had received the principal and interest due to them.

The court below ruled that they were not; and the correctness of this ruling was the chief point now in issue here.

The record had no proper bill of exceptions. The bill, so called, gave the rulings of the court, but did not show that exceptions to these rulings were taken by either party. No objection was, however, made to the record on this ground by counsel on the argument; and the associate justice of this court who presided at the circuit where the cause was tried, informed the court that an exception to the ruling on the material point considered, had been in truth taken, and that the omission of the bill to state the fact was a clerical error.

Messrs. Hutchins and Carpenter for the plaintiff in error:

1. It will be admitted that a mortgagor has no right in general to cut timber from mortgaged premises; and if he does so he is liable to the mortgagee in trespass or trover. If he sells the timber so cut, his vendee is liable to the mortgagee in like manner. The mortgagee's rights in this respect are not affected by the fact that there has been no breach of the condition of the mortgage; for the mortgagee, as against the mortgagor, is the owner of the land, and indeed if there is no stipulation, either express or implied, to the contrary, he is entitled to the possession, and may sue for and recover it immediately upon the execution of the mortgage.

2. But this case has special strength. The stipulation contained in the mortgage gave the mortgagors a right to cut timber from the premises only as they paid the mortgage debt "and no faster;" that is to say, until such time as they might fail to pay an instalment of principal or interest when due and payable, and no longer. Upon the happening of that event, *i. e.*, a failure to pay, they were, by the terms of

the deed, to "cease cutting, and yield possession," &c., until payment of another note.

The conclusion is unavoidable that the mortgagors had no right to cut timber from the mortgaged premises while in default either for principal or interest.

Moreover, when the timber was severed it became the personal property of the assignees of the mortgagee, as it was before their real property. It could no longer pass with the land, and was no longer covered by the mortgage. By a recovery of the land in a suit on the mortgage, the assignees would not have recovered the severed timber, nor could the mortgagors recover it or gain title to it by redemption of the mortgage and recovery of the land.

3. The reception by the mortgagees of the money due on the mortgage debt could not operate as a waiver of any right which had accrued to them through the default of the mortgagors. They were bound by law to receive, or suffer the loss of interest. Their right to collect and receive payment of the debt secured, was independent of their rights to the timber under the mortgage and had no connection with them.

Mr. Wells for the defendant in error.

Mr. Justice FIELD delivered the opinion of the court:

The stipulations in the mortgage to Goodall provided, as we construe them, that the mortgagors should have the right to enter upon the mortgaged premises and cut timber, at first to the value of ten hundred dollars, and subsequently as they made the several payments designated, to the value of the sums paid; but that in case they failed to make any one of the payments designated, they were to cease cutting and to surrender possession until the amount due was paid. The timber, for the conversion of which the present action is brought, was cut after the interest on some of the notes secured had become due, and whilst it remained unpaid, and the greater portion of it was cut after the principal of one of the notes had matured and was also unpaid.

In June, 1856, after the note which had matured was paid

but whilst a suit for the interest on the other notes was pending, the mortgagors sold the timber cut to King, the plaintiff below, the defendant in error in this court. The defendants below, Hutchins and Woods, who had succeeded by assignment of the notes and delivery of the mortgage, to the rights of the mortgagee, in September, 1856, took possession of the timber cut, and subsequently disposed of it, and appropriated the proceeds. In November following, the interest due on the unpaid notes was collected. It does not appear from the record at what precise period the defendants disposed of the timber, but we assume from the argument of counsel that this was done after their collection of the interest. In 1859, the present action was brought to recover the value of the timber alleged to have been thus converted.

The defence rested mainly upon a claim of ownership in the property by the defendants. The position taken by their counsel in the court below, and urged in this court, was substantially this: that between the parties to the mortgage, the mortgagee was the owner of the land, and as such was clothed with all the rights and privileges of ownership; that the license to cut timber contained in the stipulations of the mortgage ceased upon the first failure to meet one of the payments designated; and that after default the defendants succeeding to the interests of the mortgagee had the absolute right to all the timber cut from the land, without liability to account to any one. We do not state the position of the defendants in the precise language of their counsel, but we state it substantially.

A mortgage is in form a conveyance, vesting in the mortgagee upon its execution a conditional estate, which becomes absolute upon breach of the condition. At law it was originally held to carry with it all the rights and incidents of ownership. The right of the mortgagee to be treated as owner of the mortgaged premises could only be defeated upon the performance of the conditions annexed by the day designated. Subsequent performance only gave a right to the mortgagor to resort to a court of equity for relief from the forfeiture arising upon breach of the conditions. Such is

the law at this day in some of the States of the Union. But in a majority of the States the law in this respect has been greatly modified by considerations drawn from the object and intention of the parties in executing and receiving instruments of this character. The doctrine established by courts of equity, looking through the form to the real character of the transaction, that a mortgage is a mere security for a debt, and creates only a lien or incumbrance, and that the equity of redemption is the real and beneficial estate in the land, and may be sold and conveyed in any of the ordinary modes of transfer, subject only to the lien of the mortgage, has to a great extent, "by a gradual and almost insensible progress," as Kent observes, been adopted by the courts of law.* To such a degree has this equitable view prevailed that the interest of the mortgagee is now generally treated by the courts of law as real estate, only so far as it may be necessary for the protection of the mortgagee and to give him the full benefit of his security. Although, in the absence of stipulations as to the possession, he may enter upon the premises, his interest is widely different from that of owner. He cannot by conveyance transfer any interest in the premises without a transfer of the debt secured; † his interest is not subject to attachment or seizure on execution; ‡ he cannot remove the buildings on the premises, nor the fixtures attached; nor can he subject the premises to any uses but such as may furnish the means for the payment of the debt secured without impairing the value of the estate.

In few States is the equitable doctrine respecting mortgages more clearly asserted than in New Hampshire, where the mortgage was executed upon which the rights of the parties to the present action arise. Thus, in *Southerin* v. *Mendum*,§ the Supreme Court of that State, in considering the nature of the interest which a mortgagee possesses, said: "In order to give him the full benefit of the security, and appropriate remedies for any violation of his rights, he is treated as the owner

* 4 Kent, 160.

† Jackson *v.* Bronson, 19 Johnson, 325.

‡ Jackson *v.* Willard, 4 Id., 41.

§ 5 New Hampshire, 429.

of the land. But for other purposes the law looks beyond the mere form of the conveyance to the real nature of his interest, and treats his estate in the land as a thing widely different from an estate in fee simple." In that case it was held that the interest of the mortgagee in the land was a mere chattel, and passed by a simple delivery of the note secured as an incident of the debt. And in *Ellison* v. *Daniels*,* the same court said: "The right of the mortgagee to have his interest treated as real estate extends to and ceases at the point where it ceases to be necessary to enable him to avail himself of his just rights, intended to be secured to him by the mortgage." In that case the demandant in a writ of entry was mortgagor, and the tenant claimed under the mortgagee through various mesne conveyances executed after the law day, and it was held that nothing passed to the tenant, the court observing that to enable the mortgagee to sell and convey his estate was not one of the purposes for which his interest is to be thus treated; that there was no necessity that it should be so treated, as the sale could be equally well effected by the transfer of the note secured by the mortgage.

With these views of the nature of the interest of the mortgagee, under the law of New Hampshire, the question presented in the case at bar becomes one of easy solution. The timber growing upon the land mortgaged constituted a portion of the realty. It was embraced in the pledge of the land as security. As the assignees of the mortgage held the land, so they held the timber upon it both before and after it was cut, as a portion of their security. They could not sell it, any more than they could pass, by their conveyance, the fee of the land.

The mortgagors had, it is true, no right to cut the timber after default made in any of the payments designated in the mortgage. They could do nothing to diminish the value of the estate. The right to cut the timber rested upon the license contained in the stipulations of the mortgage. Their cutting, except in pursuance of such license, might have been

* 11 New Hampshire, 274.

restrained, upon proper application, by a court of equity.* The sale by them, after it was cut, did not divest the lien of the assignees of the mortgage; the purchaser took the timber subject to their paramount rights. The assignees could follow it and take possession of it, and hold it until the designated amounts due at the time were paid. When these were paid, their rights over it ceased, and the vendee of the mortgagors became invested with a complete title. The subsequent detention of the timber by the assignees was wrongful, and the sale of it a conversion, for which they were liable to the purchaser.

Some other positions were pressed by the plaintiffs in error upon the attention of the court on the argument, but we do not notice them; because what is termed in the transcript "a bill of exceptions," does not show that any exception was taken to the rulings of the court. The bill simply shows that certain positions were urged by the parties, and that certain rulings were made. We have, however, considered the material question argued, because no objection was taken to the record on the argument, and because the associate justice of this court, who presided at the circuit where the cause was tried, informs us that an exception was in truth taken, and that the omission of the bill to state the fact is a mere clerical error. We do not intend, however, to allow this case to be drawn into a precedent. To authorize any objection to the admission or exclusion of evidence, or to the giving or refusal of any instructions to the jury, to be heard in this court, the record must disclose not merely the fact that the objection was taken in the court below, but that the parties excepted at the time to the action of the court thereon.

JUDGMENT AFFIRMED.

* Brady *v.* Waldron, 2 Johnson's Ch., 148.

DERMOTT *v.* WALLACH.

Where a lease at $3000 a year, payable in *monthly* instalments, stipulated that if the tenant underlet or attempted to remove any of the goods on the premises without the landlord's consent, then, at the sole option and election of the landlord, *the term should cease*, AND MOREOVER, in either of said cases, "one whole year's *rent*, to wit, the *rent* of $3000 over and above all such rents" as have already accrued, shall be and is hereby reserved and shall immediately accrue and become due and owing, and shall and may be levied on by distress and sale of all such goods as may be found on the premises: *Held*,—*in a case where a removal and consequent levy had been made while the lease had yet more than a year to run*—that although the clause in the lease was obscure, the $3000 was "rent," intended to be secured in advance and in a gross sum instead of in the monthly shape, and was not a penalty above and independent of the other and usual rents.

MRS. DERMOTT leased to Dexter a hotel, for three years from 1st October, 1855, to be extended to five, at the option of the tenant. The rent was $3000 a year, payable in monthly sums of $250. It was expressly stipulated between the parties, and made a condition, that if the tenant should assign or underlet the premises without the written consent of the landlord, or should *remove or attempt to remove any of his goods or chattels* (except the same be replaced of equal value) from the premises without a like consent, then, and in either case and event, at the "*sole option and election*" of the landlord, *the term should cease*, and the landlord might immediately re-enter upon the premises and expel the tenant, AND MOREOVER, in either of said cases, or the happening of the events, "*one whole year's rent, to wit, the rent of* $3000 *over and above all such rents* (that is to say, all such of the rents hereinbefore reserved to be paid on the first day of each month during the said term . . . . . as shall have then already accrued) *shall be and by these presents is reserved to be paid* by the said Dexter to the said Dermott, and shall immediately thereupon accrue and become due and owing from him to her, *and shall and may be levied by distress and sale of all such goods and chattels as may be found on the premises.*"

Dexter the tenant took possession, and afterwards executed

two deeds of trust of the goods and chattels in the hotel to the defendant, Wallach, to secure certain promissory notes. One of the notes not being paid at maturity, Wallach advertised the goods and chattels for sale, and was proceeding with the sale when Mrs. Dermott levied a distress upon them for $3000. This was on the 18th of May, 1857, *about a year and five months before the lease would expire. The ordinary rent had been all punctually paid to the 1st of May, the month in which the distress was made;* so that no rent of the ordinary kind was due at the time of the distress. Wallach having replevied the goods seized, the defendant avowed; setting up, by way of justification for the taking, the attempt to remove them from the premises, and alleging that by such removal one year's rent had accrued. There were two pleas to the avowry. I. No rent in arrear. II. No demand for the rent.

The substantial question was whether this $3000 was "rent," or was a penalty, that is to say, whether the clause meant that in the event of a removal, or attempted removal, Mrs. Dermott might get a year's rent *in advance*, or whether it meant that she should have a sum of money equivalent to a year's rent "over and above" all rents, by way of penalty.

The Circuit Court for the District of Columbia, in which the case arose, gave judgment for the plaintiff. On error here, the question was the same as below and as already stated.

Messrs. Carlisle and Cox for the trustee, the defendant in error:

1. The authorities show that whenever it is doubtful what the intent of the parties was, or where there may be breaches of the agreement of different degrees of importance, and a gross sum is payable for any breach, however unimportant, or where the damage is capable of being certainly known, the sum will be treated as a *penalty*, whatever the parties may have called it. Calling the thing rent will not make it so. On the other hand, where it is impossible to estimate the damage, or a rate of forfeiture proportioned to the damage is reserved, it is considered liquidated damages, or, sometimes, an *increased rent*, or *penal* rent.*

* See the cases cited in 2 Greenleaf on Evidence, §§ 258 and 259.

The present comes within the first class of cases. The removal of the most trifling articles of furniture, and that but a week before the expiration of the lease, would, according to the terms of the instrument, entail upon the tenant the forfeiture of the whole sum of $3000, as well as of his lease, equally with the removal of the whole contents of the house at the commencement of the term. The removal may be repeated a dozen times, and the right of Mrs. Dermott accrues as often as the removal takes place. It is apparent, too, in this case, that the utmost damage which the plaintiff in error could have suffered was the loss of about two months' rent, for which she claims a whole year's.

2. If this was a case of *penalty*, the plaintiff in error had no right to distrain for it.

Before the statute 8 and 9 William III,* a party might obtain judgment at common law, for the whole amount of the penalty of a bond. But even then the distinction between penalties and liquidated damages was known; and in the former case, courts of equity would restrain proceedings at law, and direct an issue of *quantum indemnificatus*. And now, in the common law courts, a judgment can only be had for the actual damage.†

If a party cannot obtain judgment for a penalty, *à fortiori*, he cannot distrain for it. The right of distress, which is a right to take the law into one's own hands, is exceptional, and not to be favored. It is of the essence of this right that the rent or service distrained for should be certain in amount and time of payment, and therefore distress was never allowed where the services due were uncertain, in either respect.‡ Nor can agreement of the parties make any difference in this respect. No case can be found in which a distress for a penalty has been sustained.

3. By the common law, where a *nomine pœnæ* is given for non-payment of rent, the lessor must *demand* the rent before he can be entitled to the penalty; and where a right of distress is given *by agreement*, a demand is necessary to entitle a

* C. 11, § 8. † See Comyn, Landlord and Tenant, 571, Bk. IV, ch. 2.
‡ Bradby on Distress, 17.

party to distrain. This is ancient law. *Grobham* v. *Thornborough*, in Hobart's Reports,* is in point. Grobham there brought debt of £100 against Thornborough, on a lease, £60 being for rent, and £40 "a *nomine pœnæ* of 8 shillings a day for non-payment," for a hundred days. Judgment was given for him for the £60 rent. "But," says Lord Hobart, "for the £40 pain, it was adjudged against the plaintiff, because he laid no actual demand, without which a pain is not forfeited."

By parity of reasoning, even if a right of distress existed in this case, there must have been a previous demand, either to replace the goods alleged to be removed, or to pay the $3000. The tenant was entitled to a reasonable time to replace the goods. Until such time elapsed without their being replaced, and until demand made, no right accrued.

Mr. Brent, contra.

Mr. Justice NELSON delivered the opinion of the court:

The case turns mainly upon the question whether the $3000 mentioned in the lease, accruing on the happening of this event, is rent or a penalty.

The argument on behalf of the tenant is, that by the true construction of the lease, the landlord, on the happening of the event, may at his option consider the term as ended, and re-enter, and in addition distrain for the $3000, and hence the term having ended, or it being in the power of the landlord to end it, the sum reserved cannot be regarded as rent, but as a penalty, as the relation of landlord and tenant has ceased.

We do not agree to this construction. Although the wording of the clause occasions some obscurity and hesitation, yet, regarding the sense and substance of it, there can be little doubt about its meaning. It will be observed, that if the tenant assigns or underlets, the term ceases at the option of the landlord. So in the event of the removal or attempt to remove the goods. Now the words, "at the sole option

* Page 82.

and election" of the landlord, are superfluous, if intended to be limited to this breach of the covenant. All that was necessary was the inhibition to assign, underlet, or remove the goods, and the right of re-entry in case of breach. Without giving the option or election, the landlord had the right to waive the forfeiture. Receiving rent with knowledge of the breach is a waiver. So, levying a distress for the rent, or in any other way consenting to a continuance of the term. These words, we are of opinion, are entitled to an influence in the construction of this part of the lease beyond these covenants of forfeiture, and may aid in the construction and meaning of the clause which provides for the payment of the year's rent in advance. And the true meaning we think is, that the landlord may at his option consider the term at an end, and re-enter in the events mentioned, or may at his option (understood), have the year's rent in advance.

We do not think the word "moreover," in the connection found, necessarily means the rent in advance, in addition to the previous remedies mentioned, but rather an alternative remedy.

These covenants are inserted in a lease for the better security of the rent. The one in question simply makes the rent payable in advance, instead of by instalments, on the happening of the event stated. It would have been not only strange but unreasonable to have made this stipulation as contended for on the part of the plaintiff, to take effect at the moment the term ceased, or might be put an end to by the landlord. The words should be very clear and controlling to lead to such an interpretation.

It is argued that the reservation of this $3000 rent in advance should be regarded as a penalty, for the reason that the event would happen on the removal of a single article of goods, and that the remedy is out of reasonable proportion to the injury. But the answer is, the covenant against removal necessarily embraced all the goods on the premises that furnished security for the rent, and it is not for the tenant to set up as a defence to its enforcement, that the breach is not as great as it might have been. The removal of a single

article is a wrong which he is not permitted to take advantage of, and besides, there is no hardship in the case, for if he desired to remove any particular article, the covenant permits it on replacing goods of equal value.

The removal of the goods took place on the 18th of May, 1857, some year and five months before the expiration of the lease, so that practically the reservation of the rent in advance, on the event in the lease happening, works but simple justice to all parties. It became the substitute for the rent reserved payable monthly. If the tenant had brought about the event by the removal of the goods within a year of the termination of the lease, whether or not he might have had a remedy to abate the excess, we need not discuss.

JUDGMENT REVERSED, and cause remanded for a *venire de novo*.

RYAN *v.* BINDLEY.

1. Where a declaration claims a sum not sufficiently large to warrant error to this court, but where the plea pleads a set-off of a sum so considerable that the excess between the sum claimed and that pleaded as a set-off would do so,—the amount in controversy is not the sum claimed but the sum in excess, in those circuits where by the law of the State adopted in the Circuit Court, judgment may be given for the excess as aforesaid.

   For example: A declaration in assumpsit claimed *one* thousand dollars damages,—a sum insufficient to give the Supreme Court jurisdiction: more than *two* thousand being required for that purpose. The plea pleaded a set-off of *four* thousand, and by the laws of Ohio, adopted in the Federal courts sitting in that State, judgment might be given for the *three* thousand in excess, if the set-off was proved. *Held*, that *three* thousand, and not one thousand, was the amount in dispute; and accordingly, that the jurisdiction of the Supreme Court attached.

2. The rules of evidence prescribed by the laws of a State being rules of decision for the Federal courts while sitting within the limits of such State, they must be obeyed even though they violate the ancient laws of evidence so far as to make *the parties to the action* witnesses in their own cause; herein adopting a practice in opposition to a specific rule by the Federal court for the circuit.

THE Judiciary Act provides * that final judgments and decrees in civil actions and suits in equity in a *Circuit* Court, when

* § 22.

the matter in dispute exceeds the sum or value of *two* thousand dollars, exclusive of costs, may be re-examined and reversed or approved in the *Supreme* Court. With this law in force, Bindley had sued Ryan in assumpsit in the *Circuit* Court for the Southern District of Ohio, and laid his damages at *one* thousand dollars. Ryan, however, put in a plea, insisting that Ryan owed *him four* thousand dollars, which sum he claimed a right to set off against Bindley's demand, and to have judgment against Bindley for the excess: a sort of defence and judgment allowed by the laws of Ohio and the practice of the Circuit Court of the United States for its districts, which herein by rule of court had adopted the practice of the State tribunals. The verdict found $575.85 for the plaintiff.

In the course of the trial the *defendant offered himself* as a witness; not being competent of course by the general laws of evidence which prevail in the Federal courts, and indeed being, by rule of the Circuit Court where the case was tried, made, as a party, specifically incompetent, but claiming to be competent by virtue of the Ohio code of civil procedure; one section of which* declares that "No person shall be disqualified as a witness in any civil action or proceeding by reason of his interest in the event of the same, *as a party* or otherwise."

The Circuit Court, holding to its own rule, rejected the witness; and on error here two questions were raised.

1. Did the sum involved exceed $2000 in such a sense as that the *Supreme* Court had jurisdiction?

2. Was the defendant in this suit rightly rejected as a witness?

Messrs. Lee and Fisher for the plaintiff in error.

Mr. Justice DAVIS delivered the opinion of the court:

1. The allegation in the declaration must be taken, generally, as fixing the amount or value for the purposes of jurisdiction. But the subsequent pleadings may so change the original character of the suit as to involve an amount or

* § 310.

value in excess of two thousand dollars, and when this is done, the judgments and decrees of the court below are subject to be reviewed here.

In this case Ryan interposed a notice of set-off, and insisted that Bindley owed him four thousand dollars, for goods sold and money lent, which he claimed the right to set off against Bindley's demand, and to recover against Bindley a judgment for the excess. By the laws of Ohio such a defence is permitted, and if the defendant succeeds in proving his set-off, and it is larger than the plaintiff's claim, he is entitled to a judgment for the excess. The parties are concluded by the judgment, and cannot again litigate the same subject-matter, unless the judgment should be reversed, on appeal or writ of error to the Supreme Court. This law of set-off, or counter claim, and the practice under it, has been adopted as a rule of court, by the Circuit Court of the United States for the districts of Ohio. The plea in this case was therefore proper, and after it was interposed the matter in dispute rightfully exceeded the sum of two thousand dollars, exclusive of costs, and as the plaintiff had judgment, it is plain that the defendant had the right to sue out his writ of error.

2. A reversal of the judgment is claimed, because the Circuit Court refused to permit the defendant to testify as a witness. In Ohio a party to the suit is a competent witness on his own behalf. The rules of evidence prescribed by the laws of a State are rules of decision for the United States courts, while sitting within the limits of such State, under the 34th section of the Judiciary Act.* The court having rejected the witness, when he was competent, the judgment below must be reversed, and a *venire de novo* awarded.

JUDGMENT ACCORDINGLY.

* Vance *v.* Campbell, 1 Black, 430; Wright *v.* Bales, 2 Id., 535.

Ex parte Dubuque and Pacific Railroad.

When this court, under the 24th section of the Judiciary Act, reverses a judgment on a case stated and brought here on error, remanding the case, with a mandate to the court below to enter judgment for the defendant, the court below has no authority but to execute the mandate, and it is final in that court. Hence such court cannot, after entering the judgment, hear affidavits or testimony and grant a rule for a new trial; and if it does grant such rule, a mandamus will issue from this court ordering it to vacate the rule.

Litchfield sued the Dubuque and Pacific Railroad Company, in the District Court of the United States for the District of Iowa, for a tract of land in that district. The cause of action was set forth by petition, according to the mode of proceedings prescribed by the code of Iowa. It alleged that the plaintiff had a title in fee, and the right of possession; which land was withheld from him by the defendant, who was in possession. The answer of the defendant denied that the plaintiff had any title to the premises sued for. On this issue the parties went to trial before the District Court, at October Term, 1859. The court found, and entered judgment, that the *plaintiff* had right to the land claimed, and the right of possession thereof. *The facts had been agreed on* in writing, and filed on stipulation, in the District Court, *on which agreed statement the finding and judgment proceeded.* On the facts thus presented to the court below, the cause was brought to this court by writ of error, *was re-examined*, and after an elaborate opinion, reported among the decisions of December Term, 1859, the judgment below was *reversed;* and *it was ordered that the District Court enter judgment for the defendant below.**

A mandate went down, and was entered of record, and the District Court entered judgment that the plaintiff Litchfield had no title, and that he pay costs. This was done at October Term, 1861, and *immediately thereafter* (affidavits of ability to show new facts having been filed) *a new trial was moved for on behalf of Litchfield, and granted by the court.* To

* See Dubuque and Pacific Railroad *v.* Litchfield, 23 Howard, 66.

this step the railroad company excepted, and it now moved for a writ of mandamus commanding the court below to vacate the order granting the new trial.*

Mr. Mason against the motion: The judgment having been entered in the court below, became *its* judgment, possessing the same qualities as if it had been originally entered there. One of these qualities or incidents was, that it was liable to be vacated, and a new trial granted, in a proper case, in the discretion of the court below; a discretion with which this court will not interfere, as it has declared in many cases, and notably in *Eberly* v. *Moore*.†

1. This power and duty exists under the Judiciary Act of 1789. The court in the case just cited says: "The jurisdiction has been conferred by *acts of Congress* upon the courts of the United States, so to supervise the various steps in a cause as to prevent hardship and injustice, and that the merits of a cause may be fairly tried. It has been uniformly held in this court that a Circuit Court could not be controlled in the exercise of the discretion thus conceded to it."

2. It exists, also, under the statute of Iowa; which by the Judiciary Act of 1789‡ is the "rule of decisions in trials at common law." Courts in Iowa are *compelled* to grant new trials, on cause shown, on the application of a party, for any "cause affecting materially the substantial rights of such party," specified in the law; in which case, the "former report, verdict, or decision, *shall be vacated, and a new trial granted.*"§ It is to be presumed that the court had grounds which justified it in granting as it did the new trial under the above provisions.

In actions for the recovery of real property in Iowa, under its code a new trial may be granted, *without any cause* being shown, in the discretion of the court, on application within

* The parties had stipulated that no rule should be required on the Circuit Court where the cause now was by transfer, to show cause why a peremptory mandamus should not issue as prayed for in the petition, if this court could rightfully order the writ.

† 24 Howard, 147. ‡ § 34. § Code, Revision of 1860, § 3, 112.

two years after the determination of the former trial.* And this may be after the first judgment has been executed; for the code authorizes a writ of restitution to restore the possession of the property to the party who shall succeed on the new trial.†

Of course the court below cannot, directly or indirectly, question, or attempt to overthrow *the law* as settled by the judgment of this court. But the plaintiff submits that this court will not interfere with the allowance of a new trial, where he can prove *facts* upon which his rights depend, and where the affidavits show that, without fault on his part, *the merits of the cause have not been fairly tried;* which showing he assumes is proved, or must, from the fact of a new trial having been allowed, be here presumed.

Mr. Platt Smith contra: There are no new facts. Admitting that the plaintiff can prove all his affidavits, we assert that he does but make out the old case stated; and on which this court, after patient hearing, has ordered a judgment to be entered below.

When the case was brought by appeal to this court, the whole case was removed from the court below. When it was remanded, the court below could only take jurisdiction for the specific purpose of executing the judgment of this court, in accordance with the mandate and opinion. The 24th section of the Judiciary Act of 1789 enacts, that on reversals in this court, the court "shall proceed to render such judgment or pass such decree as the District Court *should have passed*, except where the reversal is in favor of the plaintiff, or petitioner; and the damages to be assessed or matter to be decreed are uncertain; in which case they shall remand the cause for final decision." The statute of Iowa, authorizing new trials, does not apply to cases that have been removed to this court by writ of error or appeal, and remanded to the court below for the mere purpose of execution. In *Ex parte Sibbald*‡ this court says: "When the Supreme Court have executed their power in a cause before

* Id. § 3, 584. † Id. § 3, 588. ‡ 12 Peters, 492.

them, and their final decree or judgment requires some further act to be done, it cannot issue an execution, but shall send a special mandate to the court below to award it. Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded. After a mandate, no rehearing will be granted. It is never done in the House of Lords; and on a subsequent appeal, nothing is brought up but the proceeding subsequent to the mandate. If the special mandate directed by the 24th section is not obeyed or executed, then the general power given to 'all the courts of the United States to issue any writs which are necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law,' by the 14th section of the Judiciary Act, fairly arises, and a mandamus or other appropriate writ will go."

The court below treats the case as though it had never been removed. But the judgment of that court is reversed and held for nought. The District Court does not pretend to overturn its own original judgment; *that* was, in the opinion of that court, all right,—it was in favor of the plaintiff. This court overturned that judgment, and ordered the District Court to enter judgment for the defendant. The District Court reversed and set aside the judgment of this court, and seeks to re-establish its original judgment. If the facts of the case required another trial, this court would have issued an order for a trial *de novo* in the court below; a peremptory mandate to enter judgment for the defendant is quite another thing.

Mr. Justice CATRON, after stating the case, delivered the opinion of the court; Mr. Justice MILLER, who had been of counsel in the case, not sitting in it here.

Opinion of the court.

In granting the new trial the District Court seems to have been governed by two reasons: *First*, because the statutes of Iowa prescribed that a second trial may be had of course in actions brought for the recovery of real estate; and *Secondly*, because the court below had the power, after the cause was presented there by a mandate from this court and the judgment of reversal entered, to hold that the cause stood on the same footing that it would have done, had the District Court entered the judgment for the defendant before the cause was brought up to this court. And in that case it is true the District Court could have granted a new trial at its discretion.

The 24th section of the Judiciary Act of 1789 governs the practice in cases brought up and reviewed in this court. It is bound to give such judgment as the court below ought to have given, and the law directs that a mandate shall be sent down to have the judgment entered as final in the lower courts, when it is for the defendant below, as here. The District Court had no power to set aside the judgment of the Supreme Court, its authority extending only to executing the mandate.*

We order that a writ of mandamus do issue to the Circuit Court of the District of Iowa, commanding it to vacate and erase the order granting a new trial in the aforesaid cause; and that a judgment be entered in conformity to the mandate of this court.

ORDER ACCORDINGLY.

ORCHARD *v.* HUGHES.
Id. *v.* Id.

1. It is no defence to a suit for debt that the debt arose from the receipt of the bills of a bank that was chartered illegally and for fraudulent purposes, and that the bills were void in law, and finally proved worthless in fact; the bills themselves having been actually current at the time the defendant received them, and they not having proved worthless in *his* hands, nor he being bound to take them back from persons to whom he had paid them away.

* Ex parte Sibbald, 12 Peters, 492.

2. When a bond is given for appeal in a bill of foreclosure of mortgage, the condition of the bond being simply that the appellant shall pay *costs and damages*, it does not operate to stay a sale of mortgaged premises already decreed.
3. Independently of a rule of court, execution cannot issue in a decree for foreclosure of a mortgage in chancery for the balance left due after a sale of the mortgaged premises (*Noonan* v. *Lee*, 2 Black, 499, recognized); and this (by opinion, however, of but a majority of the court), applies to the Territorial Court of Nebraska, as much as to the courts of States organized under the Judiciary Act of 1789.

THESE were, in form, two causes; though in fact, two branches of one case, which were heard and disposed of together; both of them coming here on appeal from the Supreme Court of the Territory of Nebraska, to which tribunal they had been taken by appeal from the District Court for the same Territory.

A suit had been brought by Hughes, the appellee in this court, against Orchard, the appellant, to foreclose a mortgage. Orchard set up by way of answer, that a part of the consideration of the mortgage consisted of the bills of the Bank of Tekama, of the Territory of Nebraska; that this bank, though chartered by the legislature of that Territory, had never been approved of by Congress, as was necessary that it should be, in order to be *legally* chartered; that the bank was never organized; that it was a device to deceive the public; that its notes were fraudulently issued and put in circulation without authority of law, and were of no validity or value whatever. But the answer showed that the bills were current and in circulation at the time they were received by him, and did not state in any sufficient way that they had proved worthless in Orchard's hands, or that they had ever been tendered back either to or by him. On the contrary, it set forth that many of them had been paid away to his creditors; some to a certain Davis, and that they had turned out to be worthless in *his* hands. To this answer there was a demurrer; upon which the District Court gave judgment for the complainant, so deciding that the defence set up was insufficient. A sale of the premises was accordingly decreed. After this decree Orchard gave bond for an appeal to the Supreme

Court—the condition of the bond being that "he shall diligently prosecute said appeal, and shall pay all *costs and damages* that may be awarded against him." The sale went on under a master's direction, and on the coming in of his report, Orchard filed several exceptions to it. Most of these were on matters which were the subject of discretion with the court below, as that the sale had not taken place at the exact hour advertised, but an hour or more afterwards. The Supreme Court considered none of the exceptions of force, and confirmed the proceedings. Among the proceedings confirmed, was the master's report, *which showed that the mortgaged premises sold for* $519.23 *less than the mortgage debt; and the decree of the District Court, which ordered that execution should issue for this amount and interest.*

On appeals here the following among other points were raised:

1. How far the illegal character of the bank, and the final worthlessness of its notes, were a defence to the bill of foreclosure.

2. Whether the sale was properly proceeded with in the District Court after Orchard had given a bond for appeal.

3. Whether an order for execution for the *balance* ($519.23) due on the mortgage was rightly made; and whether the fact that the Supreme Court of Nebraska Territory, which made it, was so organized under the organic law, by the legislature of the Territory, and not by the Judiciary Act of 1789, that a precedent binding courts established by the act, did not apply to one like the Supreme Court of the Territory aforesaid.

Messrs. Woolworth and Kernan for the appellant, Orchard; Messrs. Redick and Carlisle, contra.

Mr. Justice NELSON delivered the opinion of the court:

1. The fatal defect in both the answer and the proofs is, that, admitting every allegation against the legality of the bank charter, and of the worthlessness of the paper issued by the bank, Orchard, the maker of the note and of the mortgage, has not been the sufferer. The bills constituting a por-

tion of the consideration of the note, he used in payment of his debts, while they were current in the community, and he has not taken them back, either, voluntarily, assuming that he might have done so, and set up the fact as a defence to the note; nor has he been subjected to the repayment of the debts he discharged by the use of them; and even were he permitted to succeed in reducing the present demand by rebating the bank bills received by him, it does not appear that he is under any obligation to account for that amount to the creditor or creditors to whom he paid them. The defendant, therefore, is not in a condition to contest the several questions raised and discussed on the argument in respect to the power of the legislature to charter the bank, or the conduct of the parties concerned in its organization, or in keeping up its credit for the purpose of imposing upon and defrauding the community by means of the circulation of its paper. The decree, therefore, of the court below was right, and should be affirmed.

2. The appeal from the decree of the court below directing a sale of the mortgaged premises, did not operate to stay the proceedings, as the bond given was simply a bond for costs. The complainants below, therefore, proceeded to execute the decree by a sale of the land, under the direction of a master, and on the coming in of his report of the sale, certain exceptions were taken to the report and overruled, and a decree of confirmation entered. An appeal was taken by the defendants below from that decree, and has been argued in connection with the appeal from the previous and principal one. This second appeal seems to be a necessity from a very early decision of this court in the case of a foreclosure of a mortgage, that the decree in favor of the complainant, adjudging a sale of the mortgaged premises, was a final decree within the meaning of the Judiciary Act authorizing an appeal. We have accordingly looked into the second record in connection with the first, and are satisfied that there is no well-grounded objection to the report of the master, and that the court below was right in confirming it.

But there is a clause in this decree that is in conflict with

a recent decision of this court. According to the report of the master, the sale of the mortgaged premises did not cover the debt, but left a balance of $519.23. The decree of confirmation orders execution to issue for this amount with interest.

It was held by this court in *Noonan* v. *Lee*,* in an appeal from a decree in a foreclosure of a mortgage in chancery by the District Court of Wisconsin, with Circuit Court powers, in which execution was directed for the balance of the debt, that this part of the decree was erroneous, inasmuch as the equity courts of the United States, under the Constitution, are governed by the practice of the Court of Chancery in England, modified by acts of Congress and the rules of the Supreme Court: and as no execution could issue according to the practice in the English Chancery for this balance, and no rule had been adopted in this court authorizing it, this part of the decree was reversed.

The decree in the present case was rendered in a territorial court, and it has been contended that this court is not a court under the Constitution, nor organized under the Judiciary Act of 1789, but by the legislature of the Territory under the organic law, and whose jurisdiction is regulated by that law, and therefore that the decision in the case of *Noonan* v. *Lee* does not apply.† Of this opinion are Messrs. Justices Swayne, Field, and myself. But a majority of the court are of opinion that the case is governed by the previous one. This part of the decree is therefore reversed, and the residue affirmed.‡

DECREE ACCORDINGLY.

* 2 Black, 499–501.

† American Insurance Co. *v.* Canter, 1 Peters, 546.

‡ By rule of court, adopted since this decision, execution may now issue. See *ante*, p. iii.

EAMES *v.* GODFREY.

Where a patent is for a combination of distinct and designated parts, it is not infringed by a combination which varies from that patented, in the omission of one of the operative parts and the substitution therefor of another part substantially different in its construction and operation, but serving the same purpose.

GODFREY sued Eames in the Circuit Court of the United States for the District of Massachusetts, in an action on the case for infringing a patent for a new and useful improvement in boot-trees, of which patent he, Godfrey, was the assignee. The defendant pleaded Not Guilty, and gave notice of special matters of defence. The case was tried by a jury, who found the defendant guilty, and assessed the damages at $2177.50.

The patent was for a combination of mechanical powers for a new and useful improvement in boot-trees, and included a certain mechanism for *distending the leg of the boot-tree.* The plaintiff did not claim that the defendant had used the same mechanism that he did for *distending the leg* of the boot-tree, but that the defendant had used *all the other parts of his combination*, and that the mechanism which the defendant used, although differing in construction and operation from that described in the patent, *yet performed the same function.* The defendant contended, that not having used the mechanism described in the patent for distending the leg of the boot-tree, although he had used the other parts of the combination, he was not guilty of infringing the patent, and requested the court so to rule. The court refused to rule as requested, but instructed the jury, "that to make out an infringement of the claim for combination, it was not necessary for the plaintiff to show that the mechanism for distending used by the defendant and its mode of operation were the same with that described in the plaintiff's patent for the purpose of distending the boot-tree; and that if said mechanism for distending the leg, &c., used by the defendant, was not the same mechanism, operating in the same manner as that described in the plaintiff's patent for

the same purpose; still if there were in the defendant's machine a mechanism performing the same function as that performed by plaintiff's distending mechanism, and if this was combined with the other parts in the manner in which the distending mechanism described in the plaintiff's patent was combined, it was an infringement of said patent, and the defendant would be liable therefor."

The defendant excepted to the instructions given, and the refusal of the court to instruct as prayed for.

On error here, the instructions and refusal, as aforesaid, were the points before this court.

Mr. F. A. Brooks for the plaintiff in error; Mr. Causten Browne, contra.

Mr. Justice DAVIS delivered the opinion of the court:

The patent in controversy was for a combination of mechanical powers to effect a useful result, and such a patent differs essentially in its principles from one where the subject-matter is new.

The law is well settled by repeated adjudications in this court and the Circuit Courts of the United States, that there is no infringement of a patent which claims mechanical powers in combination unless all the parts have been substantially used. The use of a part less than the whole is no infringement.

In *Prouty & Mears* v. *Ruggles*,* the law is well considered. The patent there was for the combination of certain parts of a plough, arranged together so as to produce a certain effect. The suit was for an infringement. The court below had charged the jury, that unless the whole combination was substantially used in the defendant's plough it was no violation of the plaintiff's patent. Chief Justice Taney, in deciding the case, said: "None of the parts referred to are new, and none are claimed as new; nor is any portion of the combination less than the whole claimed as new, or stated to produce any given result. The end in view is proposed to be accom-

* 16 Peters, 341.

plished by the union of all, arranged and combined together in the manner described. The use of any two of these parts only, or of two combined with a third, which is substantially different in form or in the manner of its arrangement and connection with the others, is, therefore, not the thing patented. It is not the same combination if it substantially differs from it in any of its parts."

Testing this case by these principles, the court erred in charging the jury as it did, and in refusing to instruct as asked by the defendant. There is nothing in the record that shows in what manner the mechanism used by Eames, in distending the leg of the boot-tree, differed from that claimed in the patent. It is stated that the mechanism used by Eames was different in its construction and operation, but how far the difference extended we are left to conjecture. It is fair to presume, in the absence of proof, that it was essentially different. If, however, the mechanism used by Eames was not substantially different in its form or the manner of its arrangement from the mechanism used by Godfrey, there was an infringement; but this was a question that should have been left to the jury to pass on. The court laid down a broad rule without qualification,—that although Eames's mechanism for distending the leg of the boot-tree did differ in its construction and operation from that patented, yet if it performed the same *functions* as the mechanism in the combination, there was an infringement. This view of the law was wrong on principle and authority. Eames had a right to use any of the parts in Godfrey's combination, if he did not use the whole; and if he used all the parts but one, and for that substituted another mechanical structure substantially different in its construction and operation, but serving the same purpose, he was not guilty of an infringement.

JUDGMENT REVERSED AND VENIRE AWARDED.

Statement of the case.

GAYLORDS *v.* KELSHAW ET AL.

1. In a bill to set aside a conveyance as made without consideration and in fraud of creditors, the alleged fraudulent grantor is a necessary defendant in the bill; and if being made defendant his citizenship is not set forth on the record, the bill must be remanded or dismissed.
2. In such cases of remandment or dismissal, costs are allowed to a co-defendant, being the person charged with having received the fraudulent conveyance.

THE Gaylords, appellants here, had filed their bill in chancery in the Circuit Court for the District of Indiana, against the defendants Kelshaw and Butterworth, charging that they had an unsatisfied judgment at law in one of the Indiana courts against Kelshaw, and that some short time before the judgment was recovered, Kelshaw conveyed to Butterworth a valuable piece of real estate without any consideration; and with an intent fraudulently to hinder and delay them, the said Gaylords, in the collection of their debt. The bill prayed that the conveyance might be set aside, and the property sold in satisfaction of their debt.

The complainants alleged themselves to be citizens of Ohio, and *Butterworth to be a citizen of Indiana, but no allegation was made in any part of the record as to the citizenship of Kelshaw.* The record showed, however, that he was found within the district, and had appeared and answered. The court below dismissed the bill *on merits.*

Coming here, the case was argued by *Mr. Henderson for the complainants*, who asked a reversal *on merits*, which he argued had been misunderstood below, and by *Messrs. Ketcham and Dunn, contra.* The arguments need not be given, since the court considered the question not a question of merits but one

1. Whether, there being no allegation of Kelshaw's citizenship, jurisdiction existed under that clause of the Judiciary Act which gives the Federal courts jurisdiction in suits between citizens of different States? and,

2. If jurisdiction did not exist, what was proper to be

done; that is to say, whether the decree was to be reversed, or the bill dismissed, or the case remanded with directions, &c.?

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

It is clear, that neither the court below, nor this court, has jurisdiction of the case as between plaintiffs and Kelshaw.

But as the court might, under some circumstances, proceed to adjudicate on the rights of the parties properly before it, we must look into the case, so far as to see if it is one in which relief may be decreed, as between plaintiffs and Butterworth, without regard to Kelshaw.

Without referring to the numerous cases in this court and others, on the necessity of having all the proper parties before the court, in a suit in equity, and the circumstances under which the court will proceed in some cases, without persons who might well be made parties, it is sufficient to say that, in the present case, we think Kelshaw is properly made a defendant to this suit. It is a debt which he owes which is sought to be collected. It is his insolvency which is to be established, and it is his fraudulent conduct that requires investigation.

If the conveyance to Butterworth shall be decreed to be set aside, and the property conveyed to him, subjected to the payment of plaintiffs' debt, it is proper that Kelshaw should be bound by the decree; and to that end he ought to be a party.

It is not necessary to decide in this case, whether if Kelshaw were, in the language of the act of February 28, 1839, "not an inhabitant of, or found within the district where the suit is brought," the court could proceed without him; for the record shows that he was found within the district, and served there with process, and has answered the bill. Nor is it necessary, for the same reason, to inquire if the court could dispense with him as a party under the 47th rule prescribed by this court for the courts of equity of the United States. It is simply the case of a person made a defendant by the bill, who is also a proper defendant, according to the principles which govern courts of chancery as to parties, and who has been served with process within the district and

Statement of the case.

answered the bill; but whose citizenship is not made to appear in such a manner that the court can take jurisdiction of the case as to him.

Under these circumstances, the court is of opinion that instead of a decree dismissing the bill on the merits, it should have been dismissed without prejudice for want of jurisdiction. The case will be remanded to the court below with leave to plaintiffs to amend their bill generally, and if they shall fail to do this it shall be dismissed without prejudice. Butterworth is entitled to his costs in this court.

DECREE ACCORDINGLY.

MERCER COUNTY *v.* HACKET.

1. Where a county issues its bonds payable to bearer, and solemnly pledges the faith, credit and property of the county, under the authority of an act of Assembly, referred to on the face of the bonds by date, for their payment, and those bonds pass, *bonâ fide*, into the hands of holders for value, the county is bound to pay them. It is no defence to the claim of such a holder that the act of Assembly, referred to on the face of the bonds, authorized the county to issue the bonds only and subject to certain "restrictions, limitations, and conditions," which have not been formally complied with; nor that the bonds were sold at less than par, when the act authorizing their issue and referred to by date on the face of the instrument, declared that they should, "in no case," nor "under any pretence," be so sold.
2. Corporation bonds payable to bearer, have, in this day, the qualities of negotiable instruments. The corporate seal upon them does not change the case.
3. *Commissioners of Knox County* v. *Aspinwall* (21 Howard, 539), and *Woods* v. *Lawrence County* (1 Black, 386), affirmed. *Diamond* v. *Lawrence County* (37 Pennsylvania State, 358), denied.

By act of Assembly, passed in 1852, the legislature of Pennsylvania authorized the commissioners of Mercer County in that State to subscribe to the stock of the Pittsburg and Erie Railroad, which road, if built, would pass through their county and benefit it. The act, however, contained this proviso:

"*Provided*, that the subscription shall be made *subject to the following restrictions, limitations, and conditions, and in no other manner*

or way whatever, viz.: all such subscriptions shall be made by the county commissioners, and shall be made by them *after*, and *not before*, the amount of such subscription shall have been *designated, advised*, and recommended by a grand jury of said county; and such bonds *shall in no case*, or *under any pretence*, be sold, assigned, or transferred by the said Railroad Company *at less than the par value thereof: And provided, further*, that the acceptance of this act by the said company shall be deemed also an acceptance of the provisions of the act passed the 11th day of March, 1851, entitled An act fixing the gauges of railroads in the County of Erie."

Rightly or wrongly—with authority or without it—the bonds to the extent of several thousands of dollars were issued. The instruments were elegantly engraved, with such external indications as were calculated to arrest the eye, and through it to inspire confidence. They were signed by the commissioners of Mercer County, attested by their clerk, and authenticated by the county seal conspicuously put. At the head of the bonds it was announced that they were issued for stock in the Pittsburg and Erie Company, and were payable in twenty years from their date in the city of New York. The words in the obligatory part of the instrument were as follows:

"Know all men by these presents, that *the County of Mercer*, in the Commonwealth of Pennsylvania, is indebted to the Pittsburg and Erie Railroad Company in the full and just sum of one thousand dollars, which sum of money said *county agrees and promises to pay*, twenty years after the date hereof, to the said Pittsburg and Erie Railroad Company, *or bearer*, with interest, at the rate of six per centum per annum, payable semi-annually on the first Monday of January and July, at the office of the Ohio Life Insurance and Trust Company, in the city of New York, upon the delivery of the coupons severally hereto annexed: *for which payments of principal and interest, well and truly to be made, the faith, credit and property of the said County of Mercer are hereby solemnly pledged, under the authority of an act of Assembly of this Commonwealth*, entitled A supplement to the act incorporating the Pittsburg and Erie Railroad Company, which said act was approved the 21st day of April, A. D. 1846, and which said supplement became a law on the 4th day of May, 1852."

Statement of the case.

A number of the bonds having got, *bonâ fide and for value paid*, into the possession of one Hacket, a citizen of New Hampshire, and the coupons,—themselves also payable to bearer,—being due and unpaid, he sued the County of Mercer upon them, in the Circuit Court for the Western District of Pennsylvania. Having put the bonds and coupons in evidence, the county now offered to prove that no *such* recommendation as was required by the act was made by the grand jury, but that the jury signed a paper, in which they state that they "would *recommend* the commissioners of Mercer County to subscribe to the capital stock of the company to such an amount, and *under such restrictions as may be required by the act of Assembly authorizing them to subscribe* stock to said road, to an amount not exceeding $150,000." The county proposed further to prove, that while by the provisions of the act the railroad company was required to accept "an act fixing the gauges of railroads in Erie County," before it should be entitled to the benefit of said act authorizing counties to subscribe to the capital stock of said company, the company, by a resolution of the stockholders, had *refused* to accept those provisions, and had declared it to be inexpedient to accept subscriptions made by counties. All this being offered for the purpose of showing that the commissioners of Mercer County acted illegally in making the subscription, and in issuing bonds in payment thereof; and that they issued the same without authority of law; so that the bonds are not binding upon the county. The county proposed to prove further, "that the bonds issued were paid out by the railroad company to contractors at about sixty-six and two-thirds cents on the dollar; all this for the purpose of showing that the bonds were procured from the County of Mercer by misrepresentation and fraud, and were not binding upon her, and after being thus obtained were disposed of at less than their par value, *in violation of the provisions of the act authorizing the county to subscribe and issue bonds;* and also for the purpose of showing want and failure of consideration."

The court below refused to let such evidence be given;

and the suit having accordingly gone against the county, the correctness of the ruling was the point now considered here.

Mr. Stewart for the county: If the bonds were not issued in accordance with the requirements of law, which authorized the commissioners to make a subscription and issue bonds in payment therefor, they are void. In *Mercer County* v. *The Railroad Company*,* where the subscription to this same road by this same county came in question, the Supreme Court of Pennsylvania decided that there was such a failure on the part of the grand jury to perform the duty imposed upon it by the act of the legislature, passed the 4th day of May, 1852, as rendered the act of the commissioners, in making the subscription and issuing the bonds, illegal. The court accordingly rescinded the subscription, and ordered the bonds in possession of the railroad company to be surrendered. In that case it is decided, that by a proper and necessary construction of the act all discretionary power was vested in the grand jury and withheld from the commissioners, and that the grand jury not having *designated, advised and recommended the amount to be subscribed*, the commissioners had no authority to make a subscription,—the performance of the duty enjoined upon the grand jury having been a prerequisite to vest authority in the commissioners. The act of Assembly requiring certain things as conditions precedent to the issue of the bonds, and of course to their validity, is specifically referred to by name and date in the face of the instruments. This is the same as if it was set out at length.

If the bonds were issued without legal authority, no subsequent transfer can render them valid. Even a note, strictly negotiable, made by an assumed agent who acts without authority, acquires no increased obligation upon the principal by passing from hand to hand. There was no authority proceeding from the principal to put it upon its

* 27 Pennsylvania State, 389.

course, and be it long or short, it imparts to it no increased virtue. The inquiry always addresses itself to every one, Is it the contract of the party whose name it bears? The responsibility of a correct reply to this inquiry is imposed upon every one who gives it currency.

Bonds were never recognized by the *lex mercatoria* as commercial paper. The distinction between specialties and simple promises is defined by the common law. The remedies for their enforcement have always been different, and these lines of distinction have never been obliterated by any general system of jurisprudence, in this or any other country, with which we have any juridical comity, either as to their nature or the means of enforcing them. The same equities which exist between the original parties remain and follow specialties into whatever hands they may go, without regard to supervening equities. In no State has this ancient and salutary rule of law become so fixed as in Pennsylvania. *Diamond* v. *Lawrence County** is a strong case, and almost in point. The bonds apparently were in the hands of *bonâ fide* holders for value. But the court adverts to the shocking frauds which had prevailed in obtaining the issue, and declared that the county was not bound for more than the railroad had received. The law of the place where the contract is made, and the obligation *there* assumed, govern its construction. Every one making a contract is presumed to make it with reference to its legal effect, whether direct or incidental, in the State where it is made; and if this court were to act on any other principle, our system, political and judicial alike, would be deranged.

Mr. Loomis for the bondholder: All the elegance of the engraver's art, all the plighted "faith, credit and property," of modern finance, all the strength and assurances of language, have here been used to allure the purchaser. Reference is made on the face of the bond to an act of Assembly—not to put him on his guard, lest the preliminary requisition may not

* 37 Pennsylvania State, 358.

have been complied with—but to *attract* him by evidence that the instrument is issued under the highest sanction. It had that effect, and the paper passed readily into the hands of a confiding holder in the distant State of New Hampshire, as a safe and secure investment. How *can* the county now, with the proceeds of the bond in its treasury—with riches which the railway will bring to its people in enjoyment—set up the defence it does, and proclaim to the nations, "Base is the slave who pays?"

The recommendation of the grand jury was sufficient to warrant the subscription. If it were not, the county is concluded by *Commissioners of Knox County* v. *Aspinwall*, decided in this court,* from denying the sufficiency. The act, no doubt, required the amount to be designated by the grand jury. But the jury signed a paper in which they stated that they "would recommend" the commissioners to subscribe "to such an amount and under such restrictions as may be required by the act of Assembly authorizing them to subscribe stock to said road to an amount not exceeding $150,000." This is a substantial compliance. Even if there were an irregularity in not designating the precise amount to be subscribed, no decided case renders the subscription void. This question was before the Supreme Court of Pennsylvania, in *Mercer County* v. *The Railroad Company*, and was left undecided; Woodward, J., concurring in the opinion given by Lewis, J., that a subscription made, without any designation by the grand jury, was without competent authority and therefore void, Lowrie, J., not concurring, Knox, J., dissenting, and Black, C. J., absent. This case is not an authority for anything. The controversy was between the county and the railroad company only. The court directed the bonds ($84,900), remaining in the possession of the company, to be surrendered to the county. The remaining $65,100 having been paid to Johnson & Co., on account of work under their contract, the court refused to take action in relation to *these* bonds, a portion of which was purchased and are now held by the plain-

* 21 Howard, 545.

tiff. It declares that it leaves undisturbed the question how far innocent holders of the bonds already negotiated might be protected. In the *County of Lawrence* v. *The Northwestern Railroad Company*,* a subscription made by the county to the stock of the Northwestern Railroad Company, was annulled and set aside, "*without prejudice, however, to any rights which third persons may have lawfully acquired as purchasers of the bonds issued on payment of the said stock.*" And this ground is tenable. It is that which the Federal court for the second circuit (Grier, J.) has always taken. It has said (i), that it could not understand on what ground the constitutionality of acts authorizing these subscriptions could be maintained. But that the State court had maintained it, and that this was enough; (ii), that though the courts might, from a variety of causes, *restrain* an issue not yet made, still when the bonds were once issued and in the hands of innocent holders for value, that the county was bound to pay them. The distinction is one entirely obvious.

The bonds in this case import upon their face a compliance with the law. According to *Commissioners of Knox County* v. *Aspinwall*, the purchaser was not bound to look further for evidence of a compliance with the conditions of the grant of the power. The security was sold in a distant market. To require the purchaser to ascertain, at his peril, from an examination of the records of the county, whether facts authenticated by its proper officers and the seal of the county were true or not, would involve him in unreasonable trouble and expense, greatly impair the value and diminish the currency of such securities.

The act of Assembly did not require the company to accept the provisions of the gauge law at all. It simply declared in a proviso, "that the acceptance of this act (May 4th, 1852) by the said company shall be deemed also an acceptance of the provisions of the act fixing the gauge of railroads in the County of Erie." The acceptance was not made a condition precedent to the right to receive the benefit of the act autho-

* 32 Pennsylvania State, 152.

rizing counties to subscribe, but the acceptance of the act of 1852 involved an acceptance of the gauge law. The act of 1852 was accepted by the company's receiving the subscription of the county and the bonds issued in payment reciting a full compliance with the requirements of the law. This would have involved an acceptance of the provisions of the gauge law, had that law continued in force. It was, however, repealed before the construction of the railroad was commenced. A particular fact here requires to be stated: The report of *Mercer County* v. *The Railroad Company*, shows that I was of counsel for the company. On the trial of a subsequent cause against the company, I asserted that the case was decided upon a mistake of fact; the gauge law having been accepted by the company, evidence of which was before the court at the time the decision was made, and I read from the paper book before the court at the time of the decision, and furnished by the counsel of Mercer County, a resolution adopted at said meeting of stockholders, of the 24th of December, 1851, which proved what I asserted.* When that resolution was read, one of the judges, Mr. Justice James Thompson, who resided at Erie, where the meeting of stockholders was held, and who had a profoundly intimate knowledge both of the facts and the law of these cases, remarked, that there was no doubt about the acceptance of the gauge law. The remaining judges acquiesced in silence. And thus the only support upon which the decision in that case rested was withdrawn. That case, having been so decided, is not an authority for anything.

It is true that in *Diamond* v. *Lawrence County* the Supreme Court of Pennsylvania declared, "We have said, on several occasions, that we will not treat these bonds as negotiable securities." The court admits, however, that "*on this ground we stand alone. All the courts, English and American, are against us.*" No reader of modern law will question the truth of the

* The resolution was thus:

"*Resolved*, That the stockholders of the Pittsburg and Erie Railroad Company here convened, do hereby accept, and do hereby agree to be bound by the provisions of the act aforesaid, being an act fixing the gauge of railroads in the County of Erie, approved the 11th day of March, 1851."

sentences italicized.* But that case was exceptional. The community, in a state of intoxication about railroad subscriptions, had become wild. The voices of men of sense were not heard in an hour where madness ruled. The court determined to withstand this folly; the *ardor civium prava jubentium*. In taking a position, the judge, it is true, gives a "flash of his cimeter" sufficiently alarming. But he did not mean to place his court in opposition to *all* the tribunals which the world most respects; nor, construing his announcement in a reasonable way, does he do so. At the moment when the transfer of the bond in suit was made there was a bill in equity pending, to restrain the transfer of all bonds of that sort; and his chief reliance was on this fact.† *Bona fides* was scarce predicable in law of the transaction involved. And the language of the judge himself, in one part of his opinion, shows how little the dictum relied on by the other side entered into the grounds of the decree. It was but an answer to the argument, too much pressed at the bar, of what *some* courts in *other* States had done, and it meant no more than that the Supreme Court of Pennsylvania would not decree plain injustice upon the example of any or of all the courts of Christendom. After all, however, the court did not declare the bonds void. It allowed a recovery for what the railway company had actually received. The disrespect wrongly supposed to have been here expressed for precedent, and the apparent disregard of vested interests, de-

* See 1 American Leading Cases, note to Overton *v.* Tyler; 1 Smith's Leading Cases, note to Miller *v.* Race.

† "It is manifest from this statement," says Woodward, J., in giving that part of the opinion which is at p. 355, "that the bond now in suit was transferred by the company *in contempt of the authority of this court*. After the service of the subpœna in the equity suit, the company had no authority, under any pretence whatever, to part with a bond. . . . . Considering the extraordinary notoriety which attended the equity suit against the railroad company, we think the rule is applicable here without that limitation. And according to that rule, the suit was notice to all the world, of all the facts alleged in the pleadings; so that this plaintiff stands in no better situation for enforcing the bond against the county than the company themselves would stand." Diamond *v.* Lawrence County, 37 Pennsylvania State, 353.

stroyed with the profession everywhere the value of a case which, if the assumption of the court that *bona fides* did not exist was true, was itself rightly decided. The case was not well received in Pennsylvania when it was reported, and the clearer sense of the court is expressed in subsequent decisions, which, if *Diamond* v. *Lawrence County* decided what some have supposed, certainly overrule it. In the case of *The Commonwealth* v. *The City of Pittsburg*,* it was declared that "the holder of bonds, made payable to bearer, has a right to presume that they were issued and transferred in the mode agreed upon by the original parties; that he is not affected by any agreement between the obligor and obligee, that the latter should provide for the payment of the interest thereon." This case goes almost the length of that of *Commissioners of Knox County* v. *Aspinwall*, as to the presumptions that arise in favor of the holder of this species of paper.

Why shall such instruments not be regarded as having the qualities of negotiable paper? When issued by corporations, as they always are, they are necessarily under seal; but they do not from that fact alone become specialties. A corporation, if speaking or acting in form, can speak or act only by the medium of a seal. It is the way in which as an artificial person it acts, or expresses itself; as natural ones express themselves by handwriting simply.

Mr. Justice GRIER delivered the opinion of the court:

The bonds declare on their face that the faith, credit, and property of the county is solemnly pledged, under the authority of certain acts of Assembly, and that in *pursuance* of said act the bonds were signed by the commissioners of the county. They are on their face complete and perfect; exhibiting no defect in form or substance; and the evidence offered is to show the recitals on the bonds are not true; not that no law exists to authorize their issue, but that the bonds

* 34 Pennsylvania State, 496; and see Commonwealth *v.* Commissioners of Alleghany County, 37 Id., 237; Same *v.* Same, 32 Id., 218.

were not made "in pursuance of the acts of Assembly" authorizing them.

We have decided in the case of *Commissioners of Knox County* v. *Aspinwall*,* that where the bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further. The decision of the board of commissioners may not be conclusive in a direct proceeding to inquire into the facts before the rights and interests of other parties had attached; but *after* the authority has been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question.

The case of *Mercer County* v. *The Railroad*† has been cited as governing this case. But on examination it will be found not to contradict the doctrine we have just stated. That was a bill in equity, praying an injunction against the issuing of a portion of the bonds *not yet delivered over to the company*, or negotiated by them. It charged that the commissioners had not pursued the conditions, limitations, and restrictions of the act that authorized their issue; that, by the act, "all such subscriptions shall be made *after and not before* the amount of such subscriptions shall have been *designated, advised, and recommended by a grand jury*," whereas the grand jury only "*recommended* that the commissioners of Mercer County subscribe to the capital stock of the Pittsburg and Erie Railroad, to such amount and under such restrictions as may be required by the act of Assembly, by authorizing them to subscribe, *to an amount* not exceeding $150,000." The bill charged also most gross frauds perpetrated by the company, which fully justified the decree of the court, without resorting to the very ingenious and rather astute criticism of the phraseology of the grand jury. It is true they *recommend* only, and have not used the words "designate and advise" a subscription not to exceed $150,000. It would require no great latitude of construction to treat this, as the commissioners might justly do, as a

* 21 Howard, 545.

† 27 Pennsylvania State, 389.

substantial compliance with the act. But it would be contrary to good faith and common justice to permit them to allege a newly discovered construction of an equivocal power, after they have sold the bonds, and they have passed (as is admitted in this case) into the hands of *bonâ fide* purchasers for value. It is proper to state that the construction given has the assent of only two of the judges of that learned court, so that it has not the force of precedent even if it applied to this case. But it is due also to them to say, that they intimate no opinion as to how far the reasons given for enjoining the further issue of the bonds ought to affect their validity in the hands of "innocent holders."

The proviso to the act authorizing the subscription declares, "that the acceptance of this act shall be deemed also an acceptance of the provisions of the act passed the eleventh day of May, 1851, entitled 'An act fixing the gauges of railroads in the County of Erie.'" Now it is very plain that the acceptance of the bonds authorized by this act, operated *per se* as an acceptance of the gauge law. It needed no resolution of the railroad corporation on their minutes. They were estopped by law after receipt of the bonds, until they were afterwards released by statute from the condition. But if that were not sufficient, it may be stated as a matter of history, that on the 24th of December, 1851, the stockholders passed a resolution "accepting and agreeing to be bound by the provisions of the act aforesaid, being an act fixing the gauge of railroads in Erie County." This fact, though overlooked in the case last mentioned, was afterwards brought to the notice of the same court, on the trial of a subsequent cause between the same parties. As any subsequent resolution of the railroad company refusing compliance with this condition annexed by statute to their acceptance of the county subscriptions would be fraudulent and void, the court did not err in refusing to admit the evidence offered, or to permit the defendants to prove that the recitals of their bonds were untrue.

2. Can evidence of the fraud practised by the railroad

company to whom these bonds were delivered, and by whom they were paid to *bonâ fide* holders for value, or the fact that they were negotiated at less than their par value, be received to defeat the recovery of the plaintiff below?

This species of bonds is a modern invention, intended to pass by manual delivery, and to have the qualities of negotiable paper; and their value depends mainly upon this character. Being issued by States and corporations, they are necessarily under seal. But there is nothing immoral or contrary to good policy in making them negotiable, if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usage of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer.

That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanctions of judicial recognition, not only in this court,* but of nearly every State in the Union, is well known and admitted.

But we have been referred to the case of *Diamond* v. *Lawrence County*,† for a single decision to the contrary. The learned judge who delivered the opinion of the court in that case says, "We will not treat these bonds as negotiable securities. *On this ground we stand alone. All the courts, Ameri-*

* White *v.* Vermont Railroad Co., 21 Howard, 575.

† 37 Pennsylvania State, 353.

can and English, are against us. We know the history of these municipal and county bonds, how the legislature, yielding to popular excitement about railroads, authorized their issue; how grand jurors and county commissioners and city officers were moulded to the purposes of speculators; how recklessly railroad officers abused the overwrought confidence of the public, and what burdens of debt and taxation have resulted to the people,—a moneyed security was thrown upon the market by the paroxysm of the public mind," &c.

If this decision of that learned court was founded on the construction of the constitution or statute law of the State, or the peculiar law of Pennsylvania as to titles to land, we would have felt bound to follow it. But we have often decided that on questions of mercantile or commercial law, or usages which are not peculiar to any place, we do not feel bound to yield our own judgment, especially if it be fortified by the decision of "all other English and American courts." These securities are not peculiar to Pennsylvania, or governed by its statutes or peculiar law.

Although we doubt not the facts stated as to the atrocious frauds which have been practised, in some counties, in issuing and obtaining these bonds, we cannot agree to overrule our own decisions and change the law to suit hard cases. The epidemic insanity of the people, the folly of county officers, the knavery of railroad "speculators," are pleas which might have just weight in an application to restrain the issue or negotiation of these bonds, but cannot prevail to authorize their repudiation, after they have been negotiated and have come into the possession of *bonâ fide* holders.

In the case of *Woods* v. *Lawrence County*,* as a corollary from the principles stated, we have decided, that in a suit brought on the coupons of these bonds by a *bonâ fide* holder, his right to recover is not affected by the fact that the railroad company sold the bonds at a discount, contrary to the provisions of their charter, which forbids the sale of them at less than their par value.

* 1 Black, 386.

Statement of the case.

As the evidence offered, and overruled by the court, could not have established a defence to the case made by the plaintiff below, the court did not err in refusing to receive it.

JUDGMENT AFFIRMED WITH COSTS.

BAYNE *v.* MORRIS.

1. Where an award made under submission by parties plaintiff and defendant to that effect, awards that one party shall pay to the other a certain sum on one day specified, another sum on another day specified, and that to secure the payments he shall give a bond in a penal sum, and the party against whom the award is made refuses to do any of the things awarded, an action of debt will lie against him even although the time when both sums of money were awarded to be paid has not yet arrived. The right of action is perfect on the party's refusal to give the bond.
2. The power of arbitrators is exhausted when they have once finally determined matters before them. Any second award is void.

BAYNE & MORRIS having differences with each other, agreed to refer them to arbitrators, who besides being authorized to determine the *amount to be paid*, were authorized to award *upon what terms, as to time and security*, the payment should be made. On the 23d of January, 1858, the arbitrators made an award, and on the 26th of the same month made *a second one*. Both were received in evidence on the trial below, although the pleadings were framed solely with reference to the last one. This adjudged that Morris should pay to Bayne one sum on the 28th of July, 1858; a second sum on the 20th of January, 1859; and a third sum on the 20th of January, 1860; and that to secure the payment of these sums he should give to Bayne a *bond* with penalty and surety. No bond being given, Bayne, on the 28th of January, 1858, *that is to say, before any of the sums awarded to be paid had fallen due*, sued Morris in an action of debt; the declaration setting forth, that "the defendant hath not given the said plaintiff the said bond for the security of the payments aforesaid, although often thereto requested; nor hath he paid the said money nor any part thereof, but the same to pay hath refused; whereby an action hath accrued to the said plaintiff to have

the said sums of money *or* satisfactory security for the payment of the same, to the damage," &c.

The court below (the Circuit Court for the District of Maryland), instructed the jury that if the suit was brought before either of the sums of money became due, the plaintiff could not recover, and the correctness of this ruling was the point, on error, here.

No considerable objection was taken below to the validity of the second award, that, to wit, of 26th of January.

Mr. Brent for the plaintiff in error, and Mr. Wallis contra.

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

The court did not pass on the validity of the award as it should have done; but directed the jury to find against the plaintiff, on the ground that the action was premature, neither of the sums awarded to be paid being due when suit was brought.

It is clear that Bayne instituted his action because Morris would not give the security he was required to by the award. And on principle and authority, he had a right to sue when Morris refused to perform any material part of the award. The parties to the submission chose to say to the arbitrators, "If you order anything to be paid, by one to the other, you must settle *how* the payment is to be secured." The arbitrators did decide on the very point submitted to them, and direct the kind of security to be given, and on Morris's failure to give the bond as required he was in default, and a cause of action accrued. He had no right to say to Bayne, "Wait until the instalments are due, and then I will elect whether or not to keep the award." The provision for security was equally valid as the order for the payment of money; and it may be nearly as important. The right of action was as perfect, on Morris's refusal to give the penal bond, as it would have been after the credit allowed by the award had expired.

Where goods are sold on credit, and the purchaser agrees to give his note for them, and refuses to do so, it has been held that an action will lie before the credit expires, and that

the measure of damages is the price of the goods.* The court below, therefore, erred in charging the jury that the right to sue was in abeyance until the time limited by the award for the payment of the money had expired.

Inasmuch as this case is to be remanded, it is proper to say, that in the opinion of the court, the award of the 26th of January is inoperative and void. Arbitrators exhaust their power when they make a final determination on the matters submitted to them. They have no power after having made an award to alter it; the authority conferred on them is then at an end.†

Bayne can, if so advised, amend his pleadings and test the correctness of the first award; which not being properly in the case has not been considered by the court, and no opinion is therefore given on the question of its validity.

JUDGMENT REVERSED AND VENIRE AWARDED.

BURR v. THE DES MOINES RAILROAD AND NAVIGATION COMPANY.

1. Although this court will give judgment, on error, upon an agreed statement of facts or case stated, if it be signed by counsel and spread upon the record at large, as part thereof, yet it will not do so, except upon that which is professionally and properly known as a case stated; that is to say, upon a case which states facts simply; not one which presents, instead of facts, evidence from which facts may or may not be inferred.
2. Legal presumption being in favor of a judgment regularly rendered, the court, where it does not reverse, nor dismiss for want of jurisdiction, might, in regard to a case which it refused to consider on evidence adduced, affirm simply. However, a case being before it, and having been argued on its merits, where counsel on both sides erroneously supposed that they had brought up a case stated, when *in fact* they brought up nothing but a mass of evidence, and where they erroneously supposed, also, that they would obtain an opinion and judgment of this

* 2 Parsons on Contracts, 485–6; Cort et al. *v.* The Ambergate Railway Company, 6 English Law and Equity Reports, 237; Hanna *v.* Mills, 21 Wendell, 90; Rinehart *v.* Olwine, 5 Watts & Sergeant, 157; Mussen *v.* Price, 4 East, 147; Dutton *v.* Solomonson, 3 Bosanquet & Puller, 582.

† Russell on Arbitration, 135.

Statement of the case.

court on the case as, by common consent, they presented it,—the court benignantly "dismissed" it only; so leaving the parties at liberty to put the case, if they could, by agreement below, in a shape where it could be here reviewed. But the dismission was with costs.

THIS was a writ of error, in an action of ejectment, to the Circuit Court for the District of Iowa; the plaintiff in error having been also plaintiff below.

The record (or document so called), which was brought before the Supreme Court, after reciting the pleadings, and that the parties had appeared and waived a jury, showed that the following judgment had been rendered by the court

"The evidence having been seen and examined by the court, and the arguments of counsel heard, it is now considered and adjudged that the court do find the issue in favor of the defendant, and that the plaintiff take nothing by his petition. Whereupon it is ordered that the defendant recover of the plaintiff his costs in this behalf expended, taxed, &c., and that he have execution therefor."

Then came a certificate of the clerk to the record, certifying that what preceded the certificate contained "a true, full, and perfect copy of the plaintiff's petition and replication, of the defendant's answer, *and of all the proceedings of the court in the above-named cause.*"

After this followed thirty-six pages of printed matter, annexed to which was another certificate of the clerk, certifying, "that the foregoing twenty pages of print and writing are a true copy of *the agreed statement of facts* filed in the foregoing cause, as the same remains on file, *it being all the evidence upon which the cause was submitted.*"

This "agreed statement of facts" consisted of acts of Congress and statutes of Iowa; of opinions of Attorneys-General of the United States; of decisions of the Secretaries of the Treasury and Interior Departments, and numerous letters between those officers and members of Congress, and other persons interested in the several land grants made by Congress to the State of Iowa for purposes of internal improvement; of various matters admitted by the one party and the

other; the whole constituting a perplexing mass of law and evidence. At the close of "the record" was the following statement:

"If, upon the whole case, the title of the plaintiff to said lands has not failed, but, under the defendants' deed to him, and the subsequent legislation by Congress, he has acquired a good title to said lands, the defendants are entitled to judgment and to costs of suit.

"This cause is submitted, without a jury, upon the foregoing agreed statement of facts; but it is expressly agreed that the matters and things herein stated are only to be taken for what they are legally worth; and that all objections on account of immateriality or irrelevancy are reserved by the parties respectively; and may be urged and considered by the parties, and by the court, upon the argument and in the decision."

Notwithstanding the reservation of the right to do so, it appeared that no objection had been taken on the trial to the materiality or relevancy of any of the mass of testimony above described, nor to any ruling of the court on the law arising on the facts. The paper just quoted was not signed by counsel, nor entered on the record of the court, nor made a part of the record of the case by bill of exceptions, or in any other manner. In fact, no bill of exceptions was taken in the suit.

The case was argued here, on the large mass of testimony brought up, on its merits and as if the record had been in form, by *Mr. Gilbert for the plaintiff in error, and by Messrs. Mason and Tracy on the other side.*

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

It is very clear that a paper not signed by counsel, nor entered on the record of the court, nor made part of the record of the case by bill of exceptions, or in any other manner, cannot be considered by this court as the foundation on which it is to affirm or reverse the case. It is probable, from the language of the closing paragraph, that the parties considered it as an agreed statement of facts, on which the court

below might decide the law, and on which this court would review that decision. And it is quite true that this court has decided, in the case of *The United States* v. *Eliason*,* and in several cases since that one, that this may be done.

But in order to bring such a case properly before this court, two things are essential, which are wanting in the present case.

1. The agreed statement of facts must, in some manner in the court below, be made a part of the record of the case. The case of *The United States* v. *Eliason* shows, that it was strongly urged upon this court that it had been laid down by Sir Wm. Blackstone in his Commentaries, and by Stephen in his Treatise on Pleadings, that error did not lie on such a statement. The court, however, said that the reason for this was, that in the English practice, the agreed statement was not like a special verdict entered on the record, and the appellate court could not therefore notice it. But that in the practice of our courts such agreements are signed by "the counsel, and spread upon the record at large as part thereof." And thus they become technically a part of the record, into which the appellate court look, with the other parts of it, to ascertain if there be error.†

2. The statement of facts on which this court will inquire, if there is or is not error in the application of the law to them, is a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself, without inferences or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by this court, but must have all the sufficiency, fulness, and perspicuity of a special verdict. If it requires of the court to weigh conflicting testimony, or to balance admitted facts, and deduce from these the propositions of fact on which alone a legal conclusion can rest, then

* 16 Peters, 291. † See also Graham *v.* Bayne, 18 Howard, 60.

it is not such a statement as this court can act upon. The paper before us "is evidence of facts, and not the facts themselves as agreed or found."* It is obvious that if the whole of this paper were presented by a jury as a special verdict, it would be objectionable, as presenting the evidence of facts, and not the facts themselves, which must determine the issue.

Cases of a character nearly allied to this have been frequently before this court, and although the opinions delivered are not always reconcilable in every respect, it is believed that they speak but one language as to the two propositions here laid down.†

The paper which we have been considering being rejected, there is nothing before the court by which it can determine whether the judgment of the court below is right or wrong.

The legal presumption is in favor of the correctness of that judgment, but as the parties here have all considered the case as turning on the evidence which we have refused to consider, and have so argued it, and as it was, no doubt, prepared with a view to obtaining the opinion of this court on the case there stated, we have determined to dismiss the writ of error, thus leaving the parties at liberty, if they can do so by a proper agreement in the court below, to remove the difficulties which now prevent this court from reviewing the case.

CASE DISMISSED WITH COSTS.

* Graham *v.* Bayne, 18 Howard, 62.

† Pennock *v.* Dialogue, 2 Peters, 1; The United States *v.* Eliason, 16 Id., 300; The United States *v.* King et al., 7 Howard, 844; Bond *v.* Brown, 12 Id., 256; Weems *v.* George, 13 Id., 190; Arthurs *v.* Hart, 17 Id., 7; Graham *v.* Bayne, 18 Id., 60.

UNITED STATES v. SEPULVEDA.

1. Previous to the act of Congress of June 14th, 1860, the District Courts of the United States for California had no jurisdiction to supervise and correct the action of the Surveyor-General of California, in surveying claims under Mexican grants confirmed by the decrees of the Board of Commissioners created by the act of March 3d, 1851. They possessed no control over the execution of the decrees of the board.
2. Where Mexican grants were by metes and bounds, or where proceedings before Mexican authorities, such as took place upon a juridical delivery of possession, had established the boundaries, or where, from any other source pending the proceedings for a confirmation, the boundaries were indicated, it was proper for the board to declare them in its decrees.
3. Where a survey, made by the Surveyor-General of California, of a confirmed claim under a Mexican grant, previous to the act of June 14th, 1860, does not conform to the decree of the Board of Commissioners, the remedy must be sought from the Commissioner of the General Land Office before the patent issues, and not in the District Court.

BY acts of Congress, of March 3d, 1851,* and of August 31st, 1852,† the District Courts of the United States for California, were authorized, on appeal from the Board of Land Commissioners,—which body was empowered to settle any claim to land in California that any person might set up by virtue of any right or title derived from the Spanish or Mexican government,—"to decide upon the *validity* of the said claim." One of the statutes‡ proceeded to enact for "all claims finally confirmed by the said commissioners, a patent shall issue to the claimant upon his presenting to the land office an authentic certificate of such confirmation; and a plat or survey of the said land duly approved by the *Surveyor-General* of California, *whose duty*," the act goes on to say, "it shall be to cause all private claims which shall be finally confirmed, to be accurately *surveyed* and to furnish plats of the same." By a third act,—the act of June 14th, 1860,§—new powers were given to the District Courts of California, and they now received authority to order *into court* "*any survey*" of private claims, and to decide on it.

* § viii, &c., 9 Stat. at Large, 631.
† § xii, 10 Id., 99.
‡ Stat. of March 3d, 1851, § xiii.
§ 12 Stat. at Large, 33, § 2.

But this act did not in any express terms, perhaps in no terms at all, extend to surveys made *prior* to its passage, except they happened to be "surveys previously made and approved by the Surveyor-General, which had been at the passage of the act returned into the District Court, or in relation to which proceedings were then pending for the purpose of contesting or reforming the same;" a class of surveys within which the present one did not come.

In 1852, Sepulveda and others presented their claim to the board of commissioners for confirmation of a grant which had been made to them under the Mexican government. In 1853 the board adjudged the claim to be valid, and entered a decree for its confirmation. The case having been removed by appeal to the District Court, the attorney-general gave notice that the appeal would not be prosecuted; and upon motion of the district attorney, in pursuance of such notice, the court ordered that the appeal be dismissed, and that the claimants have leave to proceed upon the decree of the commissioners as upon a final decree. The land, the claim to which was thus confirmed, was now *surveyed* by direction of the Surveyor-General of the United States for California (as one of the statutes already mentioned directs that in such case it may be), and in 1859 the survey was approved by him. In 1860, the District Court, upon the suggestion of the district attorney that the survey did not conform to the final decree, ordered the Surveyor-General to return into court (as the statute of 1860 plainly gave the court authority to do by *a certain class* of surveys) a plat of *this* survey. *The court, on hearing, held that there was error in part of the survey, and decreed that certain corrections should be made by a new survey.* From this decree the case was now brought here by appeal: the principal question raised by the appeal being, of course, the right of the District Court, under the act of June 14th, 1860, to order the correction of a survey made *prior* to the passage of the act.

Mr. Wills, in favor of the right, relied on *United States* v.

Fossatt,* in this court, as being in point. A motion was made in that case—one similar, in many respects, he remarked, to the present,—to dismiss an appeal; the ground of the motion being that the decrees of the board of commissioners relate only to the question of the *validity* of the claim, and that by the term "validity" is meant "authenticity," "legality," and in some cases, "interpretation," but not in any case, "location," "extent," or "boundary." The court asks, "What are the questions involved in the inquiry into the validity of a claim to land?" and it answers thus: "It may present questions of the genuineness and authenticity of title, and whether the evidence is forged or fraudulent, *or*, it may present an inquiry into the authority of the officer to make the grant . . . . . *or*, it may disclose questions of the capacity of the grantee to take, or whether the claim has been abandoned or is a subsisting title. But *in addition* to these questions upon the vitality of title, there may arise questions of the *extent*, *quantity*, *location*, and legal operation, that are *equally essential* in determining the validity of the claim." The District Court was accordingly ordered "to ascertain the external *lines* of the land."

Mr. Justice FIELD delivered the opinion of the court:

The jurisdiction of the District Court to supervise and correct the action of the Surveyor-General in this case is not derived from the act of June 14th, 1860. That act applies to surveys subsequently made, with certain exceptions, within which the present case does not fall. The exceptions embrace only those surveys previously made and approved by the Surveyor-General, which had been, at the passage of the act, returned into the District Courts, or in relation to which proceedings were then pending for the purpose of contesting or reforming the same. The jurisdiction is asserted independent of the act of 1860, upon the authority of the decision of this court in the case of the *United States* v. *Fossatt*.† In that case the decree had been

* 21 Howard, 447.

† Id., 445.

rendered by the District Court, and it was held that the jurisdiction of the court extended not merely to the determination of questions relating to the genuineness and authenticity of the grant presented, and its efficacy in transferring the title, but also to questions relating to its location and boundaries; and that for the settlement of these latter questions, the power of the court over the case did not terminate until the issue of the patent conformably to its decree.

Previous to the act of 1860, the jurisdiction of the board and of the District Court, on appeal, was derived entirely from the act of March 3d, 1851, and the act of August 31st, 1852; and when the claims presented were adjudged valid and confirmed, the duty devolved upon the Surveyor-General to cause them to be surveyed. "For all claims finally confirmed," says the statute, "by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the General Land Office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the Surveyor-General of California, *whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same.*" The action of the surveyor in this respect was not in terms made subject to the control of the board or court; it was only made returnable to the Commissioner of the General Land Office at Washington, who was invested, by the previous legislation of Congress, with a general supervision over the acts of all subordinate officers charged with making surveys. Whatever jurisdiction the District Court may have possessed to enforce the execution by the Surveyor-General of its own decrees, it possessed no control over the execution of the decrees of the board.

It is true that for the determination of the validity of the claims presented some consideration must have been had of their extent, location, and boundaries. The petitions of the claimants must necessarily have designated, with more or less precision, such extent and location. And where the

grants were by metes and bounds, or where proceedings before Mexican authorities, such as took place upon a juridical delivery of possession, had established the boundaries, or where from any other source pending the proceedings for a confirmation the boundaries were indicated, it was proper for the board to declare them in its decrees. And such was the course adopted in numerous instances. But in the majority of cases the grants of the Mexican governors were for a certain specified quantity of land lying within exterior boundaries embracing a much larger tract, and in relation to which no proceedings were ever taken by the former government for its measurement and segregation. In such cases, a confirmation of the claim was only a judicial determination of the right of the claimant to have a specific quantity set apart to him out of a general tract. And the duty of the board was discharged by a confirmation of the claim in the general terms of the grant, leaving the specific quantity designated to be surveyed and laid off by the proper officers of the government, to whom the subject of surveys was intrusted. With the surveys following the decrees of the board the District Court had nothing to do.

The surveys of confirmed Mexican grants, particularly when they are for quantities lying within exterior boundaries embracing larger tracts, involve the consideration of various matters, not properly the subject of judicial inquiry. In numerous instances, the location of the quantity confirmed, whether it shall be on one or the other side of the general tract, may depend upon the past or intended action of the government with reference to the surplus. Portions of the general tract may be required, and, therefore, be properly reserved from the location, for public purposes. The act of 1860 creates a new jurisdiction in the court, which cannot be assumed independent of the act, and under it should be exercised only in cases coming clearly within its language.

The decree of the District Court revising the action of the Surveyor-General and correcting his survey, must, therefore, be reversed, and the court directed to dismiss the proceed-

ings for want of jurisdiction. If the survey does not conform to the decree of the board, the remedy must be sought from the Commissioner of the General Land Office before the patent issues, and not in the District Court.

DECREE ACCORDINGLY.

THE STATE OF MINNESOTA *v.* BACHELDER.

1. Neither the Act of Congress of 3d March, 1849—the organic law of the Territory of Minnesota, which declared that when the public lands in that Territory shall be surveyed, certain sections, designated by numbers, shall be and "hereby *are*" "*reserved* for the purpose of being applied to schools"—nor the subsequent act of February 26th, 1857, providing for the admission of that Territory into the Union—and making the same reservation for the same object—amounts so completely to a "dedication," in the stricter legal sense of that word, of these sections to school purposes, that Congress, with the assent of the Territorial legislature, could not bring them within the terms of the Pre-emption Act of 1841, and give them to settlers who, on the faith of that act, which had been extended in 1854 to this Territory, had settled on and improved them.
2. The decisions of the receiver and register of lands for the Territory of Minnesota are not of conclusive efficacy. They may be inquired into and declared inoperative by courts.
3. Error will lie to the Supreme Court of a State, under the 25th section of the Judiciary Act, where a statute of the United States is technically in issue in the pleadings, or is relied on in them and is decided against by rulings asked for and refused, even though the case may have been disposed of generally by the court on other grounds.

THIS was a writ of error to the *Supreme Court of the State of Minnesota*, and was taken under the 25th section of the Judiciary Act of 1789, which gives a writ of error here in any case where is *drawn in question any clause* of the Constitution, or of a treaty, or *statute*, or commission, held under the United States, and the decision is *against* the right, title, privilege or exemption specially set up or claimed by either party under such clause of the Constitution, treaty, *statute* or commission.

The case was thus: By the act of March 3d, 1849, the organic law of the Territory of Minnesota, was enacted "that

when the lands in said Territory shall be surveyed, sections 16 and 36 shall be and the *same hereby are* reserved for the purpose of being applied to schools." A subsequent act, that of February 26th, 1857, providing for the admission of this Territory into the Union, repeats this enactment, declaring that these same numbered sections of the public lands (and in case either of said sections or any part of them has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be), shall be granted to said State for the use of schools.

Notwithstanding this intended devotion to purposes of education of these sections Nos. 16 and 36, Congress, by an act of 1854,* declared that the provisions of what is known as the Pre-emption Act† of 1841, should extend to lands in Minnesota. The result was that great numbers of persons settled all over the State, and not unfrequently settled, in different townships, upon tracts which, when the tracts came to be surveyed, proved to bear the numbers 16 and 36. In consequence of this state of things, the Territorial legislature of Minnesota presented‡ a memorial to Congress for a remedy. The memorial stated, that by reason of the extension of the Pre-emption Act to Minnesota, many settlers had settled and made improvements by the erection of costly buildings and otherwise upon farms, which, when the government surveys were made, were found to be included within the school sections, and that it would be unjust to compel these persons to repurchase or lose their improvements thus made in good faith and with the expectation of a pre-emption of the lot, and recommended the passage of a law which should meet the hardship of such cases. Accordingly, on the 3d of March, 1857, that is to say, after the above-mentioned act, providing for the admission of the Territory into the Union, but before the acceptance of that act by the Convention of the State, and so before the actual incorporation of the State into the Union, Congress passed a joint resolution, which provided, that where any settlements by

* August 4th. † Act of Sept. 4th, 1841. ‡ Feb. 26th, 1856.

the erection of a dwelling-house, or the cultivation of any portion of the land, shall have been or shall be made upon these 16th or 36th sections, before the said sections shall have been or shall be surveyed, &c.; and if such settlers can bring themselves within the Pre-emption Act, then the right of preference to such sections or portions of them so settled and occupied shall be *in them*, the same as if such sections had not been previously reserved.

The present suit arose accordingly out of this condition of the law, and was an ejectment for a tract numbered 16, by the State of Minnesota, in behalf of its schools, against one Bachelder, the defendant, who claimed under the rights given by the joint resolution just above set forth. Bachelder set up as his defence *pre-emption* certificates and a patent, dated August 15th, 1857, to two persons of the name of Mills,—L. and J. Mills,—from whom he showed title to himself.

To this the plaintiff replied, that these had all been obtained by fraud and misrepresentations; that the Millses did not settle on the premises, did not build a house there, nor make any improvements *prior* to the government survey of the sections; that in granting the papers which he had granted, the register and receiver had been deceived as well by misrepresentations of the Millses as by the false oath of one George Dazner, whom they produced to swear to facts which did not exist, but whose existence was necessary to bring the parties within the Pre-emption Act. But the court, neither on a demurrer by the State of Minnesota to a replication by Bachelder, nor on its offers to prove these facts before a jury, considered them as making a reply to the case of the defendants, as exhibited by his certificates and patents; ruling in effect that the decision of the register and receiver could not be reviewed nor inquired into by the court, and that the remedy of the State was through the commissioner of said office or the Secretary of the Interior.

The statutes of the United States devoting the sections to school purposes were put technically in the pleadings; their binding force relied on by counsel and pressed upon the

court, and rulings under them asked for and refused, and the refusal excepted to; but although, by being set out in the pleadings and exceptions, and by rulings against them, they were technically drawn in question and decided against, yet the actual ground of the decision was as just stated rather than specially against the statutes.

The correctness of the view taken by the court below, as to the effect of the register and receiver's acts, as also the right of the State to have a writ of error from this court to the Supreme Court of Minnesota, when the statutes of the United States had not been otherwise drawn in question than as mentioned, were now the questions here; the former question being made by the plaintiff in error, the State of Minnesota, and the latter by the other side.

Mr. Cole, A. G., of Minnesota, for the plaintiff: The joint resolution of Congress is void. It cannot divest a title which the United States had previously granted. The organic act of the Territory constituted a *dedication* to public uses, perpetual and irrevocable, and whatever might have been its effect upon the naked fee, at least divested Congress of all power of disposition over the subject-matter, so far as such disposition should tend to impair the public rights created by that act. The doctrine of dedications was first announced in Strange's Reports, A.D. 1725, and applied to highways. Since then it has been vastly extended. The donations of magnificent domains, by Congress, for the promotion of learning and the liberal arts in the rising communities of the West, afford instances not the least striking and interesting of such extension, and have induced more liberal views. Thus the doctrine has in New York been applied to a public square.* So it has also in Vermont.† In the former State it has been extended to a gift for religious purposes;‡ while in Pennsylvania it reaches any property devoted to purposes of general education.§

* Trustees of Watertown *v.* Cowen, 4 Paige, 510.

† State *v.* Wilkinson, 2 Vermont, 480.

‡ Hartford Baptist Church *v.* Witherell, 3 Paige, 296.

§ Witman *v.* Lex, 17 Sergeant & Rawle, 88, 91.

If dedicated, the power of Congress over it was gone. In *Wilcox* v. *Jackson* (13 Peters, 498), the court say: "Whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes reserved from the mass of the public lands, and no subsequent law or proclamation, or sale, would be construed to embrace it or to operate upon it, although no reservation were made of it." And in the same case the court signify that "*the same principle will apply to any land which by authority of law shall have been severed from the public mass.*"

Neither is the case helped by the memorial from the Territorial legislature. The organic act (§ 18), indicates an intention to consecrate these lands for the benefit of the generations who should in future inhabit the State; and while divesting Congress of all power of disposition over them, to withhold it from any other body then in existence. They are reserved "for the purpose of being applied to schools in said Territory, *and in the States and Territories hereafter to be erected out of the same.*" They were not granted to the Territory, and were in no sense its property.

For the defendant: The error of the argument is in assuming this to be a "dedication" in the *legal* meaning of the word. In *Post* v. *Piersoll*,* long since the time of Strange, the Supreme Court of New York decided that a dedication must be confined to a highway. It may have been much extended since, but this is not within the legal meaning of the word.

No writ of error lies here from the Supreme Court of Minnesota; for no statute of the United States has been drawn *in question* and decided against. The court ruled that it could not go behind the acts of the register and receiver, and *so* disposed of the case. The fact that the statutes of the United States were presented in the pleadings and were disposed of adversely by a judgment which was based on other grounds, the argument from the statutes falling, in fact, only with the case generally, is not enough.

* 20 Wendell, 119.

Reply: *Crowell* v. *Randall* (10 Peters, 368), decides, "that it is not necessary that the question should appear on the record to have been raised, and the decision made in direct and positive terms, but that it is sufficient if it appear by clear and necessary intendment that the question must have been raised and must have been decided in order to have induced the judgment." Neither is it necessary that the treaty or act of Congress under which the party claims shall be specially pleaded or spread upon the record. *Hickey* v. *Starke* (1 Peters, 94).

The converse of the rule holds also true. Here the statutes were drawn in question, by being on the record and issue so taken to them, or by being made the subject of a request for rulings not given; a fact apparent in the bill of exceptions. When judgment was given against the State, or the rulings refused, they were decided "against," in the most exact and authoritative form of legal understanding.

Mr. Justice NELSON delivered the opinion of the court:

It is not important to inquire as to the power of Congress to pass this law independently of any application from the Territorial legislature, as the assent of the people through their convention, by coming into the Union as a State, upon the terms proposed, must be regarded as binding the State. The right of the State to the school sections within it must, therefore, be subject to the modification contained in the joint resolution, and that modification is, that in case a person shall have made a settlement upon any school section, by the erection of a dwelling-house on the same, or the cultivation of any portion of it before the survey; and further, can bring himself within the provisions of the Pre-emption Act of 1841, he shall be entitled to the section thus improved, in preference to any title of the State.

This was the state of the law in respect to these school sections in Minnesota, at the time of the application of L. and J. Mills to the register and receiver for the pre-emption of the premises in question, and of the issuing of the patent certificates by them, August 15th, 1857.

As we have seen, the defendant, who claims under L. and J. N. Mills, relies on these patent certificates and the patents issued in pursuance thereof.

To these the plaintiff replies that they were obtained by fraud and misrepresentation; that L. and J. Mills did not settle on the premises, nor erect a dwelling-house thereon, nor make any improvements on the same, previous to the survey of the sections by the government; and besides their false representations to the register and receiver, they procured one George Dazner to make a false affidavit as evidence of the settlements, erection of the dwelling-houses and improvements before these officers. The court below refused to give any effect to these facts as set forth in the pleadings, or as offered to be proved on the issues of fact before the jury, and the ground taken to uphold these rulings is, that the decision of the register and receiver and certificates issued were conclusive upon the court, and not revisable or to be inquired into; and that the remedy of the party aggrieved was by an application to the Commissioner of the Land Office or Secretary of the Interior.

These questions have been so often before this court, and were so fully considered in the last case (*Lindsey et al.* v. *Hawes et al.*),* where the authorities are collected, that it would be a waste of time to re-examine them.

A court of equity will look into the proceedings before the register and receiver, and even into those of the land office or other offices, where the right of property of the party is involved, and correct errors of law or of fact to his prejudice. The proceedings are *ex parte* and summary before these officers, and no notice is contemplated or provided for by the pre-emption laws as to parties holding adverse interests, nor do they contemplate a litigation of the right between the applicant for a pre-emption claim with a third party. The question as contemplated is between the settler and the government, and if a compliance with the conditions is shown to the satisfaction of the officers, the patent certificate is granted.

* 2 Black, 254, 557, 558. See also O'Brien *v.* Perry, 1 Id., 139.

The court below, therefore, erred in their rulings on the demurrer, and also on the trial of the issues in fact.

A point is made under the 25th section of the Judiciary Act, that this court has no jurisdiction to reverse the judgment of the court below. But the right of the State to these school sections rests upon acts of Congress, which were set up and relied on in this case, and the decision of the court below against it.

The judgment of the court below is reversed, with costs, and the cause remanded, with directions to enter judgment overruling the demurrer to plaintiff's replications, and to issue *venire de novo*, &c.

JUDGMENT ACCORDINGLY.

THE BRIDGE PROPRIETORS *v.* THE HOBOKEN COMPANY.

1. Where a statute of a State creates a contract, and a subsequent statute is alleged to impair the obligation of that contract, and the highest court of law or equity in the State *construes* the *first* statute in such a manner as that the second statute does *not* impair it, whereby the second statute remains valid under the Constitution of the United States, the validity of the second statute is "drawn in question," and the decision is "in favor" of its validity, within the meaning of the 25th section of the Judiciary Act of 1789. This court may accordingly, under the said section, re-examine and reverse the judgment or decree of the State court given as before said. The case distinguished from *The Commercial Bank* v. *Buckingham's Executors* (5 Howard, 317). GRIER, J., dissenting.
2. A party relying on this court for re-examination and reversal of the decree or judgment of the highest State court, under the 25th section of the Judiciary Act of 1789, need not set forth specially the clause of the Constitution of the United States on which he relies. If the pleadings make a case which necessarily comes within the provisions of the Constitution, it is enough.
3. The statute of the legislature of New Jersey, passed A. D. 1790, by which that State gave power to certain commissioners to contract with any persons for the building of a bridge over the Hackensack River; and by the same statute enacted that the "said contract should be valid on the parties contracting as well as on the *State of New Jersey;*" and that it should not be "lawful" for any person or persons whatsoever to erect "any *other* bridge over or across the said river for *ninety-nine* years,"—is a contract, whose obligation the State can pass no law to impair.

Statement of the case.

4. A railway viaduct, if nothing but a structure made so as to lay iron rails thereon, upon which engines and cars may be moved and propelled by steam, not to be connected with the shore on either side of said river, except by a piece of timber under each rail, and in such a manner, as near as may be, so as to make it impossible for man or beast to cross said river upon said structure, except in railway cars [the only roadway between said shores and said structure being two or more iron rails, two and a quarter inches wide, four and a half inches high, laid and fastened upon said timber four feet ten inches asunder], is not a "bridge" within the meaning of the act of New Jersey, passed A. D. 1790, and just mentioned; CATRON, J., dissenting. And the act of Assembly of that same State, passed A. D. 1860, authorizing a company to build a railway, with the necessary viaduct, over the Hackensack, does not impair the obligation of the contract made by the aforesaid act of 1790.

THE Judiciary Act (§ 25) provides, that a final decree in the highest court of equity in a State, "where *is drawn in question the validity of a statute of . . . . . any State on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of such validity*, may be re-examined and reversed" in this court. And the Constitution of the United States provides, that "no State shall pass any . . . . . law impairing the obligation of contracts."

With these provisions in force, the State of New Jersey passed, A. D. 1790, an act creating a turnpike company, from Newark to Powles Hook (near New York), and authorizing commissioners to fix suitable sites for building bridges over the rivers Passaic and Hackensack, and to *cause to be erected* a bridge over each river, with a right to take toll from classes of persons and things enumerated in the act, and which may be summed up shortly as persons on foot, animals and *vehicles crossing the bridge*. The statute enacted, "that it should be lawful for the commissioners to contract with persons who would undertake the same for such toll, or for so many years, and upon such conditions, as in their discretion should appear expedient;" and further, "that the said *contract* should be valid and binding *on the parties contracting* as *well as on the State of New Jersey*, and as effectual, to all *intents and purposes whatever*, as if the same, and *every part, covenant, and condition therein contained had been particularly and expressly set forth* and enacted in this law." It was further

enacted, "That it should not *be lawful* for any person or persons whatsoever to erect, or cause to be erected [within certain limits specified], *any other bridge or bridges* over or across the said river; *provided always*, that if the said commissioners shall refuse or neglect, for the space of four years, to cause to be erected the said bridges, in pursuance of this act, or when erected, to maintain and support them, then *it shall and may be lawful* for the legislature of this State to repeal or alter this act, and to enact such other law or laws touching or concerning the premises herein enacted, as to them, in their wisdom, shall appear equitable and expedient."

In 1793, the commissioners contracted with one Ogden and others his associates, for the erection of the bridges authorized, and demised them to the said Ogden and his associates until November 24th, A. D. 1889, with a right to levy tolls as fixed in the contract. In 1797, the legislature of New Jersey created the said Ogden and his associates a corporation, which corporation the complainants below, the present plaintiffs in error, now were.

In 1860, the legislature of New Jersey, by statute, authorized another company altogether, to wit, the Hoboken Land and Improvement Company, the defendants in this case, to construct a railroad from the same town Newark to Hoboken (opposite New York), and to build the necessary "viaducts" over these same Passaic and Hackensack Rivers. And the statute enacted that if unable to agree with the parties owning or claiming them, it should be lawful for the company to "*take and appropriate*, use, and exercise, or cause to be taken and appropriated and exercised, so much of all *rights*, *privileges*, *franchises*, *property*, *and bridges or viaducts*, or such parts thereof as may be necessary to enable the said company to construct said railroad and branches, *first making*, *or causing to be made*, *compensation therefor*, *as hereinafter provided*. *Provided*, that nothing in this act shall authorize or empower the said company to construct more than one *bridge* over each of the rivers Hackensack or Passaic, and the *bridge*

over the Hackensack to be twelve hundred feet, river measure, from any other *bridge.*"*

Under the authority of the act of 1860, the Hoboken Company now began to erect their "structure" for carrying their railway across the Hackensack River, and inside of those limits within which the bridge proprietors considered that the act of 1790 gave them exclusive privilege of bridges.

* As respected "compensation" for rights, &c., used, a matter relied on in the dissenting opinion of one member of the court, GRIER, J., in this case, the statute provided that in case the Hoboken Company could not agree with the corporation owning the right, &c., application should be made by the company to the Chief Justice of New Jersey for the appointment of commissioners in the matter. Notice of the intended application for them, of not less than ten days, was to be given to the parties interested. A particular time was to be assigned for the appointment, and the appointment made only after the Chief Justice had satisfactory evidence of the service or publication of the notice. The statute then proceeded to say that the Chief Justice should appoint three disinterested freeholders such commissioners; and they, having first taken oath impartially to examine the matter and to make a true report, should meet at a time and place to be appointed by said judge, and proceed to examine the matter and the route of the railroad, so far as the same should be located, and report in writing what rights, &c., were necessary to be taken and appropriated for the purposes of the act, and should make a just appraisement of the value of the said rights, &c., and an assessment of such damages as should be paid by the company for them; which report, it was enacted—or in case of appeal, the verdict of the jury and judgment of the Supreme Court thereon—shall (the damages being first paid to, or if they refuse the same, or are unknown, "or labor under any disability, then deposited for the owner or owners in the Supreme Court) at all times be considered as plenary evidence of the right of the said company to take, have, hold, use, occupy, possess, exercise, appropriate, and enjoy so much and such parts of said rights, &c., so necessary to be taken, appropriated, &c."

It was further enacted in substance, that in case either the company or the claimants of the said rights, &c., should be dissatisfied with the report, either might appeal to the Supreme Court of the State by petition, the filing of which should give the court power to direct an issue, and to order a jury and a view of the road, and that the jury should assess the value of the rights. There was an enactment giving a right to collect by execution the amount awarded, with a *proviso*, that the appeal from the commissioners to the Supreme Court "shall not prevent the company from taking and appropriating, exercising, using, and enjoying the said rights, privileges, franchises, and property, or so much thereof as said commissioners shall assess and appraise, upon the filing of the aforesaid report, and paying the assessment and appraisement aforesaid, or making tender thereof, and depositing the same in the said Supreme Court for the owner or owners thereof."

This was done without the consent of the bridge proprietors, and without condemning the value of their right of franchise.

The proprietors of the bridges over the rivers, &c., hereupon filed a bill in the Court of Chancery, praying an injunction and general relief. THE BILL set out the act of 1790, authorizing the commissioners to lease out the privilege of building, and the bridge when built, for a term of years, and that it enacted that no person, during 99 years, should erect any other bridge over the river within the limits in question; that the commissioners had leased their privilege for 99 years to Ogden and his associates, who had built the bridges; the incorporation, &c. It then proceeded to insist thus:

"That the said act and said lease, and all the stipulations and provisions and enactments in them, and either of them, contained, became a *contract* between the State and said party of the second part to said lease, who are now represented by your orators; and by the same the State became *held and bound to and contracted* with said party of the second part, and are now, by force *of such contract*, held and bound to *your orators*, as provided in the act, that no persons whatever should erect *any other bridge* or bridges than that erected by laid lessees, and now belonging to your orators. And your orators insist *that the State cannot, by any law, violate, void or impair said contract, even upon providing and making compensation for the damages sustained thereby.*"

It next set out several statutes, which it charged recognized these rights, and then the act of 1860, and alleged that thereby the defendants were authorized to construct a railroad, and to erect viaducts or bridges over the Hackensack River, and to take and appropriate property, rights, franchises, &c., necessary to construct the railroad. It further set out the sections providing compensation for the franchises taken (see *ante*, p. 119, note), and that one section of the act, the first, *recognized the complainants' right as still existing.* The bill set forth further, that the defendants had commenced to build a bridge within the prohibited limits; and that the complainants had not given their consent to

this; nor the defendants tendered any compensation for the violation of their contract with the State.

It *insisted*, "that there exists no such public necessity for building a bridge within the prohibited limits as warrants or requires the violation of the contract,—even had the State the power to pass a law impairing the obligation of a contract: that there exists no public necessity for the construction of the defendants' railroad, such as to authorize the taking of the property and franchises of other persons or corporations."

It *submitted*, "that there does not exist that kind of public necessity which requires or justifies taking *private property for public use*, or the abrogation of a contract."

As respected the *contract*, the bill charged on the defendants as follows:

"And they sometimes give out and pretend that the State is not held and bound, *by any contract to or with your orators*, that no other bridge shall be erected within said limits, *whereas your orators charge the contrary to be true, and that the State is held and firmly bound to your orators by their contract* that no bridge shall be erected within said limits before the 24th day of November, 1889."

The bill prayed the defendants might be restrained from building the bridge commenced; and for general relief and injunction.

THE ANSWER, admitting that "of course the obligation of no contract can be impaired," declared "that the defendant *does not pretend* that any public necessity requires the violation of any contract," and it set up several defences.

1. That by the act of 1790, the State did "*not* contract," and therefore the defendant "denied" the allegation that it had done so; adding an admission, "that the said *lease* was a contract by which the State was bound," and an allegation that "this defendant is advised and insists, that it is the only contract between the State and the said lessees, or their alienees (if any), and was by said law declared to be the contract by which the State was to be bound."

2. That the prohibitory language, "it shall not be lawful for any persons to erect any other bridge," &c., in the act of 1790, was not in restraint of the legislature.

3. That any contract in the act of 1790 was discharged by a non-performance of the *conditions precedent* contained in the act.

4. That the structure of the defendant is not a *bridge* in the sense that the word "bridge" is used in the act of 1790; that it would differ from a bridge in these particulars:

a. "It will not," the answer averred, "be connected with the shore on either side of the river, except by a piece of timber under each rail, and must necessarily be made so as to make it *impossible for man or beast to cross said river, upon the viaduct, except in defendant's cars.*"

b. "The only *roadway*," it was further asserted, "between said shores and said structure, will be two or more *iron rails*, each of the width of two and one-quarter inches, and of the height of about four and one-half inches, laid and fastened upon timber, said rails *being at a distance of four feet asunder.*"

c. "It will be *impossible*," it was finally said, "*for any vehicle or animal, which can cross the river upon the bridge of complainants, to cross the same upon the railroad of defendant*, and no foot-passenger can cross the same with safety; nor is it intended that any foot-passenger shall, but on the contrary, the said railroad across the said river shall and will be so constructed, and this defendant intends to construct the same in such manner that no vehicle can cross the said river on the said road or viaduct of the defendant, *except locomotive engines and railroad cars resting, and which must necessarily move, upon iron rails, and cannot move upon any bridge which was known or used in the year* 1790, *or up to the time of the incorporation of the complainants*, and long after; and in such manner, that no foot-passenger or animal can cross said river on the railroad viaduct of the defendant."

5. The answer asserted, that any contract in the act of 1790 was discharged by the non-performance of *conditions subsequent.*

6. That the complainants had no assignment of the lease,

i.e., had not a particular evidence of the right to claim the benefit of the act of 1790.

7. That the exclusive franchise conferred by the prohibition contained in the act of 1790 had been destroyed by the complainants' own acts, admitted in the bill, in consenting to other bridges within the prohibited limits.

8. That a court of equity would not restrain by injunction the making of a bridge like that which the Hoboken Company proposed to make, and *on which railroad cars alone* could pass, if the complainants had an exclusive right and would not exercise it.

The case was argued below, as it was here also, on bill and answer only.

The *opinion* of the chancellor below, which, however, was no part of the record nor strictly in evidence here, was given at length. In stating what he considered the points before him to be, he said,

"The material issues are—

"1. Whether the complainants have, *by virtue of a contract* with the State, the exclusive franchise of maintaining a bridge across the Hackensack River, &c.?

"2. Whether the structure which the defendants are engaged in erecting is a *violation of the complainants' franchise?*"

After an argument on the first point, he concluded:

"I am of opinion, therefore, that the proprietors of the bridges over the Rivers Passaic and Hackensack have, *by contract* with the State, the *exclusive franchise* of maintaining said bridges, and taking tolls thereon, and that such contract *is* within the protection of that provision of the Constitution, which declares that no law shall be passed impairing the obligation of contracts."

And he adds:

"The remaining inquiry is, whether the structure which the defendants are erecting is a violation of the complainants' right?"

After an argument on this, the second point, to show that a viaduct, such as the defendants proposed to construct, was

not a "bridge," within the meaning of the act of 1790, he concludes:

"Applying to this contract the ordinary rules of interpretation, having regard to the subject-matter of the contract itself, considering that it related solely to the travel upon ordinary highways by methods then known and used, and that the complainants' franchise extended only to such travel, *the construction of a railroad bridge for the sole accommodation of railroad travel cannot be deemed an infringement of the complainants' right.*"

In the Court of Errors and Appeals, where only one or two of the judges spoke, the course of argument was much the same as with the chancellor.

The *decree* in the Court of Chancery was a simple dismissal, thus: "The chancellor being of opinion that the complainants are not entitled to restrain the defendants from building the bridge *or structure* complained of," therefore it is ordered, &c., that the bill be dismissed.

The *decree* in the Court of Errors and Appeals was a simple affirmance; the language being, that "the cause coming on to be heard, and the matter having been debated, &c., and the court having advised, &c., it is hereby ordered, adjudged, and decreed, that the decree of the chancellor be in all things affirmed, with costs."

On appeal to this court from the Court of Errors and Appeals of New Jersey—"the highest court of equity" in that "State,"—the questions were:

I. Whether this court had jurisdiction? that is to say, whether there had been drawn in question, in the State courts of New Jersey, the validity of a statute of that State on the ground that it violated the obligation of a contract? the decision being in favor of the statute.

II. If the court had jurisdiction, and so could re-examine and reverse the decision below, whether there was any ground for the reversal of the same? the points raised under the second being,

1. Whether there was ever meant to be any contract at all? If so,

2. Whether it was a contract such as bound legislatures of this day? If so,

3. Whether a "viaduct," such as was here proposed, was a "bridge" within the meaning of that contract?

Mr. Bradley and Mr. Gilchrist for the Hoboken Company:

I. *As respects jurisdiction.* The case was decided on bill and answer. Hence the allegations of the answer are to be taken as true; and those of the bill are not to be taken as true, except so far as admitted by the answer. Now what is it that the pleadings put in issue? The answer, admitting the inviolability of contracts, sets up eight defences in confession and avoidance. They are already stated.* What are they? We must be excused for recapitulation.

1. That by the act of 1790, the State did not make a "contract." *This defence involves simply the construction of the act of* 1790.

2. That the language of the act, "it shall not be lawful," &c., was not in restraint of the legislature. *This defence also did but involve the construction of this act.*

3. That if the act of 1790 was a contract originally, it was one on conditions precedent, and that the omission of the parties who claimed the benefit of it to perform those conditions precedently, operated to dissolve whatever contract there was. *This involved the construction of the act, a question of fact, and perhaps a question of general State law.*

4. That the defendants were not building a "bridge," within the meaning of the act of 1790. *This also involved but the interpretation of the act and a question of fact.*

5. That any contract was discharged by the non-performance of certain conditions subsequent named in the act. *Here again was only a question of construction, a question of fact, and perhaps a question of general State law.*

6. That the complainants showed no transfer to themselves of the rights originally given by the act. *This involved nothing beyond a question of fact, and the general rules regulating the transfer and devolution of property.*

* Ante, p. 121–3

7. That the exclusive franchise given by the act of 1790 had been destroyed by the complainants' own acts, as admitted in the bill, in consenting to other bridges within the prohibited limits. *This involved the construction of the act of* 1790, *and the law regulating the nature of incorporeal hereditaments.*

8. That equity would not restrain by injunction the making of a railway bridge like the defendants', if the complainants had the exclusive right and would not exercise it. *In this defence there was nothing but a question of equity practice.*

The decree of the chancellor was in four lines. That of the Court of Errors and Appeals in five. The former was a dismissal without reasons assigned. The latter an affirmance of the same kind. Though the opinions of the chancellor and the arguments of the judges in the higher court, as delivered, are not part of the record nor in evidence, we know as a fact that the bill was dismissed, and that this dismissal was affirmed, because all the tribunals considered that a viaduct was not a "bridge," within the intent of the act of 1790. The whole matter turned, therefore, on a construction of *that* act. The constitutionality of the act of 1860 was not in question, nor was its meaning discussed.

It is not true that the *entire subject* of contracts, like that of foreign commerce, and commerce between the States, is placed under the regulation of the Federal Government. Were it so, then, in every case where a State court should adjudicate upon a contract, its decision ought to be subject to revision by Federal authority. On the contrary, to give to this court jurisdiction over a decree of a State court, supposed to decide in favor of the validity of a State statute, by the very words of the Judiciary Act,—

1st. The validity of the State statute must have been drawn in question; and the statute must have been in "dispute."

2d. There is but one ground on which the validity must have been drawn in question, *i. e.*, the ground that the statute was *repugnant* to the Constitution of the United States.

3d. The decision of the Court must have been in favor of "*such*" its validity, with respect to the Constitution.

And it makes no difference whether the contract alleged to be impaired is an ordinary contract between private citizens, or a contract made by the State with citizens. State contracts, in this regard, are of no greater validity, and have no greater sanctity, than other contracts, whether they are in the shape of statutes, or charters, or grants of land, or franchises, or otherwise. In our case, the contract relied on is the act of 1790. The only law which is pretended to have impaired its obligation is the act of 1860, authorizing the defendants to construct their railroad and bridges. Does this law of 1860 impair the obligation of the alleged contract, contained in the act of 1790, giving to that contract any construction we choose? If it does not, then, although the courts of New Jersey may not have correctly construed that contract, this court has no jurisdiction, and cannot reverse their decision, any more than it could reverse the decision of the State court in any other case, however erroneous. The *Commercial Bank* v. *Buckingham's Executors*,* in this court is in point.

If a land proprietor, without any State legislation, had erected a bridge across the Hackensack River for his own use, within the prohibited limits, and the plaintiffs had sued him in the State courts as for an infringement of their franchise, could this court have reversed the decision of the State courts in the case? Certainly not. And why not? Because the case specified in the Constitution did not arise. No law was passed impairing the obligation of a contract. The decision of the State court on the validity and construction of the alleged contract would have been final. And so in this case, if no law has been passed impairing the obligation of the contract, the decision of the State court, though based on a construction of the contract, is final. If, indeed, a State court so interprets a State law as to make it operate to impair the obligation of a contract, that must be received here as the true reading of the law, and this court will then acquire jurisdiction. But, in this case, as we have said, the State

* 5 Howard, 317.

court has not put any construction upon the act of 1860 to render it obnoxious to this objection. The act of 1790 it was which was considered; but even it was not drawn in question on the ground of its being repugnant to the Constitution of the United States, and there neither was nor could have been a decision that it was not so repugnant. As a *result*, indeed, of the construction put on the act of 1790, the act of 1860 may be to be regarded as constitutional; so may other acts of the legislature, or the *bridge-building on the Hackensack of private individuals not under State authority.* But the act of 1860 has not been drawn in question, nor ever considered. *It* was outside of what was involved, and might have sat down by itself to look calmly on the conflict which it had raised between the act of 1790 and the courts of New Jersey, who were about to strangle that act's extravagant pretensions. If this is so, then the whole question is a domestic one, which belongs to the exclusive jurisdiction of the New Jersey courts; and they may construe the contract of 1790 as they please, just as they might any other contract in litigation before them.

Undoubtedly where the *only* title of a *plaintiff* is a State statute, the decision of the suit in his favor is a decision in favor of the validity of the statute. Such were cases which the court will recall: *Smith* v. *Maryland*, (6 Cranch, 286;) *Willson* v. *Blackbird Creek*, (2 Peters, 245;) *Craig* v. *State of Missouri*, (4 Id., 410;) *Martin* v. *Hunter's lessee*, (1 Wheaton, 304.) So, where the title of the plaintiff is good, unless a State statute under which the *defendant* claims, gives the *defendant* a title, and the defendant has *no other defence*, a decision of the suit in the defendant's favor would seem to be a decision in favor of the validity of the latter statute. But where many defences are set up, and the defendant's acts are attributed to a State statute, how is the court to determine that the validity of the statute was drawn in question, as repugnant to the Constitution of the United States, and that the mere decision of *the suit* against the party raising the questions of validity, is a decision in favor of the validity of the statute, and not a decision entirely independent of that question?

For such cases the court have from time to time settled rules.

I. The State statute complained of must be stated in the record.* Here it is merely referred to.

II. It must be averred in the pleadings that the statute is void.† This averment nowhere appears.

III. The particular clause of the Constitution of the United States must appear by the record to have been specified by the plaintiffs in error in the State court; it is not enough to show that the question was involved, and might and ought to have been considered.‡ Here the Constitution of the United States is not even mentioned in the record.

IV. Any general charge of unconstitutionality of the statute, will not be considered as referring to the Constitution of the United States, but to the State Constitution.§

The point insisted on, that the State cannot impair the contract, and other references to this incapacity of the State, are not so definite in the reference to a constitutional repugnance as the third exception in *Maxwell* v. *Newbold*, decided by this court,‖ and must be referred to the State Constitution, if referable to any constitution.

V. If it appears by the record that the cause might have been decided on the *construction* of a State statute not impeached, which admits of a construction consistent with the decision—without deciding in favor of the *validity* of the statute impeached—this court will not take jurisdiction.¶

That the decision in the principal case may be fairly referred to a *construction of the act of* 1790 *alone*, and to the courts' holding that a *railroad viaduct* is not a *bridge*, in the sense that the word "bridge" is used in the act of 1790, is manifest by the fact that the same decision of that question has been made in numerous cases;** and in the opinions of the chan-

* Maxwell *v.* Newbold, 18 Howard, 516.

† Medberry *v.* Ohio, 24 *Id.*, 413.

‡ Hoyt *v.* Shelden, 1 Black, 518; Maxwell *v.* Newbold, 18 Howard, 515, 517.

§ Porter *v.* Foley, 24 Howard, 415. ‖ 18 *Id.*, 514, 516.

¶ Commercial Bank *v.* Buckingham Executors, 5 *Id.*, 317.

** Cited *post*, in the opinion of the court, *ad finem.*

cellor and Court of Errors in the principal case, which are not cited to show what the decision *was*, but that the case will admit of such decision without deciding on the *validity* of any statute. This we have already said.

VI. Nor, as we have said also already, and in our general remarks, will the court take jurisdiction, if they see that, on a view of the case that might have been taken by the State court, it is a question depending on general principles of State law, as one or more of the defences do in the principal case. In other words, a controversy which turns entirely upon the interpretation of State laws is exclusively within the jurisdiction of the State courts, if they first acquire jurisdiction, and the Supreme Court of the United States has no appellate power over them.*

VII. Nor will the court take jurisdiction, when the court below decided the cause on a question of practice.†

The last defence against the relief prayed, is that a rule of practice in equity will prevent an injunction; and that rule is, that where the owner of a franchise (as of a ferry), neglects to exercise it (provide proper boats, &c.), the court will not interfere by injunction to protect the franchise from invasion. In the principal case, the *structure* complained of was a railroad bridge or viaduct, and the complainants had not provided such a bridge, although they claimed a right to prevent its construction.

II. *How stands the case as respects contract?*

1. Is there any contract in the case? The act of 1790 is a mere act of legislation; a measure by which the State, for the benefit of all, carries on a public work. The commissioners were vested with a portion of political power. There was no consideration for any contract with them. In a country where there is less indisposition to the granting of monopolies than in ours, *Sir Wm. Scott* says, with profound truth :‡

* Congdon *v.* Goodman, 2 Black, 574; Heirs of Poydras de La Lande *v.* Louisiana, 18 Howard, 192.

† Matheson *v.* Branch Bank of Mobile, 7 Howard, 260.

‡ The Elsebe, 5 C. Robinson, 155.

"A general presumption is, that government does not mean to divest itself of a universal attribute of sovereignty, unless it is so clearly and unequivocally expressed. The wise policy of our law, which interprets grants of the crown in this respect, by other rules than those which are applied in the construction of grants of individuals, must be taken in conjunction with the universal presumption. Against an individual, it is presumed he meant to convey a benefit, with the utmost liberality his words will allow. It is indifferent to the public in which person an interest remains, whether in the grantor or grantee. With regard to the grant of the sovereign it is far otherwise. It is not held by the sovereign as private property; and no alienation shall be presumed, except that which is clearly and indisputably expressed."

2. But, if the legislature had directly *contracted* with the bridge proprietors, that for ninety-nine years no other bridge within these limits should be authorized or built, would such law be valid to bind future legislatures as a contract? The power to make roads and build bridges is a governmental power. It is always a part of the sovereign or legislative power, and the duty to provide them is correlative. In New Jersey, now, as in 1790, all legislative power is in the Senate and Assembly, elected periodically by the people. No legislature can rest it or any part of it in any other body, or place it beyond the control of the next elected legislative body. Their only power is to *exercise*, not to alien their powers. The grant of a *power* or a *franchise* is a grant of property; it is an *act* of legislative power, not an abdication of such power. But if the franchise or power attempted to be granted is not property, but part of the legislative or sovereign power, the grant is void; it is revolution, or constitution-making, not legislation. The legislature could not grant away nor limit the power of future legislatures to punish crimes, to establish courts, to regulate succession to property, or to suppress drunkenness, in the whole State or in any section of it. These are not more properly or peculiarly legislative powers, than the power of making and regulating roads or bridges. If the legislature were to incor-

porate a prison discipline society, or juvenile reform society, and to enact that it should not be lawful without their consent to punish capitally any one under seventeen years of age, either in the State, or in the county where such institution was, this as law, while unrepealed, would be good, but as a contract it would not take away the power of future legislatures. An act incorporating a law school, with a provision that no Supreme Court judge should be appointed in this State, except from its pupils; *or*, incorporating a large hotel at the seat of government, with a provision that it should not be lawful for any legislature afterwards to prohibit the sale of ardent spirits in any quantities, and that no taverns should ever afterwards be licensed; *or* incorporating a bank, with provisions that no future legislature should allow any other power or corporation to transact any banking business,—are examples of the same kind of legislation as the grant of the monopoly, *if* any monopoly ever was granted, which we deny. On the theory of the complainants, a legislature of any peculiar views on vexed questions of government, could by a section in a charter bind all future legislatures from exercising legislative powers, and fix the law forever. All will agree that such acts would be void.

This bridge act, preventing the legislature for ninety-nine years exercising a clear governmental or legislative power needed for the public prosperity and protection, is of the same kind; the same as if it had been enacted that murder there should never be punished with death; or selling of liquor should be forever free.

If one power of legislation may be parted with or placed under the veto of a private corporation, not to be resumed, so may every power successively be and by degrees, and future legislatures may be such in name only. The government controlled by corporations would not be the republican government guaranteed by the Constitution.

This company *can* have no property or grant of property in the river, except in the length occupied by their own bridge. They have paid nothing to the public or to landowners above or below for this incumbrance or incubus

upon them that they should be for ninety-nine years deprived of the benefits of legislative protection.

3. Is the contract, admitting one, impaired?

The act of 1860 provides compensation for every right, privilege, franchise, or property which might be necessary to be exercised, used, appropriated, or taken in the construction of the railroad or bridges of the defendants. The exclusive right here claimed is a franchise. That such a right of franchise may be taken or extinguished for public purposes on compensation given, is settled at the present day.* A contract is property, but is no more sacred than other property. Its obligation is not impaired, but is recognized, when compensation is provided for its infringement.

III. *The structure is not a bridge within the meaning of the act of* 1790. Such a structure as the defendants propose to build, it had not, in 1790, entered into any man's mind to conceive of. *He* would have been regarded as a dreamer, or insane, who at that time had spoken seriously of such a fabric as is described in this case.† Now there are certain rules for the construction of grants, long established in the law. They come to us with the common law of England, are very ancient, and very settled. They may be found in the oldest reporters. One of them is thus enunciated in Lord Hobart's reports: "Words in grants shall be construed according to a reasonable and easie sense; not strained to things *unlikely* or *unusual;*"‡ and this rule, the great chief justice of King James I, illustrates by a case more ancient than his own day; citing a decision from 14 Henry VIII, "that if a man grant all his woods and trees, apple-trees do not pass." "Every grant," says another old reporter, Croke,§ "shall be expounded *as the intent was at the time of the grant;* as if I grant an annuity to J. S., until he be promoted to a *competent* benefice, and at the time of the grant he was but a mean person,

* West River Bridge *v.* Dix, 6 Howard, 529.

† *Ante*, p. 122.

‡ London *v.* The Collegiate Church of Southwell, Hobart, 303; and see Hewet *v.* Painter, 1 Bulstrode, 175.

§ Mildmay *v.* Standish, Croke Eliz., 35.

and afterward is made an archdeacon, yet, if I offer him a competent benefice, according to his estate at the time of the grant, the annuity doth cease."

As respects royal or government grants, it is an equally settled rule, that nothing passes by general words or by implication. The reasons are set forth by Sir William Scott, in the passage already cited.* Hence we gather from Plowden (*Case of the Mines*) † that if the King grants lands and the mines therein contained, it will pass only common mines, not mines of gold or silver; for the words in their *common* sense are satisfied by the passing of the *more usual* ones. So Sir John Davies, Chief Justice of Ireland in the time of James I, reports, that where the King granted to Sir R. M. all the territories adjoining a river, and all the fisheries within it, except three parts of the Fishery of Banne, the fourth part did not pass to him, for the King's grants pass nothing by implication.‡ The same doctrine is declared in Rolle's Abridgment, under the head of "*Prerogative Le Roy.*"§

The special character of the structure, and its want of resemblance to a bridge, is set forth in the defendants' answer.‖ Neither man nor beast can cross on it, save in the defendants' cars. The viaduct is for a kind of vehicle which no bridge known in 1790 can carry. It is wholly open. The only roadway is two or more iron rails, separated by a distance of four feet asunder. It is in fact no more a bridge than a *sieve* is a bucket.

Such a structure, it has been decided in North Carolina and in New York, is not a bridge.¶ If in Connecticut a

* *Ante*, p. 130. † Page 336.

‡ The Royal Fishery of The Banne, Davies, 157.

§ Rolle, speaking of the prerogative, and to what things it extends, says: (page 202), that a charter of exemption of lands of a corporation from forest law, only extends to lands then held, not those after acquired. His language is:

"Si Le Roy graunt al un evesque quod omnia maneria et omnes terræ et omnia feoda del dit evesque et ses successors inde in perpetuum, libera sint, et quieta de tiel forest del Roy, &c. Evesque alia maneria sua, terras, et homines suos clamare *non potest esse quieta de Foresta, quam illa quæ tempore confectionis illius chartæ fuerunt in seisina del dit evesque.*" (18 Edward I, *lib.* Parl. I. *Evesque de Coventry & Litchfield's case.*)

‖ *Ante*, p. 122.

¶ In North Carolina, McRee *v.* Wilmington Railroad Co., 2 Jones's Law,

different decision has been given in the Enfield Bridge case—a case which will be cited and relied on by the other side—it was in a case where the viaduct was planked and railed, which made a secure roadway for man, beast, and vehicles.

Mr. Zabriskie for the Bridge Proprietors:

1. *Has this court jurisdiction to revise?* The plaintiffs claim that they are protected by a contract with the State from any bridge being erected within certain limits, and that the State cannot, by law, impair that contract. They complain further that the State had passed such law, and that the defendants were proceeding under it to erect such bridge. The defendants admit the law, alleged to violate that contract, and that they are under it proceeding to erect this bridge. They deny the contract, or that the contract prohibits the erection of a railroad bridge.

The act of 1860 is the only authority the defendants have. No bridge can be erected over a navigable river but by authority of the sovereign. The record shows that the whole right depended on this statute. The decision dismissing the bill and refusing all relief, was in favor of the statute and the authority exercised under it. The validity of the statute of 1860 and the authority exercised under it was therefore drawn in question, as being repugnant to the Constitution of the United States. This was not done in words so reciting, or pointing out the clause of the Constitution, but by stating that it was in violation of the contract; in the words of the Constitution, that "it impaired the obligation of the contract." The defence was on the ground that the act or the bridge did not impair the obligation of the contract; either that there was no contract or that it did not extend to a railroad bridge. The record shows that this was the question raised and argued, and as there *could be* no decision in favor of the defendant except by holding the act and authority valid, the record shows by *necessary intendment* that this was the decision of the State court. If this

186; in New York, The Mohawk Bridge Co. *v.* Utica Railroad, 6 Paige 564; Thompson *v.* The N. Y. & H. Railroad, 3 Sandford's Chancery, 625.

appears, this court has jurisdiction by the uniform current of decisions in this court to this time. *Crowell* v. *Randell** is the leading case. All cases recognize it.†

2. *Is there a contract in the case?* This we consider too plain for extended argument. The language of the act is pleonastically full on that subject. It declares that the contract of the commissioners shall bind the State of New Jersey, "to all intents and purposes whatsoever, as if the same and every part, covenant, and condition therein contained had been particularly and expressly set forth and *enacted*."

3. *Does the act of* 1860 *violate this contract?* There is nothing in the act to show that the legislature intended to limit the words which it uses, or to make them inconsistent with the meaning which they have from their natural force. The words are "*any* other bridge;" words of the widest import; and which taken in connection with the fact that any kind of bridges would impair the income and value of the bridge erected by the plaintiffs, should settle the question. No lexicographer confines the meaning of the word to old-fashioned bridges, for old-fashioned coaches; the American "article" of the specific year of grace, 1790. In encyclopædias; in works on railway engineering; in acts of Parliament and of our legislatures authorizing railways; in all works written in the English language, by good authors, in which railway bridges are spoken of, they are called *bridges*, and the very act of 1860 brought here in question, uses the word "bridge" to designate railroad bridges; so using it seven times in its first section. The tubular iron structure for railroads over the Straits of Menai and over the St. Lawrence at Montreal, are well known wherever the language is spoken, as the Menai bridge and the Victoria bridge. Neither of them, any more than the defendants' bridge or other railway bridges, have a footway; and, though an agile pedestrian *might* clamber over any of them, such use would thwart the purpose of their construction, and be at great

* 10 Peters, 368, 398.

† Armstrong *v.* Treasurer of Athens, 16 Peters, 281; Lawlor *v.* Walker, 14 Howard, 152, 154.

peril to life. The *subject-matter* of the contract was to prohibit any injurious competition by bridges within the prescribed limits. Beyond the limits they were not to be protected; and within the limits only against bridges, not against ferries, tunnels, balloons, or any other device. *The object* was, that all passengers and cattle, and produce and goods, carried in the vehicles on which they had a right to take toll, should have no other way of passing the river on *any bridge* within these limits but this. This would compel them to cross by plaintiffs' bridge or to go out of their way, or by an inconvenient and tedious ferry-boat. And the intent of the legislature was, by this covenant, to induce capitalists to expend their money in building bridges which would not at first remunerate them, but by a long monopoly would. The object would not have been effected by protecting them only against a bridge like their own, which, if erected, would only take away one-half their custom, and allowing a railroad bridge, which would take away nineteen-twentieths of it. Had the act of 1790 contained in the contract against any other bridge, an exception of a railroad bridge, or plank road bridge, or any other bridge which might be used for any improved system of travel thereafter to be brought in use, the persons who built this bridge would never have undertaken it. A toll bridge, or a free bridge, or a bridge, which, like this, is used as part of a railroad line, charging no tolls *eo nomine*, but a fare for being carried over the whole route, in which compensation for the use of the bridge is included, all are within the object and intent of this prohibition. They all carry passengers, animals, and freight, that without them would pass over this bridge of the plaintiffs and pay tolls. The *object and intent* of the legislature coincide with the subject-matter of the act, and can only be carried out by prohibiting "any other bridge." It is idle to say that the plaintiffs cannot charge toll for locomotives, cars, elephants, &c., and are not bound to provide bridges for them, and, therefore, bridges can be built to accommodate them; and all passengers and carriages that should otherwise go over plaintiffs' bridge, be

carried on these new bridges. If the contract is clear, and the bridges both within the letter and object of it, the State must adhere to its contract although improvident.

In *The Enfield Toll-Bridge Company* v. *The Hartford and New Haven Railway Company*,* the point now before this court was fully argued in a full bench. Williams, C. J., one of the ablest of the jurists of America, in delivering the opinion of the court speaks as follows. We cite his language as much for its cogency, as we do the judgment for its authority. Thus he speaks for the law. It is impossible that we can speak more potently for ourselves. Let his exposition of law be our argument in the case. We adopt his language as our own:

"What is a bridge? It is a structure of wood, iron, brick or stone, ordinarily erected over a river, brook, or lake, for the more convenient passage of persons or beasts, and the transportation of baggage; and whether it is a wide raft of logs floating upon the water, and bound with withes, or whether it rests on piles of wood, or stone abutments or arches, it is still a bridge. The particular manner in which the structure is built is not described; but it is said to be much in the manner common to railroad bridges,—the bottom covered with plank and the sides secured by railing. It is a matter of notoriety that railroad bridges are built upon solid abutments of mason-work and resting on piers of stone between the abutments, thus giving strength and security to the frame above. It is not easy to see wherein such a structure differs from an ordinary bridge, except that, as it is to endure a greater burden, it is more solid and substantial. It is true the planks and rails upon it are laid in a manner most convenient for the cars which are to pass it, and not convenient for, perhaps not admitting, common vehicles, and not intended for, though admitting, the passage of foot-passengers.

"It would seem, therefore, as if this was what would be ordinarily called a bridge. But we agree that it is not the name which is sufficient to designate it. We must then consider the object: What was the intent of this structure? The safe and expeditious passage of persons, whether from greater or less

* 17 Connecticut, 56.

distances, over this stream, in the cars or carriages provided for that purpose, together with all baggage or freight intrusted to the care of the company. It may not, and it is not intended to accomplish all the objects of a common bridge, as it is not adapted to the common vehicles in use; but can that fact change its character as a bridge? A bridge adapted only to foot-passengers would be still a bridge; and it would hardly be claimed that such a bridge might be erected by the side of the plaintiffs' under the provisions of this act. We find then a structure of the form of a bridge, with the name of a bridge and of the character of a bridge. But go a step further, and see if it is not doing the business of a bridge? Certain facts are not specifically found, which we all know must exist, such as,—that every passenger in the cars must cross this river upon this bridge, within the limits secured to the plaintiffs. It is constantly doing at least some, if not much, of the business which the plaintiffs had a fair right to expect under their grant.

"We find then this structure with the form of a bridge, with the name of a bridge, with the character of a bridge, doing its work, and in this way doing the very injury to the plaintiffs which this proviso was designed to guard against. We cannot, then, but conclude that it is a bridge.

"It is said it is not the bridge contemplated in the act, or 'another bridge.' It cannot be claimed that by another bridge was intended a bridge exactly like this, or that a bridge of iron or stone would not be within the provisions, or even a bridge of boats; nor can it be claimed that a bridge much safer or stronger would be equally within the prohibitions. Nor is it the improvement in the structure of the bridge, nor the additional safety it affords to travellers, that will give the rights, or constitute it 'another bridge.'

"It is further claimed, that when the plaintiffs' charter was granted, railroads were unknown; therefore it cannot be supposed the legislature intended bridges connected with railroads. But whether the fact is so or not it can make no difference. Is a grant of this kind, which we here adjudged to be a contract, to be set aside, because an advantage not contemplated at the time may result from its violation? Is there any implied condition in such a grant, that, upon some new improvement being made, the grant should be void? How would such a claim be treated in other cases of great public improvement? Suppose

the city of New York had leased Fulton Ferry for a term of years, when no boats were known but those which were moved by the hand and wind or tide; after the introduction of steamboats, could they have leased the ferry to the persons who would navigate it by steam? Or could the legislature do this, if they had granted the ferry? We know of no principle by which this case can be distinguished from that."

This opinion is an answer to all that has been said by the opposite side on the point which it treats of; an answer to which that side can find no reply.

Mr. Justice MILLER delivered the opinion of the court:

The first point arising in the case is that which relates to the jurisdiction of this court, to review the decision of the State court of New Jersey. This is a question which this court has always looked into in this class of cases, whether the point be raised by counsel or not; but here it is much pressed, and we proceed to examine it.

The suit in the State court was a bill in chancery brought by the present plaintiffs in error, against the defendants. The case was heard on bill and answer alone, and the decree was simply a dismissal of the bill. We must look, therefore, to the pleadings to determine the question of jurisdiction.

The bill sets forth, that in the year 1790, the legislature of New Jersey passed an act appointing commissioners, with powers to contract for the building of one bridge over each of the rivers Passaic and Hackensack, authorizing said commissioners to fix the maximum rate of toll to be taken by the builders, and granting them this right of toll for ninety-nine years. The act also contained a provision, that it should be unlawful for any person or persons to build any other bridge within limits which were defined on each side of these bridges.

The complainants allege that the contract thus authorized was made, and the bridges built, and that they are the successors in title and interest of the persons who were the original contractors and builders, and that the act of the New Jersey legislature, and the agreement made under it,

constituted a contract on the part of the State, with complainants. They further allege that until a short time before the filing of their bill, their exclusive right to bridges within the limits prescribed by the act, had been protected by the State of New Jersey, and respected by all.

They then charge, that by an act of the legislature of New Jersey, passed in 1860, the defendants were authorized to build a railroad from Hoboken to Newark, with power to erect and maintain the necessary viaducts over the Passaic and Hackensack Rivers, and that under said act, the defendants claimed the right to build a railroad bridge over the Hackensack, within the limits of the exclusive privilege claimed by plaintiffs, and had in fact commenced the construction of such a bridge, and unless restrained by the court, would soon have it completed and in use. It is charged that such a proceeding will be a violation of the contract of the State of New Jersey with complainants, and an injunction is prayed.

The answer of the defendants, among other things, denies that the act of 1790 and the proceedings of the commissioners under it, constitute any contract on the part of the State, that no other bridge but complainants shall be built within the designated limits; admits that they are about to run their road over the Hackensack River, within said limits, and claims that the act of 1860 authorizes them to do this, and that in doing it they infringe no right of the complainants.

These are, in substance, the allegations of the bill and answer, so far as they are necessary to the consideration of the question of the jurisdiction of this court.

It is claimed by plaintiffs in error, that the validity of the act of the New Jersey legislature of 1860, is drawn in question as being contrary to that provision of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of a contract; and that the decision of the State court was in favor of its validity, and the case is therefore embraced by the 25th section of the Judiciary Act.

It is objected, however, by the defendants, that the pleadings do not, in words, say that the statute is void because it conflicts with the Constitution of the United States, and do not point out the special clause of the Constitution supposed to render the act invalid.

It would be a new rule of pleading, and one altogether superfluous, to require a party to set out specially the provision of the Constitution of the United States, on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and defendant in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words: "This paragraph of the Constitution is the one involved in this case."

Very few questions have been as often before this court, as those which relate to the circumstances under which it will review the decision of the State courts; and the very objection now raised by defendants has more than once been considered and decided.

In the case of *Crowell* v. *Randell*,* the motion to dismiss for want of jurisdiction was argued at much length by Mr. Webster, Mr. Sergeant, and Mr. Clayton, whose names are a sufficient guarantee that the matter was well considered. The opinion was delivered by Mr. Justice Story. He reviews all the cases reported up to that time, and lays down these four propositions as necessary to bring a case within the 25th section of the Judiciary Act.

"1st. That some one of the questions stated in that section did arise in the State court. 2d. That the question was decided by the State court, as required in the same section. 3d. That it is not necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms, *ipsissimis verbis*, but that it is suf-

* 10 Peters, 368.

ficient if it appears, by clear and necessary intendment, that the question must have been raised and must have been decided, in order to have induced the judgment. 4th. That it is not sufficient to show that the question might have arisen or been applicable to the case, unless it is further shown in the record that it did arise, and was applied by the State court to the case."

In the case of *Armstrong* v. *The Treasurer of Athens County*,* Judge Catron, in delivering the opinion of the court, said that the question of jurisdiction under the 25th section of the act of 1789, had so often arisen, and parties had been subject to so much unnecessary expense, that the court thought it a fit occasion to state the principles on which it acted in such cases. Referring especially to the manner in which the question on which the jurisdiction must rest shall be made to appear, he lays down six different modes in which that may be done. The first of these is "either by express averment or by necessary intendment in the pleadings in the case." The sixth is, "that it must appear from the record that the question was necessarily involved in the decision, and that the State court could not have given the judgment or decree which they passed, without deciding it."

Now, although there are other decisions in which it is said that the point raised must appear on the record, and that the particular act of Congress, or part of the Constitution supposed to be infringed by the State law, ought to be pointed out, it has never been held that this should be done in express words. But the true and rational rule is, that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.

Looking at the record before us, and applying to it these principles, we find no difficulty in the matter. The defendants claim, under the act of 1860 of the New Jersey legislature, a right to build their railroad bridge, or viaduct, over the Hack-

* 16 Peters, 281.

ensack River, inside the limits prohibited by the act of 1790. The plaintiffs say, that to permit this is to violate the contract which they have with the State of New Jersey, and therefore the act of 1860, so far as it confers such authority on the defendants, is made void by the Constitution of the United States, because it impairs the obligation of a contract. The State court dismissed the bill on these pleadings alone. It could not have done this, without holding the act of 1860 to be valid, as it was the only authority on which defendants rested their right to build any structure whatever over the Hackensack River. In holding that act to be valid, notwithstanding plaintiffs claim that it was void as impairing the obligation of their contract with the State of New Jersey, a decision was made within the very terms of the 25th section of the act of Congress of 1789.

It is said, however, that it is not the validity of the act of 1860 which is complained of by plaintiffs, but the construction placed upon that act by the State court. If this construction is one which violates the plaintiffs' contract, and is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and that this court will not be discharging its duty to see that no State legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction of such cases.

The case of the *Commercial Bank* v. *Buckingham's Executors*,* does not conflict with this view, because that was a case in which the prior and the subsequent statutes were both admitted to be valid under any construction of them, and therefore no construction placed by the State court on either of them, could draw in question its validity, as being repugnant to the Constitution of the United States, or any act of Congress.

But there is a misconception as to what was construed in this case by the State court. It is very obvious that the statute of 1860 was *not* construed. No doubt is entertained by this court, none could have been entertained by the State

* 5 Howard, 317.

court, that it was intended by the framers of that act to authorize the defendants to build the railroad bridge which they were building, and which plaintiffs sought to enjoin. The act which was really the subject of construction, was the act of 1790, under which plaintiffs claim. For if that act and the proceedings under it amounted to a contract, and that contract prohibited the kind of structure which the defendants were about to erect under the act of 1860, then the latter act must be void as impairing that contract. If on the other hand the first act and the agreement under it was not a contract, or if being a contract it did not prohibit the erection of such a structure as that authorized by the act of 1860, the latter act was valid, because it did not impair the obligation of a contract. It was then the act of 1790 which required construction, and not that of 1860, in order to determine whether the latter was valid or invalid.

In the case of the *Jefferson Branch Bank* v. *Skelly*,* this court says: "Of what use would the appellate power of this court be to the litigant who feels himself aggrieved by some particular State legislation, if this court could not decide independently of all adjudication by the Supreme Court of a State, whether or not the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court should or could, with fidelity to the Constitution of the United States, follow the Supreme Court of a State in such matters, when it entertains a different opinion."

We are therefore of opinion, that the record before us presents a case for the revisory power of this court over the State courts, under the 25th section of the act of Congress of 1789.

Approaching the merits of the case, the first question that presents itself for solution, is whether the act of 1790, and the agreement made under it by the commissioners with the

* 1 Black, 436.

bridge builders, constitute a contract that no bridge shall be built within the designated limits, but the two which that statute authorized. This we think to be so very clear as not to need argument or illustration. The parties who built the bridges had the positive enactment of the legislature, in the very statute which authorized the contract with them, that no other bridge should be built. They had a grant of tolls on their bridges for ninety-nine years, and the prohibition against the erection of other bridges was the necessary and only means of securing to them the monopoly of those tolls. Without this, they would not have invested their money in building the bridges, which were then much needed, and which could not have been built without some such security for a permanent and sufficient return for the capital so expended. On the faith of this enactment they invested the money necessary to erect the bridges. These acts and promises, on the one side and the other, are wanting in no element necessary to constitute a contract. Such legislative provisions of the States have so often been held to be contracts, that a reference to authorities is superfluous.

We are next led, in the natural order of the investigation, to inquire if the contract of the State forbid the erection of such a structure as the defendants were authorized to erect, and which they proposed to erect, under the act of 1860.

This question, upon the decision of which the whole case must turn, we approach with some degree of hesitation. It is now over seventy years since the contract was made. A period of time equal to three generations of the human race has elapsed. During that time the progress of the world in arts and sciences has been rapid. In no department of human enterprise have more radical changes been made, than in that which relates to the means of transportation of persons and property from one point to another, including the means of crossing water-courses, large and small. The application of steam to these purposes, on water and on land, has produced a total revolution in the modes in which men and property are carried from one place to another. Perhaps the most remarkable invention of modern times, in the in-

fluence which it has had, and is yet to have, on the affairs of the world, as well as in its total change of all the elements on which land transportation formerly depended, is the railroad system. It is not strange, then, that when we are called to construe a statute relating to this class of subjects, passed before a steam engine or a railroad was thought of, in its application to this modern system, we should be met by difficulties of the gravest character.

On the one hand, we are told that the structure about to be erected by defendants is a bridge: simply that, and nothing more or less; that such is the name by which it is now called, and that it is, therefore, within the literal terms of the act; and that it performs the functions of a bridge, and is, therefore, within the spirit of the act. On the other hand, it is denied that the structure is a bridge, even in the modern sense of that word, since it is urged that the word is never applied to such a structure, without the use of the word railroad, prefixed or implied; and that it performs none of the functions of a real bridge, as that term was understood in the year 1790.

In all the departments of knowledge, it has been a constant source of perplexity to those who have attempted to reduce discoveries and inventions to scientific rules and classifications, that old terms, with well-defined meanings, have been applied so often to things totally new, either in their essence or in their combination. It is to avoid the danger of being misled by the use of a term well understood before, but which is a very poor representative of the new idea desired to be conveyed, that our modern science is enriched with so many terms, compounded of Greek and Latin words, or parts of words. It does not follow, that when a newly invented or discovered thing is called by some familiar word, which comes nearest to expressing the new idea, that the thing so styled is really the thing formerly meant by the familiar word. Matters most intimately connected with the immediate subject of our discussion may well illustrate this. The track on which the steam-cars now transport the traveller or his property is called a road, sometimes, perhaps gene-

rally, a railroad. The term road is applied to it, no doubt, because in some sense it is used for the same purpose that roads had been used. But until the thing was made and seen, no imagination, even the most fertile, could have pictured it, from any previous use of the word road. So we call the inclosure in which passengers travel on a railroad, a coach; but it is more like a house than a coach, and is less like a coach than are several other vehicles which are rarely if ever called coaches. It does not, therefore, follow, that when a word was used in a statute or a contract seventy years since, that it must be held to include everything to which the same word is applied at the present day. For instance, if a Philadelphia manufacturer had agreed with a company, seventy years ago, to furnish all the coaches which might be necessary to transport passengers between that city and Baltimore for a hundred years, would he now be required by his contract to build railroad coaches? Or, if a company had then contracted with the Government to build and keep up good and sufficient roads, to accommodate mails and passengers between those points, for the same time, would that company be bound to build railroads under that contract? Yet the structure which the defendants propose to build over the Hackensack is not more like a bridge of the olden time than a railroad is like one of its roads, or a railroad coach is like one of its coaches. It is not, then, a necessary inference, that because the word bridge may now be applied by common usage to the structure of the defendants, that it was therefore the thing intended by the act of 1790.

Let us see what kind of structure the defendants proposed to build.

It is an extension of the iron rails, which compose the material part of their road, over the Hackensack River, together with such substructure as is necessary to keep them in place, and enable them to support the cars which cross on them. There is no planked bottom, no roadway or path, nothing on which man, or beast, or vehicle can pass, save as it is carried over in the cars of the defendants. Was this

kind of thing in the minds of the framers of the act of 1790, or of the commissioners who let the contract? Or would the term bridge as then used by them, or by common usage, have included such a thing? We have no hesitation in answering both these questions in the negative. We are therefore quite clear that the adoption of that word to express the modern invention, does not bring it within the terms of the act, if it is not within the intent of it. We will inquire, therefore, a moment, if it is within the spirit of the act, and the accompanying contract with the commissioners.

There is no doubt that it was the intention of those who framed those two documents, to confer on the persons now represented by the plaintiffs, some exclusive privilege for ninety-nine years. If we can arrive at a clear and precise idea what that privilege is, we shall perhaps be enabled to decide whether the erection proposed by defendants will infringe it.

In the first place it is not an exclusive right to transport passengers and property over the Hackensack and Passaic Rivers, within the prescribed limits, for there is no prohibition of ferries, nor is it pretended that *they* would violate the contract. In the next place, it is not a monopoly of the right to build bridges within the prescribed limits, because they were only authorized to build one bridge over each river, and the statute enacted expressly, that it was unlawful to build any other bridge, by any person or persons, without excepting them. Besides, the building of a bridge was not the privilege, but the duty, of those who had the contract; a duty which constituted the consideration for the privilege which was granted to them.

The right to collect toll of persons and things passing over their bridges, is the privilege or franchise which they have, and that right is rendered valuable by the prohibition to build other bridges within the limits designated. This prohibition of other bridges is so far a part of the contract, and only so far, as it is necessary to enable plaintiffs to reap the benefit of their right to collect toll for the use of their bridges. The

extent to which tolls may be levied by the bridge owners, and the classes of persons and things on which they may be levied, are enumerated distinctly, and fixed by the contract. They may be summed up shortly, as persons on foot, animals, and vehicles, passing over the bridges. If the proposed structure is essentially calculated to interfere with, or impair the right of plaintiffs to collect these tolls, we are unable to see it. No animal can pass over it on foot. No vehicle which can pass over the bridge of plaintiffs can by any possibility pass over that of defendants. No class of persons, or things, of which plaintiffs can exact toll, can evade that toll by using the structure of defendants.

It may be said, that passengers and property now transported by that railroad, would be compelled to use the bridge of plaintiffs, if there were no such road and no such viaduct. This might be true to a very limited extent, if plaintiffs could annihilate all railroads running in the direction of the road which passes over their bridge. But this they cannot do. And, as to the road of the defendants, if they are not permitted to pass the Hackensack within the limits claimed by plaintiffs, they can with more expense cross it somewhere else. That being done, it is not believed that the number of passengers, or the amount of freight carried in wagons which would cross on the bridges of plaintiffs, in consequence of this change in the location of the railroad viaduct, is appreciable.

As the plaintiffs have no right to build any more bridges, and as the viaduct of defendants does not impair that which is really their exclusive franchise, we do not perceive how the law which authorizes such a structure can impair the obligation of the contract, made in 1790, by the State, with the bridge owners.

These views are not without the support of adjudged cases, which, if not in all respects precisely such as the one before us, are sufficiently so to show that they were considered, and entered largely into the reasoning upon which the judgments of the courts were founded.

In the *Mohawk Bridge Company* v. *The Utica and Schenec-*

tady Railroad Company,* the plaintiffs claimed an exclusive franchise, similar to that held by plaintiffs in this case, which the defendants, as they alleged, were about to violate by erecting a structure for the use of the railroad, over the same stream, within the prescribed limits. The chancellor refused the injunction upon the ground that the grant to plaintiffs was not exclusive, which was at that time a very doubtful question in New York; and also upon the ground that the exclusive right to the toll-bridge would not be infringed by the erection of a railroad bridge, within the limits over which the exclusive right extended.

In the case of *Thompson* v. *The New York and Harlem Railroad Company*,† where the contest was again between a bridge owner, claiming exclusive rights, and a railroad company seeking to cross the stream within the bounds of plaintiff's claim, the assistant vice-chancellor refers to the case above mentioned, and says that he refuses the relief on both the grounds therein mentioned.

The case of *McRee* v. *The Wilmington and Raleigh Railroad Company*,‡ was an action at law, by the owner of a bridge, who set up an exclusive franchise, against a railroad company whose track crossed the stream within the limits of his franchise, for a penalty allowed by statute for any violation of his right of toll. It is true, that the court rests its decision mainly on the ground, that by the bill of rights of the State of North Carolina, no such monopoly as that claimed by plaintiff can exist. But they argue very forcibly, that a railroad bridge is no violation of a franchise for an ordinary toll-bridge, and intimate strongly that they would so hold if the case required the decision of the point.

The case of the *Enfield Toll-Bridge Company* v. *The Hartford and New Haven Railroad Company*,§ has been cited by counsel and much relied on, as deciding the principle in question the other way. And perhaps a fair consideration of the case, and the line of argument of the learned judge who delivered the opinion, justifies counsel in claiming that

* 6 Paige, 564.

† 3 Sanford, 625.

‡ 2 Jones Law, 186.

§ 17 Connecticut, 56.

it is in conflict with the views we have here expressed. In that case, however, it was found by special verdict, as one of the facts on which the action of the court was asked, that the defendants' road and bridge would, to a certain extent, diminish the tolls of plaintiff; a fact which is not found in the case before us, and which, as we have already shown, we cannot infer from its record. What influence this fact may have had in the minds of that court we cannot say. We are, however, satisfied that sound principle and the weight of authority are to be found on the side of the judgment rendered by the New Jersey Court of Errors and Appeals in this case; and accordingly that

JUDGMENT IS AFFIRMED.

Mr. Justice CATRON, after stating the case:

1st. I think this court has jurisdiction. In the court below the question was, whether the monopoly granted to the turnpike company bound the State not to allow another bridge to be built within certain limits? Such is the claim of the bill. The State court held that the contract claimed to have secured the monopoly was not violated. The contract was construed, and the correctness of that construction we are called on to examine.

2d. The State contracted with the turnpike company not to grant to others the privilege of erecting another bridge within the limits covered by the monopoly; and the contract was violated, if the railroad bridge would be a structure within the meaning of the charter of the turnpike company. The main question presented is, whether the legislature of New Jersey has the power to convey by contract, binding their successors (for ninety-nine years, or forever) not to exercise the sovereign right of improving the State by additional roads and bridges? If so, then the left bank of the Delaware and the right bank of the Hudson could be granted by an irrevocable contract, whose obligation was beyond the reach of future legislation.

3d. That the bridge being erected by the railroad company is within the meaning of the grant to the turnpike

company, and violates it, is to my mind free from doubt. The object was to confer a monopoly of crossing the river by the turnpike bridge only, and that this railroad bridge can, and probably will, engross the carrying of passengers and freight, to the injury and probable ruin of the value of the turnpike bridge, is evident. The legislature, in the railroad charter, has made careful provision that just compensation shall be made for private property taken for the purposes of the road; and as the bridge and abutments are part of the road, it is assumed by the railroad company that the contract set up by the bill can be compensated in money. If the turnpike bridge had been taken by the railroad company, then it is conceded that a right to compensate existed. But the difficulty of dealing with a sovereign right as private property, which is claimed by the old corporation, presents the difficulty lying at the foundation of this controversy. Here are the proprietors of the land on each side of the river, whose right to just compensation is not open to controversy, if their lands are taken; their claim is for private property, and the land is taken by the sovereign right claimed by the turnpike company. It can only come in to be compensated for *public* property, which the eminent domain clearly is. For the private property taken on either bank of the river, underlying the eminent domain, the new company has already paid. But, for this public sovereign right no second compensation is provided by any constitution; it is only in cases of "private property taken for public use," that just compensation is secured to the owner.

If, however, I am in error in this assumption, then there is a provision, plain and simple, in the railroad charter, securing compensation, which obviates all objection to the erection of the railroad bridge, and on this ground I think it very clear that the bill was properly dismissed.

Mr. Justice GRIER, dissenting:

I do not concur in the opinion just read by my brother Miller; not that I question the correctness of the judgment of the Court of Appeals of New Jersey; but this court, by

affirming their judgment as to the true construction of the act of 1790, have demonstrated that they have no jurisdiction of the case.

The act of 1860, it is clear, is not repugnant to the Constitution or laws of the United States. The proposition that one legislature can restrain the power of future legislatures from erecting a bridge for ninety (and if ninety, a thousand) years, for a distance of ten miles (and if ten, a hundred), will hardly be asserted by any one.

That a State may, in its exercise of eminent domain, condemn a franchise as it might lands, cannot now be disputed.

Now, the act of 1860 protects carefully all the rights of the defendants under the act of 1790, and requires compensation to be made them if they are injured.*

The complaint is not that the legislature have passed any act impairing the obligation of the contract, but that the courts of New Jersey have misconstrued the act of 1790, which gives them their franchise. Now, it cannot be pretended that the validity of this act is drawn in question on the ground of repugnancy to the Constitution. Their own courts have decided that a railroad viaduct is not a "bridge," and the aim of the plaintiffs in error, by this writ of error, is to have this court to give a different construction to their charter. If, besides, the plain words and intention of the act of Congress conferring jurisdiction on this court under the 25th section, a decision of this point were necessary to demonstrate the unwarranted assumption of jurisdiction in this case, it will be found in the unanimous opinion of this court in *Commercial Bank of Cincinnati* v. *Buckingham.*† That case was decided after very full argument by able counsel. It was the unanimous judgment of this court. It is precisely in point, and it may be said in this case as in that, "If this court were to assume jurisdiction of this case, it is evident that the question submitted for our decision would be, not whether the statute of Ohio is repugnant to the Constitution of the United States, but whether the Su-

* See ante, p. 119; note. REP.

† 5 Howard, 342.

preme Court of that State has erred in its construction of it. It is the peculiar province and privilege of the State courts to construe their own statutes, and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretence that their judgments have impaired the obligation of contracts."

I therefore protest against this decision of the court as usurpation of jurisdiction not given to us by the Constitution or the acts of Congress. It disregards the plain words of the statute and the unanimous ruling of this court. If it be received as a precedent, it will draw to the examination of this court the construction of every act of incorporation or grant of a franchise by a State legislature. The clause of the Constitution which forbids a State to pass any act impairing the obligation of contracts will have to be construed as a general power given to the courts of the United States to restrain the courts of a State from making mistakes in the construction of their own statutes.

The opinion of my brethren of the majority, in order to sustain this assumption of jurisdiction, takes it for granted that, as a franchise is a contract, a State, in the exercise of its right of eminent domain, cannot condemn a franchise by paying its value, as well as the land of an individual. This is directly contrary to frequent decisions of this court. Yet such is the act of 1860. As I have said, it carefully saves the rights of plaintiffs, and directs compensation to be made in case of any injury to the same. I cannot give my assent to a decision founded on such an assumption, or which may hereafter be quoted to establish such a doctrine.

JONES ET AL. *v.* MOREHEAD.

1. The claim of Sherwood, under his patent, granted in 1842, and extended in 1856, for "a new and useful improvement in door-locks"—so far as the claim is for "making the cases of door-locks and latches double-faced, or so finished that either side may be used for the outside, in order that the same lock or cased fastening may answer for a right or left

hand door, substantially as described;" that is to say, the *first* claim in his schedule, is for a thing which is not original with him and void. And the question is raised by the court, but not decided, whether "the making of the case which incloses the internal works of the lock, with two faces just alike, and so well finished-off in point of style, that either side may be presented outwards, is a matter which could be patented, if no locks with such cases had ever been made before?"

2. This *part* of the invention known as the Janus-faced lock, not being original, no action lies by Sherwood or his assignees, for using it in combination with other inventions not patented by that person; nor can persons so using it be made infringers by an argument which, assuming the validity of Sherwood's invention, mingles it with these other parts, and then treats the whole as a *unit*, and gives to him or his assignees damages equivalent to the net profits on the manufacture of the entire lock.

3. Where parties in their answer, as originally filed, to a bill for infringing a patent, admit that they did manufacture and sell the articles alleged to have been patented, the fact thus admitted in the answer must be accepted as established. As, however, the admission need go no further than its terms *necessarily* imply, the court will, under special circumstances, and where this is promotive of justice, assume that the smallest number of articles were made consistent with the use of the word involved, in the plural, and with the use by the defendants of any part of the patent which is valid.

THIS was a bill filed in the Circuit Court for the Western District of Pennsylvania, to restrain the infringement of a patent for protecting the manufacture of a certain sort of door-locks, called Janus-faced locks, and for an account; the parties to the suit being two large manufacturing firms in the city of Pittsburg. The history of the invention or claim of invention in question, was essentially thus: Till within a few years past most of the door-locks used in this country, were imported from England. It was thought desirable, therefore, to have, invent, or use some plan by which this article could be obtained more cheaply and better than the imported, notwithstanding the higher price of labor here; the article of door-locks being one of immense consumption in this country. This object was in part effected by making the locks of cast iron; but some difficulty in the way of these cheaper productions was thought to exist in the fact that door-locks had to be made "*right and left*," and that a lock made for a right-hand door had to be turned upside

down in order to be used on a left-hand door, and *vice versa*. It was conceived, therefore, that if this difficulty of right and left hand locks was obviated, and every lock made equally capable of use on right or left hand doors, an advantage might be gained. An American, named Sherwood—under whom the complainants claimed—conceiving that he had invented a mode of effecting the object, and that finishing a lock on both faces was an invention and proper subject for letters, procured a patent in 1842 (extended in 1856), and established a manufactory of this sort of lock. His patent was for "a new and useful improvement in door-locks." The language of his schedule was as follows:

"What I claim as my invention, and for which I desire an exclusive right by letters patent, is, making the cases of door-locks and latches *double-faced*, or so finished that *either* side may be used for the *outside, in order that the same lock or cased fastening may answer for a right or left hand door*, substantially as described.

"I also claim the peculiar construction and double action (upon an inclined and horizontal track or way) of the locking car B, as hereinbefore described, and the combination of the locking car B and safety cars G G^2 with one another, and with the connecting or vibrating bar and bolt A, as within described, so as to fasten the bolt *c* securely and prevent its being picked.

"I also claim so constructing the bolt as hereinbefore described, that by simple turning it over in the lock-case, it is adapted to a right or left-hand door."

But the two improvements claimed in the second and third of these claims, were superseded soon after Sherwood had obtained his patent, by the invention of a certain Calvin Adams,—*this Adams being a member of the firm who were the defendants in this suit. He*, applying his improvement in the specific internal arrangement to the *case* of the lock, as Sherwood had claimed and obtained a patent for *that*, made a new combination, called the Janus-faced lock, whose manufacture, the complainants—successors to Sherwood's rights—had brought this bill to restrain and have an account of. It was not proved nor argued that the defendants had used

any part of Sherwood's patent, except the double-faced casing. In fact, no locks with the particular internal mechanism specified in Sherwood's patent were ever made, except one or two made by Sherwood himself.

The defendants below answered the bill, *admitting that they had made locks of the kind described in the patent*, and claiming that *they* were the rightful owners of that patent from Sherwood, and therefore had a right to manufacture those locks. Upon this issue considerable testimony was taken, when the defendants becoming satisfied that they were not the legal owners of the patent, asked leave to amend their answer by *denying that they had ever made locks of the kind described in it;* and by asserting that the patent was invalid for want of novelty. The Circuit Court permitted them to assert the invalidity of the patent as wanting novelty, but *refused to allow them to deny that they had manufactured the locks* described in it. The admission that they *had* manufactured them stood, therefore, on the record as it came up to this court.

On the trial below—under the defence of want of originality—great numbers of locks were brought into court, many of which were older than Sherwood's, and were undoubtedly cased on both sides. Certain ones were particularly relied on: two from the gates of the New York City Hall; one from the Custom House in that city; one or more from the City Hospital, and one from the gate of St. Mark's Church. Several manufacturers of reputation, who were offered as experts, testified that in their opinion these were not essentially different in principle from Mr. Sherwood's lock. The counsel below for Sherwood's patent argued, however, that no one of these locks had been made with an *intention* to obviate the difficulty of having right and left hand locks, or that practically any of them had been so used, or that any person, before Sherwood, in seeing one of them, had thus applied them, or perceived that they could be so applied. He contended, with a greater or less degree of force, that the Custom House lock was, in fact, from an open outdoor gate; that its inside was covered tight, in order to preserve the works of the lock from the weather and from rust,—a device

necessary in all outdoor gate locks; that it was not well suited for a Janus-faced lock, and was *finished* on one side only; that it was a left-hand lock, and not a door-lock properly speaking, at all. The lock taken from the City Hospital gate, he argued, was a dead lock, a right-hand lock; though he admitted, that by putting it wrong side out, and making some alterations, it might be converted into a left-hand dead lock. The same he thought was to be said of the gate-lock of St. Mark's Church, and of all the others. The Circuit Court reporter, in reporting the case, says, however (*see Legal Intelligencer*, vol. xviii, p. 293): "And yet undoubtedly to the eye of high inventive genius, *the finished production of Sherwood was visible in nearly every one of these ruder productions.* It required but the vital spark of genius to kindle the train, and to convert, in an instant, the manufacture designed for one purpose, into an object applicable to quite another." The question, of course, was one, in a large degree, of inspection. The locks which were exhibited below, having been made exhibits in the case, were now all exhibited here.

The Circuit Court entirely sustained Sherwood's claim; remarking, that although the makers of these other locks were *near* inventing the "double face," and might have done so,—if they had only thought of it,—yet that these persons had not actually invented it, or certainly had not *so* done it as to make their discovery practically useful. The testimony of the experts, the court conceived, "when analyzed, amounted to this, and no more: that these gate-locks, being covered on the inside, might, by a little change, have been made into Janus-faced locks, though not so intended by the maker,"—a fact which was now apparent to any mechanic who had the patented invention before him.

The injunction prayed for was accordingly granted, and a reference for an account ordered. The injunction restrained the defendants from "making, constructing, vending, or using in any way the said invention and improvements, or either of them, *or any part thereof*, mentioned and described in the said patent."

Upon the coming in of the account as settled by the master,—the account being settled in part *upon proofs adduced by the complainants as to the fact and extent of the defendants' manufacture of these locks, the original admission being apparently not relied on*,—it appeared that the *net* profits upon all the locks (*including every part of the locks*), which the defendants made or sold, were $13,282.92. The complainants claimed this entire sum; and indeed that it should be "trebled." The defendants denied that they were liable to profits on *the whole* lock, or for any profits except those properly springing from the *case* of the lock; that part of it alone of which Sherwood claimed to be the inventor, and of which, notwithstanding their resistance, he had just been declared by the court the rightful patentee. They contended that the court should apportion this sum of $13,282.92, reported as their profits, to the different *parts* of the lock; the *profits* on each part being fixed on an arithmetical proportion to the *cost* of each. The account, then, would stand thus:

Profits *on the case (the "improvement" for which Sherwood got his patent)*,	. . . . .	$3,123 48
" latch and keeper,	. . . . .	1,221 53
" other parts of the lock,	. . . . .	4,577 01
" trimmings,	. . . . .	4,360 90
		$13,282 92

The said Circuit Court, however, was not of this opinion; conceiving that although a patentee might describe his invention as an *improvement*, still, if the machine constituted a distinct machine,—a specific article known in the market,—on account of its peculiar functions, the measure of damages for infringement was the profit on the whole machine. The view was thus set forth by the judge delivering the opinion of that court:

"The great question recurs: Is this Janus-faced lock a peculiar and distinct machine, introduced into market as a cheaper and better article than other machines without the peculiar characteristic of the patented one? Does the value of the patent to its owners consist in the close monopoly of the right to make

and sell this species of lock as one individual machine? Has it peculiar characteristics which distinguish it from other machines of the same genus, and which give it a peculiar value in the market? If so, the complainants have a right to demand that the defendants, having infringed their exclusive right to make and sell this peculiar machine or manufacture, are justly liable to refund all the net profits made by such infringement. If, on the contrary, the patent is for some addition or improvement on an old and well-known implement, or some separate part or device thereof of small importance compared with the whole,—if the license to use the improvement or addition was sold as separate and distinct from the whole machine, the measure of damage would be the price of a license, and not the profit made by the exclusive right to make and sell the whole machine."

[The Circuit Court next stated that Court's idea as to the originality and merits of the invention, and continued]:

"The claim of the Sherwood patent was, for 'making the case of door-locks and latches double-faced, or so finished that either side may be used for the outside.' The arrangements of the internal parts of the lock, and devices necessary to such a lock, are set forth in the specification. They were rather complex, and required that, in order to change the lock from a right-hand to a left-hand lock, that it should be opened and some change made in the position and arrangement of the internal parts For the purpose of the present discussion it is unnecessary to describe these devices. The name 'Janus-faced' locks was given to this machine to distinguish it from others which had not its peculiar qualities.

"Now, it is evident, that although the patent of Sherwood may be said to be for an improvement in the manufacture of locks, a well-known implement or machine; nevertheless, the lock contrived by him was a new and distinct species, having certain qualities differing from all other locks; that the Janus-faced lock is a specific article (although of the genus lock), known in the market, having peculiar value; and that the value of the monopoly granted by the patent consisted in the exclusive right to manufacture this peculiar machine without any competition, and have all the profits of such a monopoly. The respondents have made large gains by trespassing on the rights of the complainants. The profits they made by this trespass justly

belong to the true owner. They have partaken equally with the complainants in the profits of the monopoly granted to them alone, without license, and in defiance of their rights. The only measure of the redress to which the complainants are entitled is an account of the actual profits made by respondents. The machine being a *unit*,—a specific article well known in the market, having peculiar value because of the patentee's discovery or invention,—the attempt to arbitrarily divide the profits of the monopoly of the whole machine among its parts is without precedent, and receives no countenance from the case of *Seymour* v. *McCormick*,* which has been relied on for an opposite idea."

The court accordingly confirmed the master's report giving to the complainants the whole profits, $13,282.92; and decree was entered accordingly.

Appeal to this court now brought before it,—

1. The originality of Sherwood's invention as set forth (*ante*, p. 157) in his *first* claim,—the claim, to wit, in these words: "What I claim as my invention, and for which I desire an exclusive patent, is making the cases of door-locks and latches double-faced, or so finished that either side may be used for the outside, in order that the same lock or cased fastening may answer for a right or left hand door, substantially as described."

2. The correctness of the idea of *unity* in machines as held, *apparently*, *from this record*, by the court below.

The case was argued by *Mr. Gifford for the appellant, and by Messrs. Browning and Bakewell contra.*

Mr. Justice MILLER delivered the opinion of the court:

It is the first claim as set forth which defendants charge to be invalid for want of novelty, and in this we think they are sustained by the testimony.

Indeed it may be doubted if the making of the case which incloses the internal works of the lock, with two faces just alike, and so well finished off in point of style that either side may be presented outwards, is a matter which could be

* 16 Howard, 480.

patented, if no locks with such cases had ever been made before. But we are not called on to decide this point, and therefore pass it without further comment.

Several locks were produced on the trial below, and were shown to us here—being made exhibits by the record—which we are satisfied are the same in principle as the double faces of the Sherwood lock. Two of these locks are from the gates of the New York City Hall. They are cased both sides alike, inclosing the internal works completely, and are so finished that one side may be presented outward as well as the other, and the locks can be applied to a door swinging from right to left, or from left to right. Locks from the City Hospitals having the double-faced case, both sides alike, have also been produced, and one from the entrance gate of St. Mark's Church. A lock from the Custom House is shown, which has the double-faced case, both sides alike, and which by being turned laterally, can be used for a door opening either to the right or left, without even turning the keyhole upside down. These locks are all proven to have been in use several years before Sherwood set up any claim to his invention. They are taken from the most public places in the great commercial city of the Union. These facts are incompatible with the claim of novelty on the part of Sherwood, for this part of his patent.

As to the two remaining claims in the schedule accompanying the patent, it appears clearly that they were never infringed by defendants. In fact no locks were ever made with the particular internal arrangements as to bolts, latches, &c., specified in Sherwood's patent, except one or two by Sherwood.

Very shortly after he obtained his patent, one Calvin Adams made an improvement upon it, which entirely superseded the use of the specific internal arrangement claimed by Sherwood in his invention. Combining this improvement with the double-faced case of Sherwood, Adams made a lock which has ever since been known as the Janus-faced lock, and which is the lock manufactured by complainants, of whom Mr. Adams is one.

It is not shown by any proof in the case, that defendants ever used any part of Sherwood's patent, except the double-faced casing. Nor is it seriously claimed in argument that they did. But it is urged that this double-faced case, when used in connection with a latch or bolt and keeper, susceptible of such an arrangement that it may be placed upon a door opening either to the right or left, constitutes a unit, and the real invention of Sherwood, which is infringed by the defendants.

This mode of viewing the matter cannot be admitted. Sherwood claims that he is the inventor of three distinct parts going to make up his lock, which thus made up answers a certain purpose, namely, a lock capable of being applied indifferently to a door opening from the right or left. Two of these claims have been long since superseded by other improvements, and abandoned by everybody, and have never been used by the defendants. The other claim which they have used is found to be invalid for want of novelty. What is left of the Sherwood patent? It is clear that no part of the patent which is valid has been used by defendants, and they cannot be made infringers by an argument that mingles the valid and invalid parts of a patent, and calls it a unit; and then claims that defendants are infringers because they have used one part of this unit, although it was a part as to which the patent is void.

It therefore appears that, in point of fact, the defendants have not infringed the Sherwood patent, and if we were unembarrassed by the pleadings, we should dismiss the bill with costs.

But the defendants have admitted in their answer, that they did make locks as described in Sherwood's patent, and when they afterwards asked leave of the court to retract that admission and deny the infringement, the court refused such permission. This request was made after the issue was made up, after much testimony had been taken, and its object was to deny a fact previously admitted under oath. It was a matter in the discretion of the Circuit Court, and we are not disposed to review its action on that subject here.

under these circumstances, if indeed it can be done under any.

An effort has been made by counsel to show that this admission has been waived, by the act of plaintiffs, in going into the proofs, and otherwise treating it as an open question. But this would violate a principle of universal application, both in proceedings at common law and in chancery, to wit, that the proofs must correspond with the allegations. It would be subversive of all sound practice, and tend largely to defeat the ends of justice, if the court should refuse to accept a fact as settled, which is distinctly alleged in the bill, and admitted in the answer.*

The fact that the defendants did manufacture and sell locks of the character of those patented by Sherwood, must be accepted as established in this case by the pleadings. The admission, however, need go no further than its terms necessarily imply. The language of the admission is satisfied, by assuming that the smallest number of *locks* were made, consistent with the use of that word in the plural, and with the use by defendants of any part of the patent which is valid.

The Circuit Court, by its decree, ordered an injunction, restraining defendants from making, using, and vending said invention, or *any part thereof*, mentioned in said patent; and the payment by defendants to plaintiffs of $13,282.92 profits made by them.

The result of the views we have expressed is, that this decree must be reversed, and the injunction modified so as to restrain the defendants from using any part of the Sherwood patent, except that embraced in the first claim of invention mentioned in the schedule attached to said patent, and a decree rendered for a nominal sum of one dollar for profits.

The appellants in this court must recover their costs.

DECREE ACCORDINGLY.

* Crocket *v.* Lee, 7 Wheaton, 522.

Statement of the case.

SWEENY ET AL. *v.* EASTER.

1. The indorsement of negotiable paper with the words "*for collection,*" restrains its negotiability; and a party who has thus indorsed it, is competent to prove that he was not the owner of it, and did not mean to give title to it or to its proceeds when collected.
2. Where a banker, having mutual dealings with another banker, is in the habit of transmitting to him in the usual course of business negotiable paper for collection, the collection being in fact sometimes on account of the transmitting banker himself, and sometimes on account of his customers, and fails, owing his corresponding banker a balance in general account,—

   I. Such corresponding banker cannot retain to answer that balance any paper so transmitted for collection, and really belonging to third persons, if he knew it was sent for collection merely.

   II. Neither can he retain it, if he did not know that it was so sent, unless he have given credit to the transmitting banker, or have suffered a balance to remain in his hands, to be met by the paper transmitted or expected to be transmitted in the usual course of dealings between them.

   III. But if the receiving banker have treated the transmitting banker as owner of the transmitted paper, and had no notice to the contrary, and upon the credit of such remittances, made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the transmitting and now failed banker, to be met by proceeds of such negotiable paper transmitted, then the receiving banker is entitled to retain the paper or its proceeds against the banker sending it, for the balance of account due him, the receiving banker aforesaid.
3. A charge which lays down the law in this way upon the case supposed, is correct; and as respects the knowledge of or notice to the receiving banker, it is unimportant from what source he have derived it; nor need instructions in such a case as is above supposed be given on that point.
4. Instructions are rightly withheld, which would refer to the jury the interpretation of the indorsement on negotiable paper; and leave them to determine a case, special in its circumstances, on the face of the paper and the custom of bankers generally; which, for example, in a case where paper was indorsed "*for collection,*" and where, by the course of dealing between the parties, paper was frequently sent for collection *only*, would leave the jury to find that title passed generally, because bankers testified that, by the *general custom and usage of bankers*, negotiable paper, indorsed as mentioned, and transmitted for collection, would be held and treated as the property of the banker transmitting it.

EASTER & Co. brought trover, in the Circuit Court for the District of Columbia, against Sweeny, Rittenhouse, Fant

& Co., bankers of Washington City, to recover the value of certain negotiable *notes* belonging to them, the first named persons, and which they had indorsed in blank and placed in the hands of Harris & Sons, bankers of Baltimore, for *collection and for no other purpose.* Harris & Sons forwarded the notes to Sweeny, Rittenhouse, Fant & Co., who were their correspondents in Washington, having first indorsed them thus:

"Pay Sweeny, R., F. & Co., or order, *for collection.*

SAM'L HARRIS & SONS."

Before the notes fell due, Harris & Sons failed, owing Sweeny, Rittenhouse, Fant & Co., a balance in general account. The last-named house claimed accordingly to hold this paper, forwarded to them as before said, to cover whatever sum might be found due on a settlement. And this was the defence to the suit.

At the trial of the cause the plaintiffs offered R. H. Harris, *one of the firm of Harris & Sons*, to prove that the notes in controversy were the property of plaintiffs, and that they had deposited them with Harris & Sons for *collection only.* The defendants objected to the witness on the ground of his being one of the indorsers. The court overruled the exception.

On being held competent, the witness testified that the plaintiffs, after their indorsement in blank, continued to be the owners of the notes, and that such indorsement was merely to enable Harris & Sons to collect; that Harris & Sons, in remitting discounted paper, having time to run, to the defendants, indorsed the same generally, "*Pay to the order of,*" without saying, "*for collection,*" and that where paper was not discounted, but deposited for collection, it was the practice of Harris & Sons to notify to the defendants, either by a mark on the paper or by the letter of advice, not to protest the same, and that the private transactions between Harris & Sons and the defendants were kept distinct from their business as collection agents, and were carried on by Harris & Sons in separate letter-books.

On cross-examination he testified, that this practice of Harris

& Sons, of distinguishing in transmitting paper to the defendants, was *not uniform*, but depended on the wish of the customer depositing the paper not discounted, and that it extended only to paper having time to run, and did not apply to checks, or sight drafts, or other cash paper, as to which the business was managed as if Harris & Sons were the absolute owners of the paper; and that said practice *was only the private practice of Harris & Sons, and that witness never informed defendants of the same, nor did he know they were ever informed thereof; nor, so far as he knows, did they ever have any information as to the practice of Harris & Sons of keeping distinct the business relating to discounted time paper and to time paper belonging to customers, by the use of separate letter-books, or otherwise, as testified by him.*

The defendants then proved that for about two years prior to the date of these transactions, there had been mutual and extensive dealings between them and Harris & Sons; that Harris & Sons transmitted, from time to time, to the defendants, negotiable paper for collection; and that, by the uniform course of dealing between the parties, Harris & Sons were treated and dealt with as the owners of the paper so transmitted; that accounts current were kept by the defendants, in which the proceeds of such paper were, when received, credited to said Harris & Sons, and they were charged with all expenses; and that accounts were transmitted monthly to said Harris & Sons, and acquiesced in by them; that upon the credit of such negotiable paper so transmitted or expected in the ordinary course of business, and of such course of dealings, large drafts were drawn from time to time by Harris & Sons, and paid by the latter, and that, upon such credit, large ascertained balances were allowed to remain in the hands of said Harris & Sons, to be met by the proceeds of such negotiable paper; and that, in all respects, the paper so transmitted was regarded, treated, and dealt with by the defendants, and said Harris & Sons, as the property of the latter; and that a similar course of dealing obtained in regard to negotiable paper transmitted by defendants to said Harris & Sons; that the notes in controversy

were regarded, and dealt with as the property of Harris & Sons, and that the defendants had no notice or knowledge, until after the insolvency, that this paper was not their property, or that the plaintiffs had any interest in it; and that the balance due the defendants on general account, at the time of the insolvency, had been suffered to remain undrawn, on the faith and credit of the paper in controversy, and the course of dealing aforesaid. The defendants further proved that Harris & Sons, at a date specified, and about three months before the failure, when there was a balance against them, on general account, of $3326.94, had drawn on the defendants for $244.08, *the defendants being then the holders of a large amount of negotiable paper, indorsed and transmitted in the same manner as the notes in controversy, and among it certain notes, indorsed by the plaintiffs in blank, and transmitted in a similar manner to the notes in controversy.* And the defendants offered evidence, by witnesses largely engaged in the business of banking, that by the general custom and usage of bankers, negotiable paper transmitted and indorsed as the notes in controversy, would be held and treated as the property of the bankers transmitting them.

The court instructed the jury as follows:

"1. If Sweeny, Rittenhouse, Fant & Co., the defendants in this action, at the time of the mutual dealings between them and S. Harris & Sons, had notice that Harris & Sons had no interest in the notes in question, and that they transmitted them for collection merely as agents, then the defendants are not entitled to retain against the plaintiffs for the general balance of their account with S. Harris & Sons.

"2. And if the defendants had *not* notice that Harris & Sons were merely agents, but regarded and treated them as the owners of the paper transmitted, yet the defendants are *not* entitled to retain against the real owners, *unless* credit was given to Harris & Sons, or balances suffered to remain in their hands to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of dealing between them.

"3. But if the defendants regarded and treated Harris & Sons as the owners of the negotiable paper which they transmitted for collection, and had no notice to the contrary, and upon the cre-

dit of such remittances made, or anticipated, in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of Harris & Sons, to be met by the proceeds of such negotiable paper, then the defendants are entitled to retain against the plaintiffs for the balance of account due from Sam. Harris & Sons."

No exception was taken by the defendants to these instructions; but they prayed the following *additional* instructions, to wit:

"That the private practice of Harris & Sons, in transmitting negotiable paper having time to run, whereby they intended to distinguish between negotiable paper discounted by them and that received for collection, as given in evidence by the witness Harris, was not competent to charge the defendants with notice as to whether the paper in controversy was discounted by and belonged to the said Harris & Sons, or was transmitted for collection, unless the jury shall find from all the evidence in the case, that the defendants had knowledge of such private practice. And that in *the absence of such knowledge the defendants were authorized to treat such paper according to what it purported on its face to be, and the general custom of bankers* in the District of Columbia and elsewhere offered in evidence."

This instruction the court declined to give. The jury found for the plaintiff.

Two exceptions were taken in the case.

The first, to the admission of R. H. Harris, one of the firm which indorsed the paper, to prove what he did prove.

The second, to the refusal of the court to give the *additional* instruction asked for.

Mr. Davidge, for the plaintiff in error, contended:

1. That the effect of the testimony of R. H. Harris was to vary the legal import of the paper; a matter which, as the paper was negotiable and he a party to it, he could not do; it being settled in this court that a party to such paper cannot be permitted either to invalidate or contradict it, or to vary its legal import. Upon this point he cited decisions in this court, as follows: *Bank of the United States* v. *Dunn*

(6 Peters, 51); *Bank of the Metropolis* v. *Jones* (8 Id., 12); *Henderson* v. *Anderson* (3 Howard, 73); *Saltmarsh* v. *Tuthill* (13 Id., 229).

2. That the court should have given *additional* instructions to the jury, as prayed, that the private practice of Harris & Sons was of no effect unless the defendants knew of it, &c. The instructions given did not cover the whole case. They related to the facts to be found in support of a verdict for either party; while the instruction asked for and rejected related exclusively to a *rule of evidence* to guide the jury in the ascertainment of one of those facts, to wit, the fact of notice.

Mr. J. H. Bradley, contra:

1. The reason of the rule asserted by the law for rejecting an indorser of negotiable paper, fails. The house to which the witness belonged had not by indorsement assisted to give currency to the notes. They had done the reverse of it by the peculiarity of their indorsement; an indorsement which gave notice to every one that the notes were held and transmitted for collection only. "A *negotiable* bill or note," said Chief Justice Gibson, of Pennsylvania,* "is a courier without luggage. A memorandum to control it, though indorsed *upon it*, would be incorporated with it, and destroy it." The expression here used, "for collection," is luggage, which the note could not carry, and yet remain free. The witness not having assisted to give currency to the paper, but having destroyed the currency, was competent, though he indorsed paper originally negotiable.

2. The instruction refused limits the direction of the court to the fact that the defendants had *knowledge of the private practice* of Harris & Sons, in indorsing paper deposited with them for collection, and excludes every other source of knowledge that the paper claimed by plaintiffs was their property, and never had been the property of Harris & Sons; and asks the court to instruct the jury that in the absence of such knowledge, that is *of the alleged private practice of Harris &*

* Overton *v.* Tyler, 3 Pennsylvania State, 348.

Sons, the defendants had a right to treat such paper according to what it purported on its face, &c.

The court could not have given such an instruction without invading the province of the jury, and determining the weight of the other evidence in the cause.

The court had already submitted the cause to the jury on instructions, not excepted to; and this instruction asks them to segregate a single part of the evidence, and to say that this single part, standing alone, was not sufficient to establish the plaintiffs' right to recover. To have granted this would have been to mislead the jury from the points clearly and precisely prescribed in the instructions previously given.

Mr. Justice MILLER delivered the opinion of the court:*

The first exception was to the admission of R. H. Harris, of the firm of Harris & Sons, as a witness.

Neither that firm nor any of its members were parties to the suit, nor is it pretended that the witness was in any manner interested in the event of it. But it is claimed that because the name of the firm of which he is a partner, is indorsed on the negotiable paper which is the subject-matter of this suit, he cannot, being a party to such paper, be permitted to invalidate, or contradict it, or vary its legal import.

The objection as thus stated embraces two distinct propositions. *First*, that a party to a negotiable instrument shall not be permitted to impeach or render invalid, the paper with which he thus stands connected. *Second*, that he cannot be permitted to contradict or vary the legal import of the original paper, or such indorsement as he may have made on it, by parol testimony.

The latter objection applies to the character of the evidence, without regard to the person offered as a witness, and would be as effectual against testimony from the mouth of a person who had no connection with the paper, as from an indorser or maker of it.

* Mr. Chief Justice Taney and Messrs. Justices Wayne and Grier, being indisposed, were absent.

Opinion of the court.

This is not a suit on the paper, or against any of the parties to it. It is an action of trover, for the wrongful conversion of the paper, in which plaintiffs seek to recover its value. The firm of Harris & Sons sent it to defendants, who were their banking correspondents, for collection; and they made a special indorsement on it, thus: "*Pay Sweeny, R., F. & Co., for collection.* SAM. HARRIS & SONS."

Now, does this testimony of the witness, to the effect that Harris & Sons were not the owners of the paper, and did not sell it to defendants, or intend to give them any lien on, or title to the paper, or its proceeds when collected, contradict or vary the legal import of this indorsement? We cannot see that it does. It rather explains the transaction in perfect conformity with the real meaning and effect of the indorsement. The words "for collection" evidently had a meaning. That meaning was intended to limit the effect which would have been given to the indorsement without them, and warned the party that, contrary to the purpose of a general or blank indorsement, this was not intended to transfer the ownership of the note or its proceeds. If defendants acquired any interest in the paper, it was not by virtue of that indorsement, but by some course of dealing with Harris & Sons, or by some other matter outside of the indorsement. The character of this indorsement also takes the case out of the rule asserted in the first proposition embraced by the exception.

Perhaps no subject connected with commercial paper has been more the subject of controversy, and of opposing and well-balanced judicial decisions, than the proposition here relied on. It was first laid down in the English courts in the case of *Walton* v. *Shelley*,* and afterwards held the other way in *Jordaine* v. *Lashbrooke*.† This court, however, has steadily adhered to the doctrine of *Walton* v. *Shelley*, and we are referred by counsel for plaintiffs in error to our own decisions on this subject in 6 Peters, 51; 8 Peters, 12; 3 Howard, 73; 13 Howard, 229.

The rule propounded in *Walton* v. *Shelley* is, that a person

* 1 Term, 296.

† 7 Id. 601.

who has placed his name on a negotiable paper as a party to it, shall not afterwards, in a suit on such security, be competent as a witness to prove any fact which would tend to impeach or invalidate the instrument to which he has thus given his name. The reason of it is, that it is against good morals and public policy to permit a person who has thus aided in giving currency and circulation to such paper, to testify to facts which would render such paper void, after he has thus imposed it upon the public as valid, with all the sanction which his name could give it.*

The indorsement in the present case was not intended to give currency or circulation to the paper. Its effect was just the reverse. It prevented the further circulation of the paper, and its effect was limited to an authority to collect it. No principle of public policy would be violated, nor any fraud upon innocent holders of the paper would be perpetrated, by permitting the parties who made that indorsement to testify to facts which are in perfect harmony with its language and its intent.

Again, the testimony does not tend to invalidate the paper, or any indorsement on it. The defendants could not have recovered of Harris & Sons on that indorsement if the notes had been protested in their hands; and they were therefore deprived by that testimony of no right which the indorsement gave them; nor was such indorsement impeached or impaired by the testimony.

This exception must be overruled.

The second exception was taken to the refusal of the court to grant an instruction to the jury prayed by plaintiffs in error. The instruction asked is as follows:

"And the private practice of Harris & Sons, in transmitting negotiable paper having time to run, whereby they intended to distinguish between negotiable paper discounted by them and that received for collection, as given in evidence by the witness Harris, is not competent to charge the defendants with notice as to whether the paper in controversy was

* Walton *v.* Shelley, 1 Term, 296; Bank of United States *v.* Dunn, 6 Peters, 57; Bank of the Metropolis *v.* Jones, 8 Id., 16.

discounted by and belonged to the said Harris & Sons, or was transmitted for collection, unless the jury shall find, from all the evidence in the case, that the defendants had knowledge of such private practice; and in the absence of such knowledge, the defendants were authorized to treat such paper according to what it purported on its face, and the general custom of bankers in the District of Columbia and elsewhere, offered in evidence."

This prayer contains two propositions, the one relating to the knowledge of defendants of certain private modes of doing business of Harris & Sons; and the other, to what the jury were authorized to infer, from certain other circumstances, in the absence of such knowledge on the part of defendants.

The instructions which were given by the court, and which are in the record, were full and sound on the first of these propositions, and we think were all that was necessary on both branches of the prayer. But the second branch of the instruction asked is objectionable, because it referred to the jury the interpretation of the indorsement on the paper, and also required of them to determine the case on the face of the paper, and the custom of bankers alone, without reference to the special facts proven in regard to the course of dealing between defendants and Harris & Sons. The charge of the court left all these matters of fact to the jury for their consideration, after a full and fair statement of all the principles of law which were necessary to a sound verdict.

We see no error in the record, and therefore the judgment of the Circuit Court is

AFFIRMED WITH COSTS.

GELPCKE ET AL. *v.* THE CITY OF DUBUQUE.

1. By a series of decisions of the Supreme Court of Iowa prior to that, A.D. 1859, in *The State of Iowa, ex relatione*, v. *The County of Wapello* (13 Iowa, 388), the right of the legislature of that State to authorize municipal corporations to subscribe to railroads extending beyond the limits of the city or county, and to issue bonds accordingly, was settled in favor of the right; and those decisions, meeting with the approbation

of this court, and being in harmony with the adjudications of sixteen States of the Union, will be regarded as a true interpretation of the constitution and laws of the State so far as relate to bonds issued and put upon the market during the time that those decisions were in force. The fact that the said Supreme Court of Iowa *now* holds that those decisions were erroneous, and ought not to have been made, and that the legislature of the State had no such power as former courts decided that they had, can have no effect upon transactions in the past, however it may affect those in the future.

2. Although it is the practice of this court to follow the latest settled adjudications of the State courts giving constructions to the laws and Constitutions of their own States, it will not necessarily follow decisions which may prove but oscillations in the course of such judicial settlement. Nor will it follow any adjudication to such an extent as to make a sacrifice of truth, justice, and law.
3. Municipal bonds, with coupons payable to "bearer," having, by universal usage and consent, all the qualities of commercial paper, a party recovering on the coupons will be entitled to the amount of them, with interest and exchange at the place where, by their terms, they were made payable.

THE Constitution of the State of Iowa, adopted in 1846, contains the following provisions, to wit:

"ART. 1. § 6. All laws of a general nature shall have a uniform operation."

"ART. 3. § 1. The legislative authority of the State shall be vested in a Senate and House of Representatives, which shall be designated the General Assembly of the State of Iowa," &c.

"ART. 7. The *General Assembly* shall not *in any manner create any debt* or debts, liability or liabilities, which shall, singly or in the aggregate, with any previous debts or liabilities, exceed the sum of *one hundred thousand dollars*, except in case of war, to repel invasion, or suppress insurrection."

"ART. 8. § 2. Corporations shall *not be created in this State by special laws, except for political or municipal purposes;* but the General Assembly shall provide, by *general laws*, for the organization of all other corporations, except corporations with banking privileges, the creation of which is prohibited. The stockholders shall be subject to such liabilities and restrictions as shall be provided by law. *The State shall not directly or indirectly become a stockholder in any corporation.*"

With these *constitutional* provisions in existence and force, the *legislature* passed certain *statutes*. One,—incorporating

the city of Dubuque, passed February 24, 1847,—provided, in its 27th section, as follows:

"That *whenever*, in the *opinion of the City Council*, it is expedient to *borrow money* for any particular purpose, the question shall be submitted to the citizens of Dubuque, the nature and object of the loan shall be stated, and a day fixed for the electors of said city to express their wishes; the like notice shall be given as in cases of election, and the loan shall not be made unless two-thirds of all the votes polled at such election shall be given in the affirmative."

By an act passed January 8, 1851, this charter was "so amended as to empower the City Councils to levy annually a special tax to pay interest on such loans as are authorized by the 27th section of said act;" that is to say, by the section just quoted. A subsequent act,—one passed 28th January, 1857,—enacts thus:

"The *city of Dubuque* is hereby *authorized and empowered* to aid in the construction of the *Dubuque Western*, and Dubuque, St. Peter's and St. Paul Railroad Companies, *by issuing* $250,000 *of city bonds to each*, in pursuance of a vote of the citizens of said city, taken in the month of December, A.D. 1856. *Said bonds shall be legal and valid*, and the City Council is authorized *and required* to levy a special tax to meet the principal and interest of said bonds, in case it shall become necessary from the failure of funds from other sources."

"The proclamation, the vote, *bonds issued or to be issued, are hereby declared valid, and the said railroad companies are hereby authorized to expend the moneys arising from the sale of said bonds, without the limits of the city and county of Dubuque*, in the construction of either of said roads; and *neither the city of Dubuque nor any of the citizens shall ever be allowed to plead that the said bonds are invalid.*"

With this Constitution, as already mentioned, in force, and after the incorporation of the city and the passage of acts of Assembly, as just mentioned,—*and after certain decisions of the Supreme Court of Iowa as to the constitutionality of these acts, the character and value of which decisions* make the

principal subject of discussion in this case,—the city of Dubuque issued a large amount of coupon bonds, which were now in the hands of the plaintiffs. The bonds bore date on the 1st of July, 1857, and were payable to Edward Langworthy, *or bearer*, on the 1st of January, 1877, at the Metropolitan Bank, in the city of New York. The coupons were for the successive half year's interest accruing on the bonds respectively, and were payable at the same place. The bonds recited that they were given "for and in consideration" of stock of the Dubuque Western Railroad Company, —(one of the roads to which, by the act last mentioned, the city was authorized to subscribe),—and that for the due payment of their principal and interest, "the said city is hereby pledged, in accordance with the code of Iowa, and an act of the General Assembly of the State of Iowa, of January 28, 1857,"—the act just referred to. The coupons on the bonds not being paid, the plaintiffs sued the city of Dubuque in the District Court of the United States for the District of Iowa, claiming to recover the amount specified in the coupons, with the New York rate of interest from the time of their maturity, and exchange on the city of New York.

The city set up the following grounds of defence:

1. That the bonds were issued by the city to aid in the construction of a railroad extending *beyond its limits into the interior of the State.*

2. That at the time of issuing the bonds and coupons, the indebtedness of the city *exceeded one hundred thousand dollars.*

3. That at the time of issuing the bonds and coupons, the indebtedness of *the State of Iowa exceeded one hundred thousand dollars.*

4. That at the time of issuing the bonds and coupons, the indebtedness of *the cities and counties of Iowa exceeded*, in the aggregate, *one hundred thousand dollars.*

The plaintiffs demurred. The demurrer was overruled, and judgment entered for the defendant. On error, the question in this court was, whether the judgment had been rightly given?

Argument for the creditors.

Mr. S. V. White and Mr. Allison for the bondholders: In one point of view, the question before the court is a narrow one; a question as to the number and relative weight of decisions of the Supreme Court of Iowa alone, and in its own constitution and statutes; a settlement of the balance on an account domestic simply. It is a question whether this court will regard seven solemn decisions, made by the Supreme Court of Iowa, beginning in A.D. 1853, and ending in A.D. 1859, on the faith of which decisions, strangers have lent their money for the improvement of the State itself, or of cities which adorn and enrich it, so overruled by a decision made in A.D. 1860, or decisions of a later date, as that bonds issued payable to BEARER, are now void in the hands of bearers who, between the said years of 1853 and 1859, and on the faith of those decisions, bought them in good faith and for value. Undoubtedly we shall ask that this question be decided; that this settlement of the account domestic simply be settled. The case involves, as a necessity, perhaps no other question. The court may possibly confine itself much to these limits. In some points of view, however, the issue is of greater dignity. It concerns the honor, not of Iowa only, but of all the States; the value of millions of securities issued by nearly every State of the Union, and by cities and counties and boroughs in them all. Yet, more: we shall ask this court to treat as contradicting precedents made by the Supreme Court of Iowa itself, and so as subversive of regard for authority,—as erroneous, therefore, in the law, and of no obligation,—the latest decisions of a State of this Union; the decision, we mean, in *The State of Iowa, ex relatione*, v. *The County of Wapello*,* and any decisions which, to the disregard of earlier and settled precedents, follow it. On all these accounts the subject deserves an examination on a wider view of precedents than those of Iowa alone. Time is not wasted in appropriating much of it to an inquiry as to American decisions universally. We propose, therefore, to examine

* 13 Iowa, 388.

Argument for the creditors.

1. The adjudications of courts of the different States upon the same or similar questions, prior to its adjudication by the courts of Iowa.

2. The adjudications of the courts of the State of Iowa, upon such questions; and,

3. The adjudications of the courts of the United States, and of the several States, since the question was first decided by the courts of Iowa.

1. And first, we may admit that all courts have held uniformly, that such acts and contracts as those to be considered in this case do not arise from any legislative power delegated to the municipal corporations, but that they arise only from powers conferred *by legislative act of the State.*

The first case upon the subject arose in Virginia, and was decided by the Court of Appeals of that State, A. D. 1837, in *Goddin* v. *Crump.** The legislature of that State had authorized the city of Richmond to subscribe for stock in a company incorporated for the improvement of the navigation of James River, and for building a road to the Falls of the Kanawha River, and to borrow money to pay the same, and to levy and collect a tax for the payment of principal and interest so borrowed. Under these acts the Common Council of the city of Richmond passed an ordinance subscribing for such stock, and for levying a tax, as authorized by such acts, and the collector of the city had levied upon a slave, the property of complainant, to satisfy the tax due from him under such levy. The complainant exhibited his bill in equity, in behalf of himself and others, citizens of the city of Richmond, who were property-holders therein, and who had not consented to the passage of the acts of the legislature, nor the acts of the council in passing the ordinance and in levying the tax, and prayed to be relieved from the payment of such tax; and that the collector, who, with the Common Council of Richmond, was made a party defendant, might be enjoined and restrained from the collection of such tax, perpetually; upon the ground that the law authorizing such subscription and levy was unconstitutional and void.

* 8 Leigh, 120.

Upon this case the Court of Appeals of Virginia (Brooke, J., dissenting) decided:

I. That an act, to be within the legitimate scope of a municipal corporation, need not be performed in the corporate limits, but might properly be extended to objects beyond the limits of the corporation.

II. That the true test of the corporate character of the act, was the *interest* of the corporation.

III. That the citizens themselves were the judges of what was the interest of the corporation, and not the judges of the court, and however much a court might doubt the wisdom of the citizens in determining that question, they would not interfere with it.

IV. That the majority of such citizens could bind a dissenting minority, and properly charge them and their property with the payment of tax, to which they had given no assent.

V. That the laws in question are not repugnant to the Constitution, and the bill was accordingly dismissed with costs.

The next case in point arose, A. D. 1843, before the Supreme Court of Errors of the State of Connecticut, *City of Bridgeport* v. *Housatonic R. R. Co.** In that case, in March, 1837, the city of Bridgeport voted to take stock in the Housatonic Railroad Company, and to procure loans of money, pledging the faith of the city therefor. In May, 1838, the legislature confirmed and legalized such acts; and on June 15th, 1838, the bonds sued on were duly issued. The court unanimously decided:

I. The legislature can give power to municipal corporations to subscribe stock in railroads passing through or terminating in them;

II. That the legislature may, by act or resolution, confirm and render valid, prior voidable acts of such corporations;

III. That the fact of a municipal corporation becoming stockholders in a railroad, and therefore, *pro tanto*, going beyond the legitimate ends for which the corporation was

* 15 Connecticut, 475.

constructed, is only an incident to the general power to provide for the interests of the citizens of the corporation, and does not, therefore, take it out of the scope of its corporate acts;

IV. That a majority of such citizens can constitutionally decide upon the acts of the corporation, and compel a minority to contribute, by taxation, to objects to which such minority are opposed.

The next case was in the Supreme Court of Tennessee, *Nichol* v. *Mayor of Nashville*,* December Term, A. D. 1848. The legislature of Tennessee had incorporated a railroad company, and by subsequent act the town of Nashville was authorized to subscribe 20,000 shares of its stock, and to borrow money, and to levy taxes to pay principal and interest on such loan. A bill was filed in equity to enjoin the borrowing of money under said act, and to prevent the issue of bonds and the levy of a tax, the ground assigned being, the acts were unconstitutional and void. Demurrer to bill. The court decide:

I. That the building of a railroad or aiding therein, by subscription to the stock, which railroad shall terminate in, or pass through or *near* a municipal corporation, is within the legitimate scope of corporate acts, and for such purposes a tax may be levied and collected by the delegated authorities of such corporation;

II. That such act neither contravenes the provisions of the Constitution of the United States, nor of the State of Tennessee.

The same questions came before the Court of Appeals in Kentucky, in *Talbot* v. *Dent*,† A. D. 1849, and again, A. D. 1852, in *Slack* v. *Maysville R. R. Co.*‡

The chief justice delivered the opinion of the court in both cases, and in both, the foregoing decisions of Virginia, Connecticut, and Tennessee were cited, argued, approved, and followed, at length.

The same questions came before the Supreme Court of

* 9 Humphreys, 252. † 9 B. Monroe, 526. ‡ 13 Id., 1.

Pennsylvania, in *The Commonwealth* v. *Mc Williams*,* May Term, 1849, and again in *Sharpless* v. *Mayor*,† and in *Moers* v. *City of Reading*.‡ All these cases decide the questions as former and other courts had done, and hold the bonds binding.

The Supreme Court of Illinois, A. D. 1849,§ held an act of the legislature, giving the right of taxation to a certain precinct, to keep up a bridge across Rock River, to be constitutional, and sustained a tax levied by the local authorities under such law; and the Supreme Court of New York,‖ May Term, 1840, made a similar ruling in behalf of a law authorizing a municipal tax, for the purpose of paying the excess of expenses for bringing a canal to such corporation, although private individuals had given bond for the payment of such excess to the canal company.

The same questions came before the Supreme Court of Ohio, A.D. 1852, and A.D. 1853, in two cases,¶ in which the questions were decided as in all the cases already named. Comment may therefore be spared.

Thus there had then been decisions of the highest appellate courts of eight States of the Union, extending through a period of sixteen years, and numbering in all twelve such decisions.

2. *As respects the Courts of Iowa.* And here, we premise, that so far as *cities* are concerned, there has never been a decision made upon the question in Iowa, but the principle has been repeatedly settled in the case of *counties*, upon principles, however, equally binding upon cities.

The question came before the Supreme Court of Iowa, at the June Term, 1853, in the case of *Dubuque Co.* v. *Dubuque and Pacific R. R. Co.*,** and the court held:

1. That a county has the constitutional right to aid in building a railroad within its limits.

* 11 Pennsylvania State, 61. † 21 Id., 147. ‡ Id., 188.
§ Shaw *v.* Dennis, 5 Gilman, 405.
‖ Thomas *v.* Leland, 24 Wendell, 65.
¶ Cincinnati R. R. Co. *v.* Commissioners of Clinton County, 1 Ohio State, 77, and Cass *v.* Dillon, 2 Id., 607. ** 4 G. Greene, 1.

II. That the provision of the Constitution, which limited the State debts to the sum of $100,000, and also the provision which declares that the State shall not directly nor indirectly become a stockholder in any corporation, applied only to the *State* in its *sovereign* capacity.

III. That § 114 of the Code of 1851, applied as well to railroads as to ordinary roads, and that proceedings regularly had, under that and subsequent sections, to § 124 inclusive, were regular and legal, and authorized the issue of bonds for railroad purposes, and that said railroad bonds were valid and binding upon the county. This opinion is written by Greene, J.; Kinney, J. dissenting.

At the June Term, 1854, in *The State* v. *Bissell*,* the same question was raised, together with minor questions, about the regularity of the proceedings. It was a proceeding in Chancery to prohibit the county judge of Cedar County from issuing bonds to a certain railroad company. The county judge in response set out his action in the premises, to which the relators filed a demurrer, which was sustained by the court below, and the defendant prohibited from levying the tax by perpetual injunction. From this decree the defendant, the county judge, appealed, and the case was heard in the Supreme Court, the decree reversed, and the county judge permitted to issue bonds and levy and collect a tax therefor. In this case the opinion was written by Hall, J., and the decision last but one cited is followed without comment. Although Greene, J., dissented on a minor question, growing out of the facts in the case, there was no dissenting opinion on the constitutionality of the bonds.

Next in order, in the course of the history of this question, in the State of Iowa, are two acts of the legislature of the State, passed at the session of December, A. D. 1854, both approved January 28th, 1855.†

By the first of these it is enacted, "*That wherever* any [railway] company shall have received, or may hereafter re-

* 4 G. Greene, 328.

† Chap. 128 and 146, of acts of Fifth General Assembly of the State of Iowa, 142 and 219, respectively.

ceive, the bonds of any city or county *upon subscription of stock*, by such city or county, such bonds may have interest at any rate not exceeding ten per cent., and may be sold by the company, at such discount as may be deemed expedient."

By the second it is enacted, "that in all cases where county or town or city incorporations have or may hereafter become stockholders in railroads, or other private companies or incorporations, it shall not be lawful for the county judges, mayors, or other agents of such cities or counties, to issue the bonds of their counties, or cities, until they are satisfied that the contemplated improvements will be constructed through or to their respective cities or counties, within thirty-six months from the issuing and delivery of said bonds; and the proceeds of such bonds shall, in all cases, be expended within the limits of the county in which said city may be situated; *Provided*, that nothing in this act shall in any way affect corporation rights, for any contracts or subscriptions heretofore made with any railroad company or corporation, for the issuing of county corporation bonds."

These acts show the construction of the State authorities at that time, and are themselves a legislative acknowledgment that under prior laws such municipal corporations had the right to issue bonds to railroads and to take stock in them, and afforded general authority of law for such actions on the part of such corporations in future.

The next case that came before the Supreme Court of the State, was that of *Clapp* v. *The County of Cedar*,* a suit brought on the same bonds, the issue of which was sought to be enjoined in the case of *The State* v. *Bissell*, and was determined before the court at the June Term, A.D. 1857, by a court composed entirely of different judges from those on the bench when the last cause was decided. In that case the majority of the court hold:

1. That the question of the constitutionality of the bonds is decided by the prior decisions, upon which the public and the world have acted, and that a change of ruling would be "the worst of all repudiation,—judicial repudiation."

* 5 Iowa, 15.

II. That such bonds and coupons were negotiable as under the law merchant.

Other questions foreign to this subject were also discussed, but it is unnecessary to refer to them. Wright, C. J., dissented, to use his own words, "very reluctantly," on the question of the constitutionality of such bonds.

The question again was decided three times at the June Term, 1858, in *Ring* v. *The County of Johnson*,* in *McMillen* v. *Boyles*,† and in *McMillen* v. *The County Judge and Treasurer of Lee County*.‡ The opinions in the first two cases were written by Woodward (Wright, C. J., dissenting in the first case); in the second case no one dissented; and the opinion in the third case was written by Wright, former dissenting judge. Each case holds,

I. That the question is *settled* by the Supreme Court *by former* adjudications, that the counties have the right, constitutionally, to take stock in a railroad, and to issue their bonds therefor.

II. And the second and third cases decide that the legislature by a curative act had made the bonds of Lee County binding upon the county, although from an informality they were irregularly issued.

In one of the cases, *Ring* v. *The County of Johnson*,§ which was decided a few days before the others, Chief Justice Wright wrote a short dissenting opinion.

Next in order in the decisions of this question comes *Games* v. *Robb*,‖ June Term, 1859, and the opinion is here written by Chief Justice Wright, who says: "That the judge had the power to submit a vote to take subscription on a railroad, to the people, and to levy a tax therefor, *we understand to be settled* in favor of the power by the cases of *Clapp* v. *Cedar County*,¶ *Ring* v. *The County of Johnson*,** and *McMillen* v. *Boyles*,†† and the cases there referred to." Thus, all the judges concur in the decision of this question, as they did in *McMillen* v. *Boyles*, holding the constitutionality of

* 6 Iowa, 265. † Id., 304. ‡ Id., 391. § 6 Id., 265.
‖ 8 Id., 193. ¶ 5 Id., 15. ** 6 Id., 265. †† 6 Id., 304.

the bonds to be decided by the former cases, the opinion of the court being, in each case, written by the learned judge who alone had dissented.

We thus have the decisions of the Supreme Court of Iowa, given to the world through a period of six years, by two different benches, in seven different decisions of the court, upon the questions now made before this court, and although two judges had dissented during that time, yet in the opinion of the Chief Justice of the State, written by him who alone had before that time "very reluctantly" dissented, the great commercial world, whose money was at that very moment building up the commerce of the State by extending railroads through it, were assured that the question was settled, and that, too, in favor of the legality and negotiability of these bonds. Whether, in view of the Constitution of Iowa, it was or was not rightly settled in the first instance, is a matter not important at all to inquire into. It was settled by a tribunal which had power to settle it; and on the faith of judicial decisions the bonds were sold.

Before examining decisions since made by the Supreme Court of Iowa, let us mention the decisions of other courts, down to the date when, at December Term, 1859, the Supreme Court just named took that first step, in *Stokes* v. *The County of Scott*, in overthrowing its decision, which was consummated in *The State, ex relatione*, v. *The County of Wapello*, at the June Term, 1862.

In Ohio, the Supreme Court, at different dates, has affirmed its ruling in five different decisions.* In Missouri, its court followed, in 1856, previous rulings also.† In this, the Supreme Court of the United States, the question was decided twice at December Term, 1858, and once in 1859, and once in 1860.‡

* Ohio *v.* Commissioners of Clinton, 6 Ohio State, 280; The State *v.* Van Horne, 7 Id., 327; Id. *v.* Trustees of Union, 8 Id., 394; Id. *v.* Commissioners of Hancock, 12 Id., 596; Trustees *v.* Shoemaker, 12 Id., 624.

† City *v.* Alexander, 23 Missouri, 483.

‡ Commissioners of Knox Co. *v.* Aspinwall, 21 Howard, 539; Same *v.* Wallace, Id., 547; Zabriskie *v.* The Cleveland R. R., 23 Id., 381; Amey *v.* The Mayor, 24 Id, 365; Commissioners, &c., *v.* Aspinwall, Id., 376.

The District Court of the United States for the District of Wisconsin, in A. D. 1861, made similar decisions, in *Smith* v. *Milwaukee & Superior R. R. Co.*,* and *Mygatt* v. *City of Green Bay*.†

The Supreme Court of New York, at June Term, 1857, in *Clarke* v. *The City of Rochester*,‡ in a review of the question, after an elaborate argument before them, made the same ruling, which was affirmed by the Court of Appeals of that State at the September Term, 1858, *nemine dissentiente*.§

The Supreme Court of Indiana, at the May Term, 1857,‖ made the same ruling.

The Supreme Court of Illinois made a similar ruling, in April Term, 1858,¶ which was, in April Term, 1860, affirmed in two cases.**

The same question, after elaborate discussion, was also unanimously decided in the same way, at the January Term, 1857, of the Court of Appeals of South Carolina.††

The Supreme Court of Wisconsin, at the December Term, 1859, in the two cases,‡‡ made the same ruling, and decided every constitutional question in this case under a Constitution the same as that of the State of Iowa, in favor of the legality of such bonds; and that, too, by the unanimous concurrence of the whole bench. There are other cases, in others of the States of the Union, which might be cited, but it would only tend to lengthen the list, rather than to make it stronger.

Nowhere, in short, can an authority be found, save the subsequent ruling of the State of Iowa, where the highest appellate court of a State, or of the United States, has held such bonds to be invalid, in the hands of *bonâ fide* holders for value; and at the time when that decision was rendered,

* 9 American Law Register, 655. † 8 Id., 271. ‡ 24 Barbour, 446.
§ Bank of Rome *v.* Village of Rome, 18 New York, 38.
‖ The City of Aurora *v.* West, 9 Indiana, 74.
¶ Prettyman *v.* Supervisors, 19 Illinois, 406.
** Johnson *v.* The County, 24 Id., 75; Perkins *v.* Lewis, Id., 208.
†† Copes *v.* Charleston, 10 Richardson, 491.
‡‡ Clark *v.* City, 10 Wisconsin, 136, and Bushnell *v.* Beloit, Id., 195.

decisions had been made by the Supreme Court of the United States, and of fifteen of the different States of the Union, of which Iowa was one, running through a quarter of a century of time, and all going to establish the obligation.

But upon what grounds was this contrarient decision finally based?

In *Stokes* v. *The County of Scott*,* the majority of the court held, where the bonds had been negotiated, and rights had become vested, by purchase, by innocent holders, that there they were valid; but that where the question was presented prior to the issue of such bonds, the court might properly interfere to restrain the issue. Wright, C. J., took his former position, holding such bonds to be unconstitutional and void, in the hands of all parties. Stockton, J., held the bonds constitutional, but not warranted by law; that they might be enforced by innocent third parties, but that it was properly within the province of a court of equity to restrain the issue thereof, where the question was presented *in limine*.

Woodward, J., dissented from both the other judges, holding that the question was settled in the State, and that it was the duty of the court to abide by precedents.

Of the immediate effect of this decision, the world had no right to complain, as no money had been invested, and it was only so far as it tended to cast loose from the accepted decisions of the State of Iowa, and of other States, and to render vested rights insecure, that it tended to work a hardship upon the commercial world.

We come now to *The State of Iowa, ex relatione*, v. *The County of Wapello*, June Term, 1862. The court there decided:

I. That section 114 of the Code of 1851, did not afford the authority of law for issuing of county bonds, overruling the case of 1853,—*Dubuque County* v. *Dubuque and Pacific Railroad Co.*

II. That certain statutes relied on, did not afford such authority, nor legalize such acts already performed; but—

III. That if a constitutional question did not preclude it,

* 10 Iowa, 166.

the court would feel bound by the construction of the statute by former courts, and would follow such decisions.

IV. That such a law, however passed, would not confer the authority, because unconstitutional.

[The counsel then examined this case on principle, arguing that independently of precedents it was wrongly decided.]

Now in the face of this history of decisions in Iowa and everywhere, of what value is this case, *The State of Iowa, ex rel.*, v. *The County of Wapello*, so much relied on? By whom, after all, is law to be settled among us? By the Supreme Court of the United States, or of the State of Iowa? By the supreme tribunal of fifteen States or of one? By the Supreme Court of Iowa for *seven* years or for *two?* By *six* judges of that State or by *three?* Are you to hold, in the face of the fact that millions of dollars have been invested, under the law which enters into and forms a part of every contract as it was interpreted by the courts of the whole country, that you yourselves were mistaken? That for twenty-five years all the tribunals of the whole country were mistaken? That for *seven years the Supreme Court of Iowa was mistaken?* Because it appears now that that tribunal has *reversed its long-established rulings?* Had the question been presented to you one year ago to-day, you would not have hesitated an hour on the proposition, for then there was no diversity of rulings anywhere. Because the Supreme Court of Iowa has chosen thus to disregard its own precedents, are millions of property, treasured on the banks of the Delaware, the Hudson, the Thames, the Seine, and the Rhine; are the decisions *of this State of Iowa* itself, as of all the States; the reputation of *that people*, as of Americans generally, to be swept away? swept away by a "surge of judicial opinion?" Is the sway of law among us thus to "shake like a thing unfirm?" This cannot be. At best there is no settled law in Iowa upon the subject. The court of this year has reversed the decisions of former years; and has but taught instructions which will return, hereafter, to plague it. Assuredly, this high tribunal of the United States, whose opinion has been expressed with clearness,

will not vary its opinion and cut loose from its own, and from accepted decisions of the whole country, at a time when, above all times, change would be unwarranted in principle and freighted with disaster.

Mr. Bissell, for the City of Dubuque: The question is, Whether a subscription to an extra-territorial railway,—made by a city corporation under authority of an act of the legislature,—is valid under the *Constitution and decisions of the State of Iowa?* It is not here important for us to inquire what other courts, acting under other constitutions and under other laws, may have decided. And, first, it is conceded by the other side that a city corporation has no power by virtue of its ordinary franchises to make such subscription. If the power exist at all, it is now admitted that it comes only from legislation directly authorizing it. How, then, stands the case?

1. Let it be considered irrespectively of precedents anywhere. Under our form of government, the legislature, unlike parliament, is not omnipotent. Irrespectively of all constitutions, bills of right, or anything of that sort, it will be conceded that the legislature cannot directly take the property of one man and give it to another, or compel one man, or any number of men, to engage in particular pursuits, or to invest their money in particular securities. Nor can it take private property for even public purposes, without *just* compensation; compensation of some kind or in some way. What it cannot do in one form it cannot do in another. What it cannot do by command, it cannot do by taxation. If the legislature should tax the property of individuals in one city for all the expenses of another, such legislation would be void. And even in regard to improvements of a kind really public, if more than any citizen's just share of the expense of them is taken, the legislation is null. If power is given to take property in one place which concerns the public at large, property not being proportionably taken from that public at large, or if property is taken from one place only for objects which concern another, the

power is not one conformed to the principles of constitutional republican government. Now a man's property is as much taken by a tax as by any other form. Indeed of all modes of taking property it is the most effective, as also the most difficult to analyze and oppose. It has always been the instrument of unconstitutional legislation, and, therefore, should be watched and guarded. It is of the essence of taxation, therefore, that it be just. And wherein does this justness consist? Plainly in a just apportionment of taxes; that is to say, an apportionment which brings to the party, *in some form*, just compensation for this property taken away. In regard to a man's property taken by tax and applied to purposes purely local and about him, he gets the just recompense, by the application itself. Where the application is to purposes of a wider and more public kind,—for the purposes of his State, or the United States,—he gets a just recompense, provided all others are taxed *proportionably* with him. But just in so far as he is taxed *above* them, he gets no just recompense at all. The principles are readily applied to a case like the present.

It is almost unnecessary to say, that what the legislature cannot do directly, it cannot do indirectly. The stream can mount no higher than its source. The legislature cannot create corporations with illegal powers, nor grant unconstitutional powers to those already granted.

Again: Counsel of the other side do not distinguish well between private corporations and public ones.

Private corporations are only created with the assent of the corporators. They, by becoming corporators, *voluntarily* enter into a *contract*, by which they put their money or property into a common fund, to be controlled in accordance with rules to which they have assented, and which cannot be changed without their assent. The legislature cannot change the terms of their charter, neither can the majority of the corporators, unless it has been so prescribed in the contract, to which each corporator has given his assent. It is therefore right that these corporations should be permitted to enter into such speculations as they may choose. Each

member has placed just so much of his property under the control of the corporation, as he has deemed best for his interest, and no more. With *public* corporations it is different. The corporation is created by the legislature without necessarily consulting the will of the inhabitants, and often, in fact, in opposition to said will. The rights, duties, and powers of public corporations may be altered or taken away at any time by legislative enactment, or greater powers may be conferred upon the corporation in the same manner. The inhabitants of such corporation have no voice in accepting the charter; they have no power of electing how much of their property they will subject to the control of the corporation; they cannot transfer their stock, and thus cease to be members of such corporation. The legislature has power to create such corporation, in opposition to the will of the corporators, because such corporation is a portion of the government of the State itself, and every man yields up to the State just so many of his inherent rights, as are necessary to carry on the government which protects him. As said before, every citizen of a State yields up to the State all those rights which are necessary to carry on the government. He yields up the right *without his individual assent*, to be united, with other citizens, into cities, towns, counties, &c., as the legislature may deem proper. As it is necessary to have roads, wharves, waterworks, &c., for the use of the citizens of such corporations, he yields his assent to be taxed for the creation of such works. Such works, however, when created, are under the control of the corporation. They are for the sole use of the corporation.

In regard to the State of Iowa, its Constitution comes in aid of general principles. It declares (i) that all laws of a general nature shall have a uniform operation. Is not a law which authorizes a great public improvement—one running over the State—a law of a general nature? Does it have a uniform operation when the cost of it is laid on the people living at one terminus, all those along its line being exempt? It declares (ii) that the legislative power of the *State* shall be vested in the *Assembly* of the State; meaning,

of course, that it shall not be delegated. But is it not delegated when, by statute, you give a city power to legislate in a manner, which, but for the statute, it confessedly would not have? It declares (iii) that the Assembly shall not "in *any* manner create *any* debt, . . . which shall singly or in the *aggregate*, ... exceed $100,000." The restraint is not against the creation of a debt in behalf of the State, any more than on behalf of her subdivisions. The language is broad. When the State authorizes the cities, counties, townships, boroughs, which cover her whole surface, to lay debts on every respective part of her, is not the purpose of the restraint violated? A construction which renders practically vain a *constitutional* provision which a different interpretation, not forced, will preserve, can not be a sound one. It declares (iv) that corporations shall not be created by general laws, except for political or municipal purposes. Here is a law, in fact creating a corporation for a purpose which is neither. It declares in the same section that the State shall not directly nor *indirectly* become a stockholder in any corporation. But does not the State become indirectly a stockholder in a corporation, when she authorizes a portion of her people to enter into an organization, *which, but for her statute, they cannot have*, and allows them in such form to become a stockholder in a corporation?

It is urged that the courts of the different States of the Union have decided this question so uniformly in favor of the power of the legislature to confer the authority claimed, that it is no longer an open question. We may observe in passing that it is matter of difficulty for professional men or judges—if not belonging to a State—perfectly to understand the value of decisions made under local constitutions and local statutes in that State. They may run into great error if they read them by lights in which they are accustomed to see elsewhere. But assuming all that is claimed for them, such decisions are not binding upon this court; and if the decisions of other courts are not in accordance with the law as understood by this court, they will not be followed. If a dissenting opinion of said courts is based upon correct legal

principles, this court will follow such principles, rather than an erroneous decision of a court. Let us see if the decisions of the courts of the different States do establish the principle, that a legislature, with power like that of the State of Iowa, can confer upon municipal corporations the right to purchase stock in railroad corporations.

In the first case cited, *Goddin* v. *Crump*, it was decided that the legislature of Virginia had power to authorize the city of Richmond to levy a tax, to aid in removing a bar from James River, to open navigation to the city, and to take stock in a private corporation, organized to perform such work. This river was a navigable stream, under the laws of Virginia. The court held that the levy of the tax to pay for such stock was legal, and also held that the interest of the corporation was the true test of the corporate character of the act, and that the legislature was the sole judge of what would conduce to the interest of the city. The act giving the power to aid in the construction of said work, was passed at the request of a majority of the citizens of the city. The majority of the court seem to have lost sight of the fact that an interest in an improvement is entirely different from an incidental benefit arising from the same improvement. But there is a dissenting opinion by Brooke, J., which places the question upon the true grounds. He holds that such legislation violated the bill of rights; that the power of such corporations to tax the people must be limited to objects of purely a local character. This case arose under an express act of the legislature, giving the specific power claimed.

In the next case relied on, *Bridgeport* v. *Housatonic Railroad Co.*, it was decided that the legislature, upon request of a city, may authorize such city to subscribe for and take stock in a railroad leading to such city, provided such act be approved by the people of the city. The only clause in the Constitution, which was claimed to restrict the legislature, was that which forbade private property being taken for public use without compensation. This was also under an express act of the legislature.

In Tennessee it has been decided—the third case cited, shows—that under the provision of the Constitution of that State, which provides that "the legislature has power to grant to counties and incorporated towns the right to impose taxes for *county* and *corporation purposes*," the legislature may authorize a city to aid in the construction of a railroad *to such corporation*, and when the expenditure is by a county, the expenditure must be *within* the county. The Constitution of that State does not limit the grant to an expenditure municipal for *municipal purposes*, but for corporate purposes.

In Kentucky, it has been decided that the legislature had power to authorize municipal corporations to take stock in railroad corporations, and levy taxes to assist in building said road to such corporation. There is an able dissenting opinion in this case. This decision is founded upon the fact that there was no limitation to the legislative power in their Constitution, and that it was, therefore, omnipotent.

In Pennsylvania, this doctrine was carried to its extreme limit in one case,—*Sharpless* v. *The Mayor of Philadelphia*,—where it was decided that a municipal corporation may aid in the construction of a railroad, miles away, if it can be supposed that it may benefit the corporation; and that the legislature is the judge of the question. But in another,—*Diamond* v. *The County of Lawrence*,*—when suit was brought on bonds, like those here, in the hands of holders who had paid value for them, the court declared that they were open to defences of every kind; and a recovery was not had.

In Illinois, where there is no constitutional limitation, it has been held that a municipal corporation may, under legislative authority, aid in the construction of railroads within the corporation.

In Florida, under a similar provision of the Constitution to that of Tennessee, it was held that a county might aid in constructing a railroad *through the county*.†

Other States have followed the decisions we dissent from; some following them to a full extent, and some limiting the

* 37 Pennsylvania State, 358. See *ante*, Mercer County *v.* Hacket, p. 87.

† Cotton *v.* Com. of Leon, 6 Florida, 610.

application to a narrower compass. All of the decisions, we believe, are where there was no constitutional restriction, or where the power was expressly given, as in Tennessee and Florida.

In many of the decisions, the courts seem to have been imbued with the frenzy of the day, and to have lost sight of the well-defined distinction between the powers and liabilities of municipal and private corporations.

This question, it is believed, has not been decided by this court as an independent question; but its decisions so far are based upon the decisions of the courts of the State in which the cases originated, and upon the rule that this court will follow the decisions of State courts, as to the construction of their own Constitution or statutes. If this question has been settled by the courts in the State of Iowa, then this court will follow such ruling; but if they have not settled it, then it is an open question for determination by this court. What is the history of these decisions?

The Supreme Court of Iowa, in the case of *The Dubuque and Pacific Railroad Co.* v. *Dubuque County*, which is claimed to be decisive of this question, decided that the Constitution of the State had not *deprived* the *citizens* of the county of the right to vote the credit of said county to build a railroad within the county limits. That court uses the following language: "As the people have not, in the Constitution, delegated this power, to vote upon such propositions, nor in any way conceded or divested themselves of this right, but have in express terms affirmed, in the bill of rights, that 'all political power is inherent in the people' (Art. I, Sec. 2), we conclude that the people may, with constitutional propriety, vote the credit of the county to aid in the construction of a railroad within its limits;" one judge dissenting as to the power of the county to take stock in railroads. That court has thus decided that the Constitution has not conferred upon the legislature of the State any power to authorize such an expenditure. That this power is not in the people in their aggregate capacity, either as a town, city, county, or State, but in their individual capacity. It

holds virtually that the legislature has no such power, but that it is inherent in the people. There is nothing said about the power of the legislature to confer this authority on a city or county.

The next case relied on is the *State* v. *Bissell*. In that case the question was not raised, and the court say: "This decision is not intended to sanction or deny the legal validity of the decision in the foregoing case, but to leave that question where that decision has left it."*

The next case is *Clapp* v. *County of Cedar*. The court disposes of the constitutional question with the following remarks: "The second step would be, whether a legislature possesses the power to confer this authority upon a county? Few have doubted the existence of this power, the question having generally been, whether the power had been exercised, or whether a county possessed the desired authority without a special grant?"† The court, however, say that "this power is not, as far as the court can see, derived from any legislative enactment," but, upon the strength of the judgment of the court in the above case of *The Dubuque and Pacific Railroad Co.* v. *Dubuque County*, it decides that the counties have power to aid in the construction of railroads within the limits of such county; one judge dissenting.

In *Ring* v. *Johnson Co.*, and *McMillen* v. *Boyles*, the last cases cited on the other side, the question was not directly raised nor decided, the court conceding that counties had the right to aid in the construction of railroads to be constructed *within their limits*.‡

But confessedly the Iowa decisions in favor of these bonds end here. They were never quite unanimous, and have never given satisfaction to either profession or courts. In *Stokes* v. *The County of Scott*, a majority of the court assumed tenable ground, and restrained an issue about to be made. Then came *The State, ex relatione*, v. *The County of Wapello*, a case fully argued, much considered, and unanimously decided. That this case does decide these bonds to be void, that

* 4 G. Greene, 332.

† 5 Iowa, 45.

‡ See, also, Games *v.* Robb, 8 Iowa, 199.

such is now the law in the State of Iowa, is undeniable, we think. The court in that great case remarks, that although some fourteen or fifteen States had expressed their opinions upon this exercise of power by municipal corporations, they had not reached satisfactory conclusions. Hence, it declares, the renewed agitation on the subject; an agitation, it remarks, which "will continue to obtrude itself upon the courts of the country, year after year, until they have finally settled it upon principles of adjudication which are known to be of the class of those that are laid up among the fundamentals of the law: and which will leave the capital of private individuals where the railroad era, when it dawned upon the world, found it, namely, under the control and dominion of those who have it, to be employed in whatever field of industry and enterprise they themselves might judge best." The court then speaks of the decisions of Iowa from the first, *Dubuque Co.* v. *The Dubuque, &c., R. R.*, in 1853, where by a divided court the power was held to have been given, to the last, *Stokes* v. *County of Scott*, in 1859, where by a like court it was to a degree decided otherwise. "The intermediate decisions," it declares, "were an acquiescence in the former of these, by two members of the court, not upon the ground that the legislature had in fact authorized the exercise of any such power by the cities or counties in this State (for this they had expressed very great doubts about, and affected not to believe), but because they felt themselves so much committed and trammelled by the previous decision and subsequent legislative recognition, that they did not feel themselves at liberty, from public considerations, to unsettle the construction which the first decision had given to the code on the subject."

"In this aspect of the case," the court continues, "it will be perceived that the question now under consideration is an entirely open one in this State, and that this court as now constituted must pass upon it as an original question, wholly unaffected by the doctrine of *stare decisis;* or, if influenced at all by prior decisions, we should be inclined to follow the later rather than the earlier opinions." The court then ex-

amines the history of legislation in Iowa, and shows that important features in it have escaped the notice of judges who first gave a construction to the code. It then inquires whether the legislature *can* pass laws like those in question, and considers the question on the principles of State and of municipal governments, and on the character and responsibilities, the risks and liabilities, of railroad corporations; declaring that the legislature cannot. The court was conscious of the importance of the decision they were making. They say, in denying the validity of these bonds: "We are not insensible that in doing so, at this late day, we are liable to expose ourselves and our people to the charge of insincerity and bad faith, and perhaps that which is still worse, inflict a great wrong upon innocent creditors and bondholders: consequences which we would most gladly have avoided, if we could have done so and been true to the obligations of conscience and principle." But they declare that the legislative power assumed "practically overturns one of the reserved and fundamental rights of the citizen, that of making his own contracts, choosing his own business pursuits, and managing his property and means in his own way, and which, under the Constitution of this State, however it may be elsewhere, entitles him to the intervention and protection of the courts, we are willing to risk the consequences resulting from the exercise of such a power as furnishing a sufficient answer in itself to all the reasons which have been or may be assigned in favor of its exercise." In answer to the cry about improvement and trade, they declare that if any person "who believes the law to possess the dignity of a science, and hold an exalted rank in the empire of reason," will "analyze the question with reference to the principles and theory of our own political organization, he will discover that it implicates a right which in importance is above all or any interest connected with the business relation or the physical improvements of the county." And rendering everything to its proper sphere, and leaving to the law its duties, and to conscience hers, they end with this declaration: "We know, however, that there is such a thing as a moral sense and a public faith

which may be successfully appealed to, when the law is impotent to afford relief. These sentiments, we cannot but believe, still reside in the hearts and consciences of our people, and may be invoked to save themselves and their State from seeming bad faith." The case may be avoided or evaded. Answered, on principle, it cannot be.

Amey v. *Alleghany City*, decided in this court in 1859,* is one of the decisions relied on to support the plaintiff's case; but that decision is against it. The case, a Pennsylvania one, acknowledged the force of the argument we have used as to the proper objects of legislation, and the constitutionality or unconstitutionality of statutes accordingly. But the court considered that constitutionality was not *there* open for discussion; it having been affirmed by the State court. If it had been open, such legislation would not have been supported. "We have not," say the court, "discussed that position of the learned counsel. *Agreeing with him in the main, as to the foundations upon which the correctness of legislation should be tested, and the objects for which it ought to be approved*, we cannot, with the respect which we have for the judiciary of his State, discuss the imputed unconstitutionality of the acts; it having been repeatedly decided by the judges of the courts of Pennsylvania, including its Supreme Court, that acts for the same purposes as those are which we have been considering were constitutional."

If this court considers, as the court of Iowa has done, that the constitutionality of the Iowa acts is open for consideration, they will decide that constitutionality does not exist, and that the bonds are void.

Then, the question is, whether the constitution and laws of a State are to be construed by the State courts of other States, or by its own courts? whether, in a case where no power to interpret *above* the State's court is given to the Supreme Court of the United States—as such power is given in certain other cases,† where a writ of error lies to the highest State court from this—this court will determine that the con-

* 24 Howard, 364.

† Judiciary Act, 1789, § 25.

stitution and statutes of a State mean one thing, when the courts of the State itself have solemnly adjudged that they mean another? whether this court will say, that the State courts have decided a question, when the judges who sit on the bench of that court are declaring unanimously that "the question is an entirely open one," and to be passed upon as an "original question?" whether, because dealers upon change, whose daily bread, like that of underwriters, is "risk;" people upon the "Rhine"—the respectable citizens of the Juden-Gasse of Frankfürt-am-Maine,—have bought these bonds at large discounts, *on account of those doubts of their legality* which everywhere have attended the issue of them, shall have them enforced in the face of constitutions and solemn decisions of the State courts, simply because they *have* bought and yet hold them? These are the questions; some of them grave ones,—if resolved in the affirmative.

Mr. Justice SWAYNE delivered the opinion of the court:

The whole case resolves itself into a question of the power of the city to issue bonds for the purpose stated.

The act incorporating the city, approved February 24, 1847, provides as follows:

"SECT. 27. That whenever, in the opinion of the City Council, it is expedient to borrow money for any public purpose, the question shall be submitted to the citizens of Dubuque, the nature and object of the loan shall be stated, and a day fixed for the electors of said city to express their wishes, the like notice shall be given as in cases of election, and the loan shall not be made unless two-thirds of all the votes polled at such election shall be given in the affirmative."

"By an act approved January 8th, 1851, the act of incorporation was "so amended as to empower the City Council to levy annually a special tax to pay interest on such loans as are authorized by the 27th section of said act."

An act approved January 28th, 1857, contains these provisions:

"That the city of Dubuque is hereby authorized and empow-

ered to aid in the construction of the Dubuque Western and the Dubuque, St. Peter's & St. Paul Railroad Companies, by issuing $250,000 of city bonds to each, in pursuance of a vote of the citizens of said city, taken in the month of December, A. D. 1856. Said bonds shall be legal and valid, and the City Council is authorized and required to levy a special tax to meet the principal and interest of said bonds, in case it shall become necessary from the failure of funds from other sources."

"The proclamation, the vote, and bonds issued or to be issued, are hereby declared valid, and the said railroad companies are hereby authorized to expend the money arising from the sale of said bonds, without the limits of the city and county of Dubuque, in the construction of either of said roads, and neither the city of Dubuque, nor any of the citizens, shall ever be allowed to plead that said bonds are invalid."

By these enactments, if they are valid, ample authority was given to the city to issue the bonds in question. The city acted upon this authority. The qualifications coupled with the grant of power contained in the 27th section of the act of incorporation are not now in question. If they were, the result would be the same. When a corporation has power, under any circumstances, to issue negotiable securities, the *bonâ fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper.* If there were any irregularity in taking the votes of the electors or otherwise in issuing the bonds, it is remedied by the curative provisions of the act of January 28, 1857.

Where there is no defect of constitutional power, such legislation, in cases like this, is valid. This question, with reference to a statute containing similar provisions, came

* Commissioners of Knox Co. *v.* Aspinwall, 21 Howard, 539; Royal British Bank *v.* Turquand, 6 Ellis & Blackburne, 327; Farmers, Land & T. *v.* Curtis, 3 Selden, 466; Stoney *v.* A. L. I. Co. 11 Paige, 635; Morris Canal & B. Co. *v.* Fisher, 1 Stockton's Chancery, 667; Willmarth *v.* Crawford, 10 Wendell, 343; Alleghany City *v.* McClurkan, 14 Pennsylvania State, 83.

under the consideration of the Supreme Court of Iowa, in *McMillen* v. *Boyles*,* and again in *McMillen et al.* v. *The County Judge and Treasurer of Lee County.*† The validity of the act was sustained. Without these rulings we should entertain no doubt upon the subject.‡

It is claimed "that the legislature of Iowa had no authority under the Constitution to authorize municipal corporations to purchase stock in railroad companies, or to issue bonds in payment of such stock." In this connection our attention has been called to the following provisions of the Constitution of the State:

"ART. 1. § 6. All laws of a general nature shall have a uniform operation."

"ART. 3. § 1. The legislative authority of the State shall be vested in a Senate and House of Representatives, which shall be designated as the General Assembly of the State of Iowa," &c.

"ART. 7. The General Assembly shall not in any manner create any debt or debts, liability or liabilities which shall, singly or in the aggregate, exceed the sum of one hundred thousand dollars, except," &c. The exceptions stated do not relate to this case.

"ART. 8. § 2. Corporations shall *not be created in this State by special laws, except for political or municipal purposes*, but the General Assembly shall provide by general laws for the organization of all other corporations, except corporations with banking privileges, the creation of which is prohibited. The stockholders shall be subject to such liabilities and restrictions as shall be provided by law. The State shall not, directly or indirectly, become a stockholder in any corporation."

Under these provisions it is insisted,—

1. That the general grant of power to the legislature did not warrant it in conferring upon municipal corporations the power which was exercised by the city of Dubuque in this case.

* 6 Iowa, 305. † Id., 391.

‡ Wilkinson *v.* Leland, 2 Peters, 627; Satterlee *v.* Matthewson, 2 Id., 380; Baltimore & S. R. Co. *v.* Nesbit et al., 10 Howard, 395; Whitewater Valley Canal Co. *v.* Vallette, 21 Id., 425.

2. That the seventh article of the Constitution prohibits the conferring of such power under the circumstances stated in the answer,—debts of counties and cities being, within the meaning of the Constitution, debts of the State.

3. That the eighth article forbids the conferring of such power upon municipal corporations by special laws.

All these objections have been fully considered and repeatedly overruled by the Supreme Court of Iowa: *Dubuque Co.* v. *The Dubuque & Pacific R. R. Co.* (4 Greene, 1); *The State* v. *Bissel* (4 Id., 328); *Clapp* v. *Cedar Co.* (5 Iowa, 15); *Ring* v. *County of Johnson* (6 Id., 265); *McMillen* v. *Boyles* (6 Id., 304); *McMillen* v. *The County Judge of Lee Co.* (6 Id., 393); *Games* v. *Robb* (8 Id., 193); *State* v. *The Board of Equalization of the County of Johnson* (10 Id., 157). The earliest of these cases was decided in 1853, the latest in 1859. The bonds were issued and put upon the market between the periods named. These adjudications cover the entire ground of this controversy. They exhaust the argument upon the subject. We could add nothing to what they contain. We shall be governed by them, unless there be something which takes the case out of the established rule of this court upon that subject.

It is urged that all these decisions have been overruled by the Supreme Court of the State, in the later case of the *State of Iowa, ex relatione*, v. *The County of Wapello*,* and it is insisted that in cases involving the construction of a State law or constitution, this court is bound to follow the latest adjudication of the highest court of the State. *Leffingwell* v. *Warren*† is relied upon as authority for the proposition. In that case this court said it would follow "the latest *settled* adjudications." Whether the judgment in question can, under the circumstances, be deemed to come within that category, it is not now necessary to determine. It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and au-

* 13 Iowa, 390.

† 2 Black, 599.

thority. They are in harmony with the adjudications of sixteen States of the Union. Many of the cases in the other States are marked by the profoundest legal ability.

The late case in Iowa, and two other cases of a kindred character in another State, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety. However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. "The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law."*

The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case.

Bonds and coupons, like these, by universal commercial usage and consent, have all the qualities of commercial paper. If the plaintiffs recover in this case, they will be entitled to the amount specified in the coupons, with interest and exchange as claimed.†

We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts, giving constructions to the laws and constitutions of their own States. It is the settled rule of this court in such cases, to follow the decisions of the State courts. But there have been heretofore, in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice, and the law, because

* The Ohio Life & Trust Co. *v.* Debolt, 16 Howard, 432.

† White *v.* The V. & M. R. R. Co., 21 Howard, 575; Commissioners of the County of Knox *v.* Aspinwall et al., 21 Id., 539.

a State tribunal has erected the altar and decreed the sacrifice.

The judgment below is reversed, and the cause remanded for further proceedings in conformity to this opinion.

JUDGMENT AND MANDATE ACCORDINGLY.

Mr. Justice MILLER, dissenting:

In the opinions which have just been delivered, I have not been able to concur. But I should have contented myself with the mere expression of dissent, if it were not that the principle on which the court rests its decision is one, not only essentially wrong, in my judgment, but one which, if steadily adhered to in future, may lead to consequences of the most serious character. In adopting that principle, this court has, as I shall attempt to show, gone in the present case a step in advance of anything heretofore ruled by it on the subject, and has taken a position which must bring it into direct and unseemly conflict with the judiciary of the States. Under these circumstances, I do not feel at liberty to decline placing upon the records of the court the reasons which have forced me, however reluctantly, to a conclusion different from that of the other members of the court.

The action in the present case is on bonds of the city of Dubuque, given in payment of certain shares of the capital stock of a railroad company, whose road runs from said city westward. The court below held, that the bonds were void for want of authority in the city to subscribe and pay for such stock. It is admitted that the legislature had, as to one set of bonds, passed an act intended to confer such authority on the city, and it is claimed that it had done so as to all the bonds. I do not propose to discuss this latter question.

It is said, in support of the judgment of the court below, that all such grants of power by the legislature of Iowa to any municipal corporation is in conflict with the Constitution of the State, and therefore void. In support of this view of the subject, the cases of *Stokes* v. *Scott County*,* and *The State of Iowa, ex relatione*, v. *The County of Wapello*,† are relied on.

* 10 Iowa, 166.

† 13 Id., 398.

In the last-mentioned case, the County of Wapello had agreed to take stock in a company whose road passed through the county, but had afterwards refused to issue the bonds which had been voted by the majority of the legal voters. The relator prayed a writ of mandamus to compel the officers of the county to issue the bonds. One question raised in the discussion was, whether section 114 of the code of Iowa, of 1851, was intended to authorize the counties of the State to take stock in railroad companies? And another was, that conceding such to be the fair construction of that section of the code, was it constitutional?

The Supreme Court, in a very elaborate and well-reasoned opinion, held that there was no constitutional power in the legislature to confer such authority on the counties, or on any municipal corporation. This decision was made in a case where the question fairly arose, and where it was necessary and proper that the court should decide it. It was decided by a full bench, and with unanimity. It was decided by the court of highest resort in that State, to which is confided, according to all the authorities, the right to construe the Constitution of the State, and whose decision is binding on all other courts which may have occasion to consider the same question, until it is reversed or modified by the same court. It has been followed in that court by several other decisions to the same point, not yet reported. It is the law administered by all the inferior judicial tribunals in the State, who are bound by it beyond all question. I apprehend that none of my brethren who concur in the opinion just delivered, would go so far as to say that the inferior State courts would have a right to disregard the decision of their own appellate court, and give judgment that the bonds were valid. Such a course would be as useless, as it would be destructive of all judicial subordination.

Yet this is in substance what the majority of the court have decided.

They have said to the Federal court sitting in Iowa, "You shall disregard this decision of the highest court of the State on this question. Although you are sitting in the State of

Iowa, and administering her laws, and construing her constitution, you shall not follow the latest, though it be the soundest, exposition of its constitution by the Supreme Court of that State, but you shall decide directly to the contrary; and where that court has said that a statute is unconstitutional, you shall say that it is constitutional. When it says bonds are void, issued in that State, because they violate its constitution, you shall say they are valid, because they do *not* violate the constitution."

Thus we are to have two courts, sitting within the same jurisdiction, deciding upon the same rights, arising out of the same statute, yet always arriving at opposite results, with no common arbiter of their differences. There is no hope of avoiding this, if this court adheres to its ruling. For there is in this court no power, in this class of cases, to issue its writ of error to the State court, and thus compel a uniformity of construction, because it is not pretended that either the statute of Iowa, or its constitution, or the decision of its courts thereon, are in conflict with the Constitution of the United States, or any law or treaty made under it.

Is it supposed for a moment that this treatment of its decision, accompanied by language as unsuited to the dispassionate dignity of this court, as it is disrespectful to another court of at least concurrent jurisdiction over the matter in question, will induce the Supreme Court of Iowa to conform its rulings to suit our dictation, in a matter which the very frame and organization of our Government places entirely under its control? On the contrary, such a course, pursued by this court, is well calculated to make that court not only adhere to its own opinion with more tenacity, but also to examine if the law does not afford them the means, in all cases, of enforcing their own construction of their own constitution, and their own statutes, within the limits of their own jurisdiction. What this may lead to it is not possible now to foresee, nor do I wish to point out the field of judicial conflicts, which may never occur, but which if they shall occur, will weigh heavily on that court which should have yielded to the other, but did not.

The general principle is not controverted by the majority, that to the highest courts of the State belongs the right to construe its statutes and its constitution, except where they may conflict with the Constitution of the United States, or some statute or treaty made under it. Nor is it denied that when such a construction has been given by the State court, that this court is bound to follow it. The cases on this subject are numerous, and the principle is as well settled, and is as necessary to the harmonious working of our complex system of government, as the correlative proposition that to this court belongs the right to expound conclusively, for all other courts, the Constitution and laws of the Federal Government.*

But while admitting the general principle thus laid down, the court says it is inapplicable to the present case, because there have been conflicting decisions on this very point by the Supreme Court of Iowa, and that as the bonds issued while the decisions of that court holding such instruments to be constitutional were unreversed, that this construction of the constitution must now govern this court instead of the later one. The moral force of this proposition is unquestionably very great. And I think, taken in connection with some fancied duty of this court to enforce contracts, over and beyond that appertaining to other courts, has given the majority a leaning towards the adoption of a rule, which in my opinion cannot be sustained either on principle or authority.

The only special charge which this court has over contracts, beyond any other court, is to declare judicially whether the statute of a State impairs their obligation. No such question arises here, for the plaintiff claims under and by virtue of the statute which is here the subject of discussion. Neither is there any question of the obligation of contracts, or the right to enforce them. The question goes behind that. We are called upon, not to construe a contract, nor to determine how one shall be enforced, but to decide whether there ever

* See Shelby *v.* Guy, 11 Wheaton, 361; McCluny *v.* Silliman, 3 Peters, 277; Van Rensselaer *v.* Kearney, 11 Howard, 297; Webster *v.* Cooper, 14 Id., 504; Elmendorf *v.* Taylor, 10 Wheaton, 152; The Bank *v.* Dudley, 2 Peters, 492.

was a contract made in the case. To assume that there was a contract, which contract is about to be violated by the decisions of the State court of Iowa, is to beg the very question in dispute. In deciding this question the court is called upon, as the court in Iowa was, to construe the constitution of the State. It is a grave error to suppose that this court must, or should, determine this upon any principle which would not be equally binding on the courts of Iowa, or that the decision should depend upon the fact that certain parties had purchased bonds which were supposed to be valid contracts, when they really were not.

The Supreme Court of Iowa is not the first or the only court which has changed its rulings on questions as important as the one now presented. I understand the doctrine to be in such cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law, and is overruled for that very reason. The decision of this court contravenes this principle, and holds that the decision of the court makes the law, and in fact, that the same statute or constitution means one thing in 1853, and another thing in 1859. For it is impliedly conceded, that if these bonds had been issued since the more recent decision of the Iowa court, this court would not hold them valid.

Not only is the decision of the court, as I think, thus unsound in principle, but it appears to me to be in conflict with its former decisions on this point, as I shall now attempt to show.

In the case of *Shelby* v. *Guy*,* a question arose on the construction of the statute of limitations of Tennessee. It was an old English statute, adopted by Tennessee from North Carolina, and which had in many other States received a uniform construction. It was stated on the argument, however, that the highest court of Tennessee had given a different construction to it, although the opinion could not then be produced. The court said, that out of a desire to follow

* 11 Wheaton, 361.

the courts of the State in the construction of their own statute, it would not then decide that question, but as the case had to be reversed on other points, it would send it back, leaving that question undecided.

In the case of *The United States* v. *Morrison*,* the question was, whether a judgment in the State of Virginia was, under the circumstances of that case, a lien on the real estate of the judgment debtor. In the Circuit Court this had been ruled in the negative, I presume by Chief Justice Marshall, and a writ of error was prosecuted to this court. Between the time of the decision in the Circuit Court and the hearing in this court, the Court of Appeals of Virginia had decided, in a case precisely similar, that the judgment was a lien. This court, by Chief Justice Marshall, said it would follow the recent decision of the Court of Appeals without examination, although it required the reversal of a judgment in the Circuit Court rendered before that decision was made.

The case of *Green* v. *Neal*,† is almost parallel with the one now under consideration, but stronger in the circumstances under which the court followed the later decision of the State courts in the construction of their own statute. It is stronger in this, that the court there overruled two former decisions of its own, based upon former decisions of the State court of Tennessee, in order to follow a later decision of the State court, after the law had been supposed to be settled for many years. The case was one on the construction of the statute of limitations, and the Circuit Court at the trial had instructed the jury, "that according to the present state of decisions in the Supreme Court of the United States, they could not charge that defendant's title was made good by the statute of limitations." The decisions here referred to were the cases of *Patton* v. *Easton*,‡ and *Powell* v. *Harman*.§

The first of these cases was argued in the February Term, 1815, by some of the ablest counsel of the day, and the opinion delivered more than a year afterwards. In that opinion

* 4 Peters, 124. † 6 Id., 291. ‡ 1 Wheaton, 476.
§ 2 Peters, 241; erroneously cited in Green *v.* Neal, 6 Id., 291, as Powell *v.* Green. REP.

Chief Justice Marshall recites the long dispute about the point in North Carolina and Tennessee, and says it has at length been settled by the Supreme Court of the latter State by two recent decisions, made after the case then before it had been certified to this court, and the court follows those decisions. This is reaffirmed in the second of the above-mentioned cases.

In delivering the opinion in the case of *Green* v. *Neal*, Justice McLean says that the two decisions in Tennessee referred to by Judge Marshall were made under such circumstances that they were never considered as fully settling the point in that State, *there being contrariety of opinion among the judges.* The question, he says, was frequently raised before the Supreme Court of Tennessee, but was never considered as finally settled, until 1825, the first decision having been made in 1815. The opinion of Judge McLean is long, and the case is presented with his usual ability, and I will not here go into further details of it. It is sufficient to say that the court holds it to be its duty to abandon the two first cases decided in Tennessee, to overrule their own well-considered construction in the case of *Patton* v. *Easton*, and its repetition in *Powell* v. *Green*, and to follow without examination the later decision of the Supreme Court of Tennessee, which is in conflict with them all.

At the last term of this court, in the case of *Leffingwell* v. *Warren*,* my very learned associate, who has just delivered the opinion in this case, has collated the authorities on this subject, and thus on behalf of the whole court announces the result:

"The construction given to a State statute by the highest judicial tribunal of such State, is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. . . . . If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decision, this court will follow the latest settled adjudications."†

* 2 Black, 599.

† United States *v.* Morrison, 4 Peters, 124; Green *v.* Neal, 6 Id., 291.

It is attempted, however, to distinguish the case now before us from those just considered, by saying that the latter relate to what is rather ambiguously called a rule of property, while the former concerns a matter of contract. I must confess my inability to see any principle on which the distinction can rest. All the statutes of the States which prescribe the formalities and incidents to conveyances of real estate would, I presume, be held to be rules of property. If the deed by which a man supposes he has secured to himself and family a homestead, fails to comply in any essential particular with the statute or constitution of the State, as expounded by the most recent decision of the State court, it is held void by this court without hesitation, because it is a rule of property, and the last decision of the State court must govern, even to overturning the well-considered construction of this court. But if a gambling stockbroker of Wall Street buys at twenty-five per cent. of their par value, the bonds issued to a railroad company in Iowa, although the court of the State, in several of its most recent decisions, have decided that such bonds were issued in violation of the Constitution, this court will not follow that decision, but resort to some former one, delivered by a divided court, because in the latter case it is not a rule of property, but a *case of contract.* I cannot rid myself of the conviction that the deed which conveys to a man his homestead, or other real estate, is as much a contract as the paper issued by a municipal corporation to a railroad for its worthless stock, and that a bond when good and valid is property. If bonds are not property, then half the wealth of the nation, now so liberally invested in the bonds of the government, both State and national, and in bonds of corporations, must be considered as having no claim to be called property. And when the construction of a constitution is brought to bear upon the questions of property or no property, contract or no contract, I can see no sound reason for any difference in the rule for determining the question.

The case of *Rowan* v. *Runnels*,* is relied on as furnishing

* 5 Howard, 134.

a rule for this case, and support to the opinion of the court. In that case the question was on the validity of a note given for the purchase of slaves, imported into the State of Mississippi. It was claimed that the importation was a violation of the Constitution of the State, and the note therefore void. In the case of *Groves* v. *Slaughter*,* this court had previously decided that very point the other way. In making that decision it had no light from the courts of Mississippi, but was called on to make a decision in a case of the first impression. The court made a decision, with which it remained satisfied when *Rowan* v. *Runnels* came before it, and which is averred by the court to have been in conformity to the expressed sense of the legislature, and the general understanding of the people of that State. The court therefore in *Rowan* v. *Runnels* declined to change its own rulings, under such circumstances, to follow a single later and adverse decision of the Mississippi court.

In the case now before the court it is not called on to retract any decision it has ever made, or any opinion it has declared. The question is before this court for the first time, and it lacks in that particular the main ground on which the judgment of this court rested in *Rowan* v. *Runnels*. It is true that the chief justice, in delivering the opinion in that case, goes on to say, in speaking of the decision of the State courts on their own constitution and laws: "But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into *with citizens of other States*, which, in the *judgment of this court*, were lawfully made." I have to remark, in the first place, that this dictum was unnecessary, as the first and main ground was, that this court could not be required to overrule its own decision, when it had first occupied the ground, and when it still remained of the opinion then declared. Secondly, that the contract in *Rowan* v. *Runnels*, was between a citizen of Mississippi, on the one part, and a citizen of Virginia on the other, and the language of the chief justice makes that the ground of the

* 15 Peters, 449.

right of this court to disregard the later decision of the State court; and in this case the contract was made between the city of Dubuque and a railroad company, both of which were corporations existing under the laws of Iowa, and citizens of that State, in the sense in which that word is used by the chief justice. And, thirdly, the qualification is used in the Runnels case that the "*contracts were, in the judgment of this court, lawfully made.*" In the present case, the court rests on the former decision of the State court, declining to examine the constitutional question for itself.

The distinction between the cases is so obvious as to need no further illustration.

The remaining cases in which the subject is spoken of, may be mentioned as a series of cases brought into the Supreme Court of the United States by writ of error to the Supreme Court of Ohio, under the twenty-fifth section of the Judiciary Act. In all these cases the jurisdiction of the Supreme Court of the United States was based upon the allegation that a statute of Ohio, imposing taxes upon bank corporations, was a violation of a previous contract made by the State with them, in regard to the extent to which they should be liable to be taxed. In the argument of these cases it was urged that the very judgments of the Supreme Court of Ohio, which were then under review, being the construction placed by the courts of that State on their own statutes and constitution, should be held to govern the Supreme Court of the Union, in the exercise of its acknowledged right of revising the decision of the State court in that class of cases. It requires but a bare statement of the proposition to show that, if admitted, the jurisdiction of the Federal Supreme Court to sit as a revisory tribunal over the State courts, in cases where the State law is supposed to impair the obligation of a contract, would be the merest sham.

It is true that in the extract, given in the opinion of the court just read, from the case of the *Ohio Trust Company* v. *Debolt*, language is used by Chief Justice Taney, susceptible of a wider application. But he clearly shows that there was in his mind nothing beyond the case of a writ of error to

the Supreme Court of a State, for he says in the midst of the sentence cited, or in the immediate context, "The writ of error to a State court would be no protection to a contract, if we were bound to follow the judgment which the State court had given, and which the court brings up here for revision." Besides, in the opinion thus cited, the chief justice says, in the commencement of it, that he only speaks for himself and Justice Grier. The remarks cited, then, were not the opinion of the court, were outside the record, and were evidently intended to be confined to the case of a writ of error to the court of a State, where it was insisted that the judgment sought to be revised should conclude this court.

But let us examine for a moment the earlier decisions in the State court of Iowa, on which this court rests with such entire satisfaction.

The question of the right of municipal corporations to take stock in railroad companies, came before the Supreme Court of Iowa, for the first time, at the June Term, A.D. 1853, in the case of *Dubuque County* v. *The Dubuque and Pacific Railroad Company.** The majority of the court, Kinney J., dissenting, affirmed the judgment of the court below, and in so doing must necessarily have held that municipal corporations could take stock in railroad enterprises. The opinions of the court were by law filed with the clerk, and by him copied into a book kept for that purpose. The dissenting opinion of Judge Kinney, a very able one, is there found in its proper place, in which he says, he has never seen the opinion of the majority. No such opinion is to be found in the clerk's office, as I have verified by a personal examination. Nor was it ever seen, until it was published five years afterwards, in the volume above referred to, by one of the judges, who had ceased to be either judge or official reporter at the time it was published. Shortly after this judgment was rendered, Judge Kinney resigned, and his place was supplied by Judge Hall. The case of the *State* v. *Bissell*† then came before the court in 1854. In this case, after disposing of

* 4 G. Greene, 1.

† 4 Id., 328.

several questions relating to the regularity of the proceedings in issuing bonds for a railroad subscription, Judge Hall, who delivered the opinion of the court, then refers to the right of the county to take stock and issue bonds for railroad purposes. He says: "This point is not urged, and the same question having been decided at the December Term of this court in 1853, in the case of the *Dubuque and Pacific Railroad Company* v. *Dubuque County*, is not examined. This decision is not intended to sanction or deny the legal validity of that decision, but to leave the question where that decision left it." It is clear that if Judge Hall had concurred with the other two judges, no such language as this would have been used, but they would have settled the question by a unanimous opinion. In the case of *Clapp* v. *Cedar County*,* the question came up again in the same court, composed of new judges. The Chief Justice, Wright, was against the power of the counties to subscribe stock, and delivered an able dissenting opinion to that purport. The other two judges, however, while in substance admitting that no such power had been conferred by law, held that they must follow the decision in the Dubuque case. Several other cases followed these, with about the same result, up to 1859, Wright always protesting, and the other judges overruling him. In 1859, in the case of *Stokes* v. *Scott County*,† which was an application to restrain the issue of bonds voted by the county, Judge Stockton said that, in a case like that, where the bonds had not passed into the hands of *bonâ fide* holders, he felt at liberty to declare them void, and concurring with Judge Wright that far, they so decided; Judge Wright placing his opinion upon a want of constitutional power in the legislature. Finally, in the case of the *State of Iowa, ex relatione*, v. *Wapello County*, the court, now composed of Wright, Lowe, and Baldwin, held unanimously that the bonds were void absolutely, because their issue was in violation of the Constitution of the State of Iowa. The opinion in that case, delivered by Judge Lowe, covers the whole ground, and after

* 5 Iowa, 15.

† 10 Id., 166.

an examination of all the previous cases, overrules them all, except *Stokes* v. *Scott County*. It is exhausting, able, and conclusive, and after a struggle of seven or eight years, in which this question has been always before the court, and never considered as closed, this case may now be considered as finally settling the law on that subject in the courts of Iowa. It has already been repeated in several cases not yet reported. It is the first time the question has been decided by a unanimous court. It is altogether improbable that any serious effort will ever be made to shake its force in that State; for of the nine judges who have occupied the bench while the matter was in contest, but two have ever expressed their approbation of the doctrine of the Dubuque County case.

Comparing the course of decisions of the State courts in the present case with those upon which this court acted in *Green* v. *Neal*,* how do they stand?

In the latter case the court of Tennessee had decided by a divided court in 1815, and that decision was repeated several times, but with contrariety of opinion among the judges, up to 1825, when the former decisions were reversed. In the cases which we have been considering from Iowa, the point was decided in 1853 by a divided court; it was repeated several times up to 1859, by a divided court, under a continuous struggle. In 1859 the majority changed to the other side, and in 1862 it became unanimous. In the Tennessee case, this court had twice committed itself to the decision first made by the courts of that State; yet it retracted and followed the later decision made ten years after. In the present case, this court, which was not committed at all, follows decisions which were never unanimous, which were struggled against and denied, and which had only six years of judicial life, in preference to the later decisions commenced four years ago, and finally receiving the full assent of the entire court.

I think I have sustained, by this examination of the cases, the assertion made in the commencement of this opinion,

* 6 Peters, 291.

that the court has, in this case, taken a step in advance of anything heretofore decided by it on this subject. That advance is in the direction of a usurpation of the right, which belongs to the State courts, to decide as a finality upon the construction of State constitutions and State statutes. This invasion is made in a case where there is no pretence that the constitution, as thus construed, is any infraction of the laws or Constitution of the United States.

The importance of the principle thus for the first time asserted by this court, opposed, as it is, to my profoundest convictions of the relative rights, duties, and comities of this court, and the State courts, will, I am persuaded, be received as a sufficient apology for placing on its record, as I now do, my protest against it.

NOTE.

At the same time with the preceding and principal case, No. 80 of the term, two other cases between the same parties—one being No. 79, and the other No. 81—were disposed of. They were thus:

SAME *v.* SAME.

No. 81.

A statute which enacts that whenever any railroad company "shall have received or may hereafter receive the bonds of any city or county upon subscriptions of stock by such city or county, such bonds *may bear an interest*" at a rate specified, and "*may be sold* by the company," in a way mentioned,—*implies* that a city (whose charter gave it power to borrow money for public purposes), had power to subscribe to the stock and to issue its bonds in payment, and makes the subscription and bonds as valid as if authorized by the statute directly.

THIS suit differed from 80—the principal one—only in the fact that the bonds of the city, which in this case bore date 1st September, 1855, were issued prior to the passage of the act of 28th January, 1857, *specially authorizing* the city to subscribe to the railroads for which the bonds in No. 80 had been subsequently given. The bonds rested in this case (No. 81), therefore, on the charter of the city (approved February 24, 1847), authorizing it "to borrow money for *public purposes*," and on an act passed 25th January, 1855, before the bonds were issued, one section of

Statement of the case.

which enacted that whenever "any company shall have received, or may hereafter receive, the bonds of any city or county upon subscription of stock by such city or county, such bonds may bear an interest at a rate not exceeding ten per cent., and may be sold by the company at such discount as may be deemed expedient," and which enacted also (§ 3), that "the provisions of this act shall apply to any railroad bonds which have been heretofore issued, as well as to those which may hereafter be issued."

Mr. JUSTICE SWAYNE, after stating the difference between the case and No. 80, and quoting this act, thus delivered the opinion of the court:

"In this act it is clearly implied that cities have authority to subscribe for railroad stock, and to issue their bonds in payment of it. What is implied in a statute is as much a part of it as what is expressed. (*United States* v. *Babbitt*, 1 Black, 61.) Considering the subject in the light of these acts, we entertain no doubt that the city possessed the power to issue these bonds."

JUDGMENT REVERSED AND CASE REMANDED.

SAME *v.* SAME.

No. 79.

1. Where some parts of a contract are illegal while others are legal, the legal may be separated from the illegal, if there be no imputation of *malum in se;* and if the good part show a sufficient cause of action, it is error to sustain demurrer to the whole.
2. Where suit is brought on a contract made by a city, where the laws regulating it require the consent of two-thirds of its electors to validate debts for borrowed money, such consent need not be averred on the plaintiff's part. If with such sanction the debt would be obligatory, the sanction will, primarily, be presumed. Its non-existence, if it does not exist, is matter of defence, to be shown by the defendant.
3. A contract made by a city to pay a sum of money with interest to a person who has assumed the payment of interest on some of the city's debt,—as well interest to become due, as interest already due—is not a "borrowing of money," but is a contract for the payment of a debt; and, as the last, will be sustained, when, if the former, it might fall within prohibitions against the city's borrowing money except on certain terms.

THIS suit differed both from the principal and from the preceding case in that it was not upon *bonds* issued upon the city, but was upon an instrument of writing by which the mayor and recorder

of the city had entered (Feb. 7, 1859) into a contract with the same Gelpcke and others, that if they, Gelpcke and others, would pay or advance the interest due on various bonds *already* issued by the city (part of the interest then due, and part to become due), and would advance a certain sum of money to enable the city to pay various pressing pecuniary demands upon it, the city "*covenants* that its *city council shall by ordinance require*" a certain tax, to be appropriated for the payment of this debt, and that it *will convey unto F. S. W., as trustee, all its real estate, of whatsoever nature the same may be* (excepting that appropriated to public uses), in trust for payment of the debt. To the suit on this contract the city put in three demurrers. Two of them related to these or other provisions of the contract; "a contract," each demurrer alleged, "the city had no authority to make." The third one was founded on the provision of the 27th section of the charter (see *ante*, p. 176), and was because the petition did not show that the proposition to borrow money had first passed the city council, nor that it had been submitted to vote, nor that it had been adopted by two-thirds of the qualified voters of the city. The court below sustained the demurrers, and gave judgment for the city; which on error here was the point brought up. No argument was made on the first two demurrers. The third one was argued in No. 80.

Mr. JUSTICE SWAYNE delivered the opinion of the court:

The counsel of the plaintiffs in error have submitted no argument in regard to the two first causes assigned for the demurrer. We have not therefore considered the questions which they present. They relate to certain provisions of the contract which are claimed to be invalid. Conceding this to be so, they are clearly separable and severable from the other parts which are relied upon. The rule in such cases, where there is no imputation of *malum in se* is, that the bad parts do not affect the good. The valid may be enforced.* That part of the complaint only which relates to the stipulations claimed to be valid will be considered. The residue of the complaint may be laid out of view as surplusage. The demurrer is to the whole complaint. If the part to be considered shows a sufficient cause of action, the court below should have overruled the demurrer.

* United States *v.* Bradley, 10 Peters, 360.

Statement of the case.

I. It is claimed that the contract is for the borrowing of money, and that the complaint is bad, because it does not aver the sanction of two-thirds of the electors of the city. If the fact were so, the consequence would not follow. If the city could make such a contract with that sanction, the sanction will be presumed until the contrary is shown. The non-existence of the fact is a matter of defence which must be shown by the defendant.

II. We are also of the opinion that the contract, except the provision for an advance to the city of $20,000, which it is stated has been repaid, is not for borrowing money. It bound the plaintiffs to pay the interest for the city upon the debts of the city already created and presumed to be valid. The city agreed to refund the amount so paid at the times and in the manner specified. Such a contract is neither within the terms nor the spirit of the provisions of the charter upon the subject of borrowing.

JUDGMENT REVERSED AND CAUSE REMANDED.

N. B. The dissenting opinion of Mr. Justice Miller, given in the principal case, No. 80, applied to Nos. 79 and 81. See also the dissenting opinion of that Justice in *Meyer* v. *City of Muscatine* (*post*), as well as that case generally.

BALDWIN *v.* HALE.

A discharge obtained under the insolvent law of one State is not a bar to an action on a note given in and payable in the same State; the party to whom the note was given having been and being of a different State, and not having proved his debt against the defendant's estate in insolvency, nor in any manner been a party to those proceedings.

THIS was a writ of error to the Circuit Court for the District of Massachusetts; the case, as appearing from an agreed statement of facts, being thus:

J. W. Baldwin, a citizen of *Massachusetts*, made, at *Boston*, in that State, his promissory note, *payable there*, in these words:

$2000. BOSTON, February 21, 1854.

Six months after date I promise to pay to the order of myself, two thousand dollars, *payable in Boston*, value received.

J. W. BALDWIN.

And duly indorsed it to Hale, the plaintiff, then and afterwards a citizen of *Vermont*. After the date of the note, but

before any suit was brought upon it, Baldwin, upon due proceedings in the Court of Insolvency of the State of *Massachusetts*, obtained a certificate of discharge from his debts; the certificate embracing by its terms all contracts to be performed within the State of Massachusetts. Hale did not prove his debt, nor take any part in the proceedings.

Suit having been afterwards brought against Baldwin by Hale, the indorsee and holder of the note, and still, as originally, a citizen of Vermont, the question was *whether the certificate was a bar to the action.*

The court below ruled that it was not, and the correctness of the ruling was now before this court on error.

Messrs. Hutchins & Wheeler for the plaintiff in error: It is settled that State insolvent laws not operating retrospectively (such being the character of those under which the discharge here pleaded was granted), do not fall within the constitutional prohibition against the violation of contracts. Otherwise such State insolvent laws would not have been held valid and binding as between the citizens of the States enacting them, as they have been ever since *Ogden v. Saunders.** The law, then, under which the discharge here pleaded was granted, possesses all the validity and force which the State of Massachusetts, with uncontrolled power of legislation on the subject and in the absence of any constitutional restraint, could impart to it. We do not suggest that this or any State law relating to property possesses extra-territorial force: the legislative sovereignty of each State is confined to its limits. Beyond these the laws of some other local jurisdiction prevail.

The question, then, presented for decision, being not one of constitutional law, but rather of public or international law, we set out with the principle, well settled, that contracts take their legal construction and validity or invalidity from the "*law of the place*" to which they belong; including, under this term, both the place of origin and of execution, where

* 12 Wheaton, 279.

they are not the same. We do not find that contracts as such take any attribute from the circumstance that the domicile or allegiance of the contracting parties is different, unless they are alien enemies.

When the place both of the origin and the execution of the contract is the same, then the contract is to be governed wholly by the law of that place.*

Upon the same principle, it is held that a contract discharged by the law of the place which governs it, is discharged everywhere; and conversely, a contract not discharged by the law of that place, is nowhere discharged.†

It seems, therefore, that where, as here, the contract, the discharge, and the party pleading it, come wholly under and within the same jurisdiction, all the conditions necessary to subject the contract to the law of that jurisdiction exist,—so that the discharge should be deemed effectual in bar of any action upon it. And upon this state of facts the Supreme Court of Massachusetts, while announcing their purpose to follow, strictly, decisions by this court of constitutional questions, have yet held such a discharge as was here given to be a good defence in a suit brought by a non-resident creditor. They say in *Scribner et al.* v. *Fisher*,‡ that the question raised here in the case at bar, has never been passed on by the court at all. The judgment below must therefore be reversed, unless this court should overrule the doctrine of the Massachusetts case, and determine that it is in conflict with its own decisions, and it cannot do this without contradicting at the same time the declaration to the contrary of the Massachusetts court itself.

Ogden v. *Saunders*, which will be relied on by the other side, settled, no doubt, that the insolvent laws of the State of the origin of a contract, are not competent to discharge a contract when entered into by one of its citizens with a citi-

* Cox *v.* United States, 6 Peters, 172; Strother *v.* Lucas, 12 Id., 436-7; Andrews *v.* Pond, 13 Id., 77; Bell *v.* Bruen, 1 Howard, 182.

† May *v.* Breed, 7 Cushing, 38; Van Reimsdyk *v.* Kane, 1 Gallison, 375; Very *v.* McHenry, 29 Maine, 206; Green *v.* Sarmiento, 1 Peters's C. C., 74.

‡ 2 Gray, 43.

zen of another State, *where no place of performance is fixed, otherwise than by the origin of the contract;* but that case did not make the citizenship of the contracting parties, instead of the law of the contract itself, the test for determining whether it was liable to be defeated by a discharge in insolvency. To have done so, would have been to establish a test of the legal obligation of contracts hitherto unknown to the law.

We admit that some influence might, in the absence of authority to the contrary, be ascribed to the fact of the foreign domicile of a creditor, but not that such influence can be exerted over the contract, where no *locus* is given to it by the parties themselves. It fails altogether as a test, where the parties contract with the express reference to a place of performance, and embody this provision in the contract, as was done by the parties in the case at bar.

Mr. F. A. Brooks for the creditor, Hale: It is not contended that this note would have been barred by the discharge (it being given by a citizen of Massachusetts to a citizen of Vermont), had it not been *payable in Massachusetts;* but it is said that this makes it a Massachusetts contract, and subjects the claim to the operation of the insolvent laws of that State, although given to a citizen of Vermont. But this question has been decided. It is not the question where the note is payable or where it is dated, but whether the contract is between a citizen of Massachusetts and of Vermont, and if so, an insolvent law of Massachusetts cannot discharge it. It is a question of *citizenship.* Many cases decide this.* The Massachusetts case of *Scribner* v. *Fisher*† is opposed; but we submit that the case is not law. Metcalf, J., dissented, and the true view we conceive is contained in his opinion.

* Sturges *v.* Crowninshield, 4 Wheaton, 122; McMillan *v.* McNeil, 4 Id., 209; Ogden *v.* Saunders, 12 Id., 279; Boyle *v.* Zacharie, 6 Peters, 348; Suydam et al. *v.* Broadnax, 14 Id., 75; Springer *v.* Foster et al., 2 Story, 383; Cook *v.* Moffat et al., 5 Howard, 308; Donnelly *v.* Corbett, 3 Selden, 500; Poe *v.* Duck, 5 Maryland, 1; Anderson *v.* Wheeler, 25 Connecticut, 607; Felch *v.* Bugbee et al., 48 Maine, 9.

† 2 Gray, 43.

An insolvent law of one State cannot discharge the contracts of citizens of other States, because it has no jurisdiction over the citizens of other States. It has no authority to issue notice or process, or in any way to bind the citizens of other States by its proceedings. Its laws can have no *extra-territorial* operation.* A citizen of Vermont, by making his note payable in Massachusetts, does not thereby subject himself to the jurisdiction of Massachusetts laws. Even presentment at the place appointed for payment is not necessary to charge a maker of a note.†

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

Contract was made in Boston and was to be performed at the place where it was made, and upon that ground it is contended by the defendant that the certificate of discharge is a complete bar to the action. But the case shows that the plaintiff was a citizen of Vermont, and inasmuch as he did not prove his debt against the defendant's estate in insolvency, nor in any manner become a party to those proceedings, he insists that the certificate of discharge is a matter *inter alios*, and wholly insufficient to support the defence.

Adopting the views of the court in *Scribner et al.* v. *Fisher*, 2 Gray, 43, the defendant concedes that the law is so, as between citizens of different States, except in cases where it appears by the terms of the contract that it was made and must be performed in the State enacting such insolvent law. Where the contract was made and is by its terms to be performed in the State in which the certificate of discharge was obtained, the argument is, that the discharge is entirely consistent with the contract, and that the certificate operates as a bar to the right of recovery everywhere, irrespective of the citizenship of the promisee. Plaintiff admits that a majority

* Ogden *v.* Saunders, 12 Wheaton, 213; per Washington, J., and per Johnson, J.; second opinion. Baker *v.* Wheaton, 5 Massachusetts, 509.

† Wallace *v.* McConnell, 13 Peters, 136; S. C. 1 American Leading Cases, 4th ed., 348.

of the Supreme Court of Massachusetts, in the case referred to, attempted to maintain that distinction, but he insists that it is without any foundation in principle, and that the decisions of this court in analogous cases are directly the other way.

Controversies involving the constitutional effect and operation of State insolvent laws have frequently been under consideration in this court, and unless it be claimed that constitutional questions must always remain open, it must be conceded, we think, that there are some things connected with the general subject that ought to be regarded as settled and forever closed.

State legislatures have authority to pass a bankrupt or insolvent law, provided there be no act of Congress in force establishing a uniform system of bankruptcy, conflicting with such law; and, provided the law itself be so framed that it does not impair the obligation of contracts. Such was the decision of this court in *Sturges* v. *Crowninshield*, 4 Wheat., 122, and the authority of that decision has never been successfully questioned. Suit was brought in that case against the defendant as the maker of two promissory notes. They were both dated at New York, on the 22d day of March, 1811, and the defendant pleaded his discharge under an act for the benefit of insolvent debtors and their creditors, passed by the legislature of New York subsequently to the date of the notes in controversy. Contracts in that case, it will be observed, were made prior to the passage of the law, and the court held, for that reason, that the law, or that feature of it, was unconstitutional and void, as impairing the obligation of contracts within the meaning of the Constitution of the United States. Suggestion is made that the ruling of the court in the case of *McMillan* v. *McNeill*, 4 Wheat., 209, decided at the same term, asserts a different doctrine, but we think not, if the facts of the case are properly understood.

Recurring to the statement of the case, it appears that the contract was made in Charleston, in the State of South Carolina, and it is true that both parties resided there at the time

the contract was made, but the defendant subsequently removed to New Orleans, in the State of Louisiana, and it was in the latter State where he obtained the certificate of discharge from his debts. He was also one of a firm doing business in Liverpool, and a commission of bankruptcy had been issued there, both against him and his partner, and they respectively obtained certificates of discharge. Suit was brought in the District Court for the District of Louisiana, and the defendant pleaded those certificates of discharge in bar of the action, and the plaintiff demurred to the plea. Under that state of the case and of the pleadings, the court held that the certificate of discharge obtained in the State of Louisiana, was no defence to the suit, and very properly remarked that the circumstance that the State law was passed before the debt was contracted made no difference in the application of the principle. Bearing in mind that the plaintiff was a citizen of South Carolina, and that the contract was made there, it is obvious that the remark of the court is entirely consistent with the decision in the former case.

Secondly, the court also held that a discharge under a foreign bankrupt law was no bar to an action in the courts of the United States, on a contract made in this country. Speaking of that case, Mr. Justice Johnson afterwards remarked that it decided nothing more than that insolvent laws have no extra-territorial operation upon the contracts of other States, and that the anterior or posterior character of the law with reference to the date of the contract makes no difference in the application of that principle. Eight years later the question, in all its phases, was again presented to this court, in the case of *Ogden* v. *Saunders*, 12 Wheat., 213, and was very fully examined.

Three principal points were ruled by the court. First, the court held that the power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States did not exclude the right of the States to legislate on the same subject, except when the power had actually been exercised by Congress, and the State laws conflicted with those of Congress. Secondly, that a bankrupt or insolvent

law of any State which discharges both the person of the debtor and his future acquisitions of property, was not a law impairing the obligation of contracts so far as respects debts contracted subsequent to the passage of such law. Thirdly, but that a certificate of discharge under such a law cannot be pleaded in bar of an action brought by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained. Much diversity of opinion, it must be admitted, existed among the members of the court on that occasion, but it is clear that the conclusions to which the majority came were in precise accordance with what had been substantially determined in the two earlier cases to which reference has been made. Misapprehension existed, it seems, for a time, whether the second opinion delivered by Mr. Justice Johnson in that case was, in point of fact, the opinion of a majority of the court, but it is difficult to see any ground for any such doubt. Referring to the opinion, it will be seen that he states explicitly that he is instructed to dispose of the cause, and he goes on to explain that the majority on the occasion is not the same as that which determined the general question previously considered. Ample authority exists for regarding that opinion as the opinion of the court, independently of what appears in the published report of the case. When the subsequent case of *Boyle* v. *Zacharie et al.*, 6 Pet., 348, was first called for argument, inquiry was made of the court whether the opinion in question was adopted by the other judges who concurred in the judgment of the court. To which Marshall, C. J., replied, that the judges who were in the minority of the court upon the general question concurred in that opinion, and that whatever principles were established in that opinion were to be considered no longer open for controversy, but the settled law of the court. Judge Story delivered the unanimous opinion of the court in that case during the same session, and in the course of the opinion he repeated the explanations previously given by the chief justice. *Boyle* v. *Zacharie et al.*, 6 Pet., 643. Explanations to the same effect were also made by the present chief justice in the case of

Cook v. *Moffat et al.*, 5 How., 310, which had been ruled by him at the circuit. He had ruled the case in the court below, in obedience to what he understood to be the settled doctrine of the court, and a majority of the court affirmed the judgment. Acquiescing in that judgment as a correct exposition of the law of the court, he nevertheless thought it proper to restate the individual opinion which he entertained upon the subject, but before doing so, he gave a clear and satisfactory exposition of what had previously been decided by the court. Those remarks confirm what had at a much earlier period been fully explained by the former Chief Justice and his learned associate. Taken together, these several explanations ought to be regarded as final and conclusive. Assuming that to be so, then, it was settled by this court, in that case,—1. That the power given to the United States to pass bankrupt laws is not exclusive. 2. That the fair and ordinary exercise of that power by the States does not necessarily involve a violation of the obligation of contracts, *multo fortiori* of posterior contracts. 3. But when in the exercise of that power the States pass beyond their own limits and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict of sovereign power and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States, and with the Constitution of the United States. Saunders, a citizen of Kentucky, brought suit in that case against Ogden, who was a citizen of Louisiana at the time the suit was brought. Plaintiff declared upon certain bills of exchange drawn by one Jordan, at Lexington, in the State of Kentucky, upon Ogden, the defendant, in the city of New York, where he then resided. He was then a citizen of the State of New York, and the case shows that he accepted the bills of exchange at the city of New York, and that they were subsequently protested for non-payment.

Defendant pleaded his discharge under the insolvent law of New York, passed prior to the date of the contract. Evidently, therefore, the question presented was, whether a dis-

charge of a debtor under a State insolvent law was valid as against a creditor or citizen of another State, who had not subjected himself to the State laws otherwise than by the origin of the contract, and the decision in express terms was, that such a proceeding was "incompetent to discharge a debt due a citizen of another State." Whenever the question has been presented to this court since that opinion was pronounced, the answer has uniformly been that the question depended upon citizenship. Such were the views of the court in *Suydam et al.* v. *Broadnax et al.*, 14 Pet., 75, where it was expressly held that a certificate of discharge cannot be pleaded in bar of an action brought by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained. Undoubtedly a State may pass a bankrupt or insolvent law under the conditions before mentioned, and such a law is operative and binding upon the citizens of the State, but we repeat what the court said in *Cook* v. *Moffat et al.*, 5 How., 308, that such laws "can have no effect on contracts made before their enactment, or beyond their territory." Judge Story says, in the case of *Springer* v. *Foster et al.*, 2 Story, C. C., 387, that the settled doctrine of the Supreme Court is, that no State insolvent laws can discharge the obligation of any contract made in the State, except such contracts as are made between citizens of that State. He refers to the case of *Ogden* v. *Saunders* to support the proposition, and remarks, without qualification, that the doctrine of that case was subsequently affirmed in *Boyle* v. *Zacharie*, where there was no division of opinion. In the last-mentioned case he gave the opinion of the court, and he there expressed substantially the same views. Confirmation of the fact that such was his opinion may be found both in his Commentaries on the Constitution and in his treatise entitled Conflict of Laws. His view as to the result of the various decisions of this court is, that they establish the following propositions: 1. That State insolvent laws may apply to all contracts within the State between citizens of the State. 2. That they do not apply to contracts made within the State between a citizen of the

State and a citizen of another State. 3. That they do not apply to contracts not made within the State: 2 *Story on Const., sec.* 1390 (*3d edition*), *p.* 281; *Story on Confl. L., sec.* 341, *p.* 573.

Chancellor Kent also says that the discharge under a State law is not effectual as against a citizen of another State who did not make himself a party to the proceedings under the law. 2 *Kent Com.* (*9th ed.*), *p.* 503. All of the State courts, or nearly all, except the Supreme Court of Massachusetts, have adopted the same view of the subject, and that court has recently held that a certificate of discharge in insolvency is no bar to an action by a foreign corporation against the payee of a note, who indorsed it to the corporation in blank before its maturity, although the note itself was executed and made payable in that State by a citizen of the State. Repeated decisions have been made in that court, which seem to support the same doctrine. *Savoye* v. *Marsh*, 10 Met., 594; *Braynard* v. *Marshall*, 8 Pick., 196. But a majority of the court held, in *Scribner et al.* v. *Fisher*, 2 Gray, 43, that if the contract was to be performed in the State where the discharge was obtained, it was a good defence to an action on the contract, although the plaintiff was a citizen of another State and had not in any manner become a party to the proceedings. Irrespective of authority it would be difficult if not impossible to sanction that doctrine. Insolvent systems of every kind partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence. *Nations et al.* v. *Johnson et al.*, 24 How., 203; *Boswell's Lessee* v. *Otis et al.*, 9 How., 350; *Oakley* v. *Aspinwall*, 4 Comst., 514.

Regarded merely in the light of principle, therefore, the rule is one which could hardly be defended, as it is quite evident that the courts of one State would have no power to require the citizens of other States to become parties to any such proceeding. *Suydam et al.* v. *Broadnax et al.*, 14

Pet., 75. But it is unnecessary to pursue the inquiry, as the decisions of this court are directly the other way; and so are most of the decisions of the State courts. *Donnelly* v. *Corbett*, 3 Seld., 500; *Poe* v. *Duck*, 5 Md., 1; *Anderson* v. *Wheeler*, 25 Conn., 607; *Felch* v. *Bugbee et al.*, 48 Me., 9; *Demerrit* v. *Exchange Bank*, 10 Law Rep. (N. S.), 606; *Woodhull* v. *Wagner*, Bald., C. C., 300.

Insolvent laws of one State cannot discharge the contracts of citizens of other States, because they have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceeding, has no jurisdiction in the case. Legal notice cannot be given, and consequently there can be no obligation to appear, and of course there can be no legal default. The judgment of the Circuit Court is therefore affirmed with costs.

JUDGMENT ACCORDINGLY.

BALDWIN *v.* BANK OF NEWBURY.

The case of *Baldwin* v. *Hale* (*ante*, p. 223) affirmed.

Where negotiable paper is drawn to a person by name, with addition of "Cashier" to his name, but with no designation of the particular bank of which he was cashier, parol evidence is allowable to show that he was the cashier of a bank which is plaintiff in the suit, and that in taking the paper he was acting as cashier and agent of that corporation.

THE Bank of Newbury, a corporation, at the time of the suit and now, established in Vermont, brought an action of assumpsit in the Circuit Court of the United States for the Massachusetts district against Baldwin, upon a promissory note made by him in Massachusetts, where he resided. The following is a copy of the note. It was unindorsed:

$3500. BOSTON, Dec. 9, 1853.

Five months after date I promise to pay to the order of *O. C. Hale, Esq., Cashier*, Thirty-five hundred dollars, *payable at either bank in Boston*, value received.

J. W. BALDWIN.

After making the note, and pursuant to laws of Massachusetts existing prior to making it, Baldwin obtained a certificate of discharge from his debts, embracing by its terms all contracts to be performed within the State of Massachusetts after the passage of said laws. The Bank of Newbury took no part in these proceedings in insolvency in Massachusetts by which Baldwin obtained his discharge. This discharge he pleaded in bar of the action on this note.

He also pleaded the general issue, and under that plea objected that the note declared on was not competent evidence to support the declaration, and did not sustain the cause of action therein set forth. On this point the case, as agreed on by the parties, was as follows, viz.:

"It is agreed that O. C. Hale was *in fact the Cashier of the Bank of Newbury* at the time of the making of said note, and in case the court would admit such evidence after objection by the defendant, and not otherwise, and not waiving his objection to the same as incompetent, the defendant admits that said Hale mentioned in said note, in taking said note was acting as the cashier of and agent for the plaintiff corporation. If upon the foregoing facts the plaintiff has made out a legal cause of action in his favor, and the defendant's discharge, &c., is ineffectual as a bar of said action, the defendant is to be defaulted; otherwise the plaintiff is to become nonsuit."

Two points thus arose and were argued:

1. Whether the contract, being by a citizen of Massachusetts, was discharged by the proceedings in Massachusetts, even though to be performed in that State,—Hale being a citizen, and the Bank of Newbury being a corporation of Vermont, a different State.

2. Whether, if this discharge was not a bar, parol evidence was admissible to show that "O. C. Hale, Esq.," described in the note as "Cashier," *simply*, was cashier of the *Bank of Newbury*, the plaintiff in the suit, and that in taking the note, he acted as the cashier and agent of the corporation.

The court below ruled that the discharge pleaded was no bar, and also that the plaintiff had made out a cause of

action, and gave judgment accordingly. On error here the same two questions arose.

Mr. F. A. Brooks, for Baldwin, the plaintiff in error.

1. The first point will be determined by whatever decision is given in *Baldwin* v. *Hale*, *ante*, p. 223, and need not be discussed.

2. The second point has been precisely adjudged in the Circuit Court of the United States for Vermont, in *Bank of the United States* v. *Lyman*.* The note in that case was payable to "*Samuel Jaudon, Esq., cashier, or order.*" Jaudon was notoriously cashier of that bank, which was there plaintiff. The debt, no one doubted, was due to the bank and was not due to Jaudon. The case, completely, was our case. The Bank of the United States, having the same view of the law that the present plaintiff has, sued on the note without Jaudon's indorsement. The court decided that suit could not be so maintained. Prentiss, J., examined the subject on principle and on authority, both English and American. He begins with *Evans* v. *Cramlington*, so far back as Carthew,† affirmed in the Exchequer Chamber, 2 Ventris, 307. He says that the observations of Buller, J., in *Fenn* v. *Harrison*,‡ show, very plainly, that in his opinion no person could be considered as a party to a bill unless his name was upon it, and cites an observation of Lord Abinger,§ who, speaking of a case before him of "written simple agreements," says that "cases of bills of exchange are quite different in principle from those that ought to govern this case." His honor, after affirming that the doctrine enforced by him, he "may safely say," prevails in general in this country, though there may have been now and then an *occasional* departure from it, and that there can be "little doubt," when we refer to *Van Ness* v. *Forrest* (8 Cranch, 30), "how the rule of law on the subject is understood in the *national* court," thus sums up the subject:

"Upon the whole, it appears to me, that the true rule of law,

* 20 Vermont, 676. † Page 5. ‡ 3 Term, 757.

§ Beckham *v.* Drake, 9 Meeson & Welsby, 78.

as deducible from the adjudged cases, American as well as English, is that no person, although in fact a principal or partner, can sue or be sued upon a bill or negotiable note, unless he appear upon its face to be a party to it. A promissory note, according to the expression of very great judges, partakes in some measure of the nature of a specialty, importing a consideration, and creating a debt or duty by its own proper force. Being assignable, and passing by mere indorsement, it is necessary that the parties to it should appear, and be known, by bare inspection of the writing; for it is on the credit of the names appearing upon it that it obtains circulation. It is for these qualities, and on these considerations, that it is distinguished from written, simple contracts in general, and made subject to a different rule.

"The note in question here is a perfect instrument, without ambiguity in form or purpose, and must have operation and effect according to the terms in which it is expressed. It is made payable to '*Samuel Jaudon, Esquire, cashier, or order.*' The promise, therefore, is to pay him, or the person to whom he shall order it to be paid; and it would be repugnant to the terms of the instrument to allow the Bank of the United States, or any one else, without his order, to demand and enforce payment of it by suit. The bank is not named in the note at all, either as principal or otherwise; nor can it be inferred, from anything contained in the note, that it was made even in trust or for the benefit of the bank, or that the bank has any interest whatever in it. To admit parol evidence to show that the bank is the real principal, and hold that it may sue upon the note as such, would be to subject negotiable paper to the very uncertainty the law intended to avoid. It would be putting promissory notes upon the footing of other written simple contracts, and prostrate entirely the distinction, which sound policy, as well as the nature and purpose of negotiable securities, demands should be kept up between the two classes of cases."

The case in the national court* to which Prentiss, J., refers, strongly supports, by implication, our view. There a note was executed to *Joseph Forrest, President of the Commercial Company*, for merchandise belonging to and sold as the pro-

* Van Ness *v.* Forrest, 8 Cranch, 30.

perty of the company. On the question, whether an action could be maintained upon the note in the name of Forrest, Marshall, C. J., said:

"The suit is instituted on a promissory note given, not to the company, but to Joseph Forrest, president of the company. Although the original cause of action does not merge in this note, yet a suit is clearly maintainable on the note itself. Such suit can be brought *only* in the name of Joseph Forrest. *It can no more be brought in the name of the company, than if it had been given to a person not a member, for the benefit of the company.* The legal title is in Joseph Forrest, who recovers the money in his own name, as a trustee for the company."

The *Commercial Bank* v. *French* (21 Pickering, 486), whether decided rightly or the reverse of rightly, is not at essential variance with the doctrine we maintain; for in that case the note was drawn to no person by name. It was to the *Cashier* of the *Commercial Bank*, Boston, or his order. The name of the cashier was not in the note, while that of the bank was so, prominently. It was almost the same thing as if made to the bank by some loose form of name. On the face of the note it belonged to the Commercial Bank. Here no bank at all is specified. An individual is specified by name, and the name is not that of the party suing. "Cashier" is mere surplusage. Neither was the case in accordance with Massachusetts precedents. In one case in that State,* it was decided that a note payable to the treasurer of a parish might be sued in the name of the treasurer. And in another case in the same State,† that a note indorsed to S. S. Fairfield, *Cashier*, might be sustained in the name of Fairfield. It is true that these cases do not directly decide that action might not have been brought also in the name of the corporation which the plaintiffs represented; and it is by this suggestion that the judge who gives the opinion in *The Commercial Bank* v. *French*, evades their force. But with what regard to law does he evade it, if Marshall, C. J., be right

* Fisher *v.* Ellis, 3 Pickering, 381. † 16 Id., 381.

in *his* declaration, in *Van Ness* v. *Forrest*, that suit on such note can be brought "*only*" in the name of the person to whom it was given, and "can no more be brought in the name of the company than if it had been given to a person not a member?"

Mr. Hutchins, contra.

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

1. Two questions are presented for decision, but the first is the same as that just decided in the preceding case, and for the reasons there given must be determined in the same way. Contrary to what was held in the case of *Scribner et al.* v. *Fisher*, 2 Gray, 43, we hold that the certificate of discharge in the case was no bar to the action, because the debt was due to a citizen of another State. Such was the rule laid down in *Ogden* v. *Saunders*, 12 Wheaton, 279; and we also hold that the circumstance that the contract was to be performed in the State where the discharge was obtained does not take the case out of the operation of that rule.

2. Agreed statement also shows that O. C. Hale was in fact the cashier of the Bank of Newbury at the time the defendant executed the note, but the defendant insists, as he insisted in the court below, that parol evidence was not admissible to prove that the person therein named as payee in taking the note acted as cashier and agent of the corporation. He admits that the plaintiff can prove those facts, if admissible, but denies that parol evidence is admissible for that purpose, which is the principal question on this branch of the case. Counsel very properly admit that such evidence would be admissible in suits upon ordinary simple contracts, but the argument is that a different rule prevails where the suit is upon a promissory note or bill of exchange. Suit in such cases, it is said, can only be maintained in the name of the person therein named as payee, and consequently that the plaintiff bank cannot be treated as such without explanatory evidence, and that parol evidence is not admissible to furnish any such explanation. Suppose the rule were so, still it could

not benefit the defendant in this case, because it is unconditionally admitted that O. C. Hale was in fact cashier of the plaintiff bank at the time of the making of the said note. Undeniably the note must be considered in connection with that admitted fact, and when so considered it brings the case directly within the rule laid down in the case of *Commercial Bank* v. *French*, 21 Pickering, 486, and the several cases there cited upon the same subject. In that case the court say the principle is that the promise should be understood according to the intention of the parties. If in truth it be an undertaking to the corporation whether a right or a wrong name is inserted, or whether the name of the corporation or some of its officers be used, it should be declared on and treated as a promise to the corporation, and as a general rule it may be said that where enough appears to show that the parties intended to execute the instrument in the name of the principal, the form of the words is immaterial, because as between the original parties their intention should govern. But it is not necessary to place the decision upon that ground alone, as we are all of the opinion that even if the facts set forth in the agreed statement are all to be regarded merely as an offer of proof, subject to the objections of the defendant, still the case must be decided in the same way. Regarded in that point of view, the question then is whether the evidence offered was admissible. Promise, as appears by the terms of the note, was to O. C. Hale, cashier, and the question is, whether parol evidence is admissible to show that he was cashier of the plaintiff bank, and that in taking the note he acted as the cashier and agent of the corporation. Contract of the parties shows that he was cashier, and that the promise was to him in that character. Banking corporations necessarily act by some agent, and it is a matter of common knowledge that such institutions usually have an officer known as their cashier. In general he is the officer who superintends the books and transactions of the bank under the orders of the directors.

His acts within the sphere of his duty are in behalf of the bank, and to that extent he is the agent of the corporation.

Viewed in the light of these well-known facts, it is clear that evidence may be received to show that a note given to the cashier of a bank was intended as a promise to the corporation, and that such evidence has no tendency whatever to contradict the terms of the instrument. Where a check was drawn by a person who was a cashier of an incorporated bank, and it appeared doubtful upon the face of the instrument whether it was an official or a private act, this court held, in the case of the *Mechanics' Bank* v. *The Bank of Columbia*, 5 Wheat., 326, that parol evidence was admissible to show that it was an official act. Signature of the promissor in that case had nothing appended to it to show that he had acted in an official character, and yet it was unhesitatingly held that parol evidence was admissible to show the real character of the transaction. Opinion in that case was given by Mr. Justice Johnson, and in disposing of the case he said, that it is by no means true, as was contended in argument, that the acts of agents derive their validity from professing on the face of them to have been done in the exercise of their agency. Rules of form, in certain cases, have been prescribed by law, and where that is so those rules must in general be followed, but in the diversified duties of a general agent, the liability of the principal depends upon the fact that the act was done in the exercise and within the limits of the powers delegated, and those powers, says the learned judge, are necessarily inquirable into by the court and jury. Maker of the note in that case had signed his name without any addition to indicate his agency, which makes the case a stronger one than the one under consideration. Same rule as applied to ordinary simple contracts has since that time been fully adopted by this court. Examples of the kind are to be found in the case of the *New Jersey Steam Navigation Company* v. *The Merchants' Bank*, 6 How., 381, and in the more recent case of *Ford* v. *Williams*, 21 How., 289, where the opinion was given by Mr. Justice Grier. In the latter case it is said that the contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein. Parol proof may be admitted to show

the real nature of the transaction, and it is there held that the admission of such proof does not contradict the instrument, but only explains the transaction.

Such evidence, says Baron Park, in *Higgins* v. *Senior*, 8 Mee. & Wels., 844, does not deny that the contract binds those whom on its face it purports to bind, but shows that it also binds another by reason that the act of the agent is the act of the principal. Argument for the defendant is, that the doctrine of those cases can have no application to the present case, because the suit is founded upon a promissory note, but the distinctions taken we think cannot be sustained under the state of facts disclosed in the agreed statement. Mr. Parsons says, if a bill or note is made payable to A. B., cashier, without any other designation, there is authority for saying that an action may be maintained upon it, either by the person therein named as payee or by the bank of which he is cashier, if the paper was actually made and received on account of the bank; and the authorities cited by the author fully sustain the position. *Fairfield* v. *Adams*, 16 Pick., 381; *Shaw* v. *Stone*, 1 Cush., 254; *Barnaby* v. *Newcombe*, 9 Cush., 46; *Wright* v. *Boyd*, 3 Barb., S. C., 523. Among the cases cited by that author to show that the suit may be maintained by the bank, is that of the *Watervliet Bank* v. *White*, 1 Den., 608, which deserves to be specially considered. Note in that case was indorsed to R. Olcott, Esq., cashier, or order, and the suit was brought in the name of the plaintiff bank, of which the indorsee was the cashier. Objection was made that the suit could not be maintained in the name of the bank, but it appearing that the indorsement was really made for the benefit of the corporation, the court overruled the objection, and gave judgment for the plaintiff. *Bayley* v. *Onondaga Ins. Co.*, 6 Hill, 476. Suggestion was made at the argument that the rule was different in Massachusetts, but we think not. On the contrary, the same rule is established there by repeated decisions, which have been followed in other States. *Eastern R. R. Co.* v. *Benedict et al.*, 5 Gray, 561; *Folger* v. *Chase*, 18 Pick., 63; *Hartford Bank* v. *Barry*, 17 Mass., 94; *Long* v. *Colburn*, 11 Mass., 97; *Swan* v. *Park*,

1 Fairf., 441; *Rutland & R. R. Co.* v. *Cole*, 24 Vt., 33. Doubt cannot arise in this case that the person named in the note was in fact the cashier of the plaintiff bank, because the fact is admitted, and it is also admitted that the plaintiff can prove that in taking the note he acted as the cashier and agent of the corporation, provided the evidence is legally admissible. Our conclusion is, that the evidence is admissible, and that the suit was properly brought in the name of the bank. The judgment of the Circuit Court is therefore affirmed with costs.

JUDGMENT ACCORDINGLY.

EX PARTE VALLANDIGHAM.

The Supreme Court of the United States has no power to review by *certiorari* the proceedings of a military commission ordered by a general officer of the United States Army, commanding a military department.

THIS case arose on the petition of Clement L. Vallandigham for a *certiorari*, to be directed to the Judge Advocate General of the Army of the United States, to send up to this court, for its review, the proceedings of a military commission, by which the said Vallandigham had been tried and sentenced to imprisonment; the facts of the case, as derived from the statement of the learned Justice (WAYNE) who delivered the opinion of the court, having been as follows:

Major-General Burnside, commanding the military department of Ohio, issued a special order, No. 135, on the 21st April, 1863, by which a military commission was appointed to meet at Cincinnati, Ohio, on the 22d of April, or as soon thereafter as practicable, for the trial of such persons as might be brought before it. There was a detail of officers to constitute it, and a judge advocate appointed.

The same general had, previously, on the 13th of April, 1863, issued a general order, No. 38, declaring, for the information of all persons concerned, that thereafter all persons

found within his lines who should commit acts for the benefit of the enemies of our country, should be tried as spies or traitors, and if convicted should suffer death; and among other acts prohibited, was the habit of declaring sympathies for the enemy. The order issued by General Burnside declared that persons committing such offences would be at once arrested, with a view to being tried as above stated, or to be sent beyond his lines into the lines of their friends; that it must be distinctly understood that treason, expressed or implied, would not be tolerated in his department.

On the 5th of May, 1863, Vallandigham, a resident of the State of Ohio, and a citizen of the United States, was arrested at his residence and taken to Cincinnati, and there imprisoned. On the following day, he was arraigned before a military commission on a charge of having expressed sympathies for those in arms against the Government of the United States, and for having uttered, in a speech at a public meeting, disloyal sentiments and opinions, with the object and purpose of weakening the power of the Government in its efforts for the suppression of an unlawful rebellion.

The specification under the charge was, that he, the said Vallandigham, a citizen of Ohio, on the 1st of May, 1863, at Mount Vernon, in Knox County, Ohio, did publicly address a large meeting of persons, and did utter sentiments, in words or to the effect, "that the present war was a wicked, cruel, and unnecessary war, one not waged for the preservation of the Union, but for the purpose of crushing out liberty and to erect a despotism; a war for the freedom of the blacks and the enslavement of the whites; and that if the administration had not wished otherwise, that the war could have been honorably terminated long ago; that peace might have been honorably made by listening to the proposed intermediation of France; that propositions, by which the Southern States could be won back, and the South guaranteed their rights under the Constitution, had been rejected the day before the late battle of Fredericksburg by Lincoln and his minions, meaning the President of the United States, and those under him in authority. Also charging that the

Government of the United States was about to appoint military marshals in every district to restrain the people of their liberties, and to deprive them of their rights and privileges, characterizing General Order No. 38, from headquarters of the Department of the Ohio, as a base usurpation of arbitrary authority, inviting his hearers to resist the same, by saying, the sooner the people inform the minions of usurped power that they will not submit to such restrictions upon their liberties, the better; and adding, that he was at all times and upon all occasions resolved to do what he could to defeat the attempts now being made to build up a monarchy upon the ruins of our free government, and asserting that he firmly believed, as he had said six months ago, that the men in power are attempting to establish a despotism in this country, more cruel and oppressive than ever existed before."

The prisoner, on being arraigned, denied the jurisdiction of the military commission, and refused to plead either to the charge or specification. Thereon, the members of the commission, after private consultation, directed the judge advocate to enter a plea of Not Guilty, and to proceed with the trial, with an allowance to the petitioner to call witnesses to rebut the evidence which might be introduced against him to establish the charge. The next day the commission proceeded with the trial. Seven members of it were present, and tried the charge in due form of military law. The prisoner exercised his right to call witnesses, and to cross-examine those who were sworn for the prosecution. At his request he had the aid of counsel, and the court adjourned to enable him to procure it. Three gentlemen of his own choice attended; but for some cause, only known to themselves and their client, they remained in an adjoining room during the trial, without having been introduced before the commission, though it expressly authorized it to be done, saying that it had adjourned to permit the prisoner to obtain their presence. The prisoner was informed by the judge advocate, when he closed his evidence, that no other witnesses would be introduced. He then offered the Hon. S. S.

Cox as a witness in his behalf. This gentleman was interrogated in chief, without being cross-examined, and it was admitted by the judge advocate, that if three other persons who had been summoned to appear as witnesses for the prisoner had appeared, but who were not in court, that their evidence would have been substantially the same as Mr. Cox had given. Here the accused closed his testimony, and then read to the commission a statement, which, with the other proceedings of the trial, was forwarded to the judge advocate general, and was inserted in the record.

It began with the declaration, that he had been arrested without due process of law, without a warrant from any judicial officer; that he was then in a military prison, and had been served with a charge and specifications, as in a court-martial or military commission; that he was not either in the land or naval forces of the United States, nor in the militia in the actual service of the United States, and, therefore, not triable for any cause by any such court; that he was subject, by the express terms of the Constitution, to arrest only by due process of law or judicial warrant, regularly issued upon affidavit by some officer or court of competent jurisdiction for the trial of citizens; that he was entitled to be tried on an indictment or presentment of a grand jury of such court, to a speedy and public trial, and also by an impartial jury of the State of Ohio, to be confronted with witnesses against him, to have compulsory process for witnesses in his behalf, the assistance of counsel for his defence, by evidence and argument according to the common law and the usages of judicial courts;—all those he demanded as his right as a citizen of the United States, under the Constitution of the United States. He also alleged that the offence of which he is charged is not known to the Constitution of the United States, nor to any law thereof; that they were words spoken to the people of Ohio, in an open and public political meeting, lawfully and peaceably assembled under the Constitution, and upon full notice; that they were words of criticism upon the policy of the public servants of the people, by which policy it was alleged that the welfare

of the country was not promoted. That they were used as an appeal to the people to change that policy, not by force, but by free elections and the ballot-box; that it is not pretended that he counselled disobedience to the Constitution or resistance to the law or lawful authority; that he had never done so, and that beyond this protest he had nothing further to submit.

The judge advocate replied, that so far as the statement called in question the jurisdiction of the commission, that had been decided by the authority convening and ordering the trial, nor had the commission, at any time, been willing to entertain the objection; that as far as any implications or inferences designed or contemplated by the statement of the accused, his rights to counsel and to witnesses for his defence, he had enjoyed the allowance of both, and process for his witnesses, which had been issued; and that as to the facts charged in the specification, they were to be determined by the evidence;—that his criminality was a question peculiarly for the commission, and that he had submitted the case to its consideration. The commission was then cleared for consideration.

The finding and sentence were, that Vallandigham was guilty of the charge and specification, except so much of the latter, "as *that propositions by which the Southern States could be won back and guaranteed in their rights under the Constitution had been rejected the day before the battle of Fredericksburg*, by Lincoln and his minions, meaning the President of the United States, and those under him in authority;" and the words, "*asserting that he firmly believed, as he had asserted six months ago, that the men in power are attempting to establish a despotism in this country more oppressive than ever existed before.*" As to those words the prisoner was not guilty; but of the charge he was guilty, and the commission, therefore, sentenced him to be placed in close confinement in some fortress of the United States, to be designated by the commanding officer of this department, there to be kept during the war.

The finding and sentence were approved and confirmed

by General Burnside, in an order bearing date the 16th of May, 1863, and Fort Warren was designated as the place of imprisonment. On the 19th of May, 1863, the President, in commutation of the sentence, directed Major-General Burnside to send the prisoner, without delay, to the headquarters of General Rosecrans, then in Tennessee, to be by him put beyond our military lines; which order was executed.

In support of the motion for the *certiorari*, and against the jurisdiction of the military commission, it was urged that the latter was prohibited by the act of March 3d, 1863, for enrolling and calling out the national forces (§ 30, 12 *Stat. at Large*, 736), as the crimes punishable in it by the sentence of a court-martial or military commission, applied only to persons who are in the military service of the United States, and subject to the articles of war. And also, that by the Constitution itself, § 3, art. 3, all crimes, except in cases of impeachment, were to be tried by juries in the State where the crime had been committed, and when not committed within any State, at such place as Congress may by law have directed; and that the military commission could have no jurisdiction to try the petitioner, as neither the charge against him nor its specifications imputed to him any offence known to the law of the land, and that General Burnside had no authority to enlarge the jurisdiction of a military commission by the General Order No. 38, or otherwise.

Mr. Justice WAYNE, after stating the case, much as precedes, delivered the opinion of the court:

General Burnside acted in the matter as the general commanding the Ohio Department, in conformity with the instructions for the government of the armies of the United States, approved by the President of the United States, and published by the Assistant Adjutant-General, by order of the Secretary of War, on the 24th of April, 1863.*

* They were prepared by Francis Leiber, LL.D., and were revised by a board of officers, of which Major-General E. A. Hitchcock was president.

It is affirmed in these instructions,* that military jurisdiction is of two kinds. First, that which is conferred and defined by statute; second, that which is derived from the common law of war. "Military offences, under the statute, must be tried in the manner therein directed; but military offences, which do not come within the statute, must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local law of each particular county."

In the armies of the United States, the first is exercised by courts-martial, while cases which do not come within the "rules and regulations of war," or the jurisdiction conferred by statute or court-martial, are tried by *military commissions.*

These jurisdictions are applicable, not only to war with foreign nations, but to a rebellion, when a part of a country wages war against its legitimate government, seeking to throw off all allegiance to it, to set up a government of its own.

Our first remark upon *the motion for a certiorari* is, that there is no analogy between the power given by the Constitution and law of the United States to the Supreme Court, and the other inferior courts of the United States, and to the judges of them, to issue such processes, and the prerogative power by which it is done in England. The purposes for which the writ is issued are alike, but there is no similitude in the origin of the power to do it. In England, the Court of King's Bench has a superintendence over all courts of an inferior criminal jurisdiction, and may, by the plenitude of its power, award a certiorari to have any indictment removed and brought before it; and where such certiorari is allowable, it is awarded at the instance of the king, because every indictment is at the suit of the king, and he has a prerogative of suing in whatever court he pleases. The courts of the United States derive authority to issue such a writ from the Constitution and the legislation of Congress. To place the two sources of the right to issue the writ in obvious contrast, and in application to the motion we are considering

* § 1, ¶ 13.

for its exercise by this court, we will cite so much of the third article of the Constitution as we think will best illustrate the subject.

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish." "The judicial power shall extend to all cases in law and equity, arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls," &c., &c., and "*in all cases affecting ambassadors, other ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction.* In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." Then Congress passed the act to establish the judicial courts of the United States,* and in the 13th section of it declared that the Supreme Court shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers or their domestics or their domestic servants as a court of law can have or exercise *consistently with the laws of nations*, and original, but not exclusive jurisdiction, of suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul shall be a party. In the same section, the Supreme Court is declared to have appellate jurisdiction in cases hereinafter expressly provided. In this section, it will be perceived that the jurisdiction given, besides that which is mentioned in the preceding part of the section, is an exclusive jurisdiction of suits or proceedings against ambassadors or other public ministers or their domestics or domestic servants, as a court of law can have or exercise consistently with the laws of nations, and original but not exclusive jurisdiction of all suits *brought by ambassadors or other public ministers*, or in which a consul or vice-consul shall be a party, thus guarding them

* 1 Stat. at Large, 73, chap. 20.

from all other judicial interference, and giving to them the right to prosecute for their own benefit in the courts of the United States. Thus substantially reaffirming the constitutional declaration, that the Supreme Court had original jurisdiction in all cases affecting ambassadors and other public ministers and consuls, and those in which a State shall be a party, and that it shall have appellate jurisdiction in all other cases before mentioned, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The appellate powers of the Supreme Court, as granted by the Constitution, are limited and regulated by the acts of Congress, and must be exercised subject to the exceptions and regulations made by Congress.* In other words, the petition before us we think not to be within the letter or spirit of the grants of appellate jurisdiction to the Supreme Court. It is not in law or equity within the meaning of those terms as used in the 3d article of the Constitution. Nor is a military commission a court within the meaning of the 14th section of the Judiciary Act of 1789. That act is denominated to be one to establish the judicial courts of the United States, and the 14th section declares that all the "before-mentioned courts" of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, agreeably to the principles and usages of law. The words in the section, "the before-mentioned" courts, can only have reference to such courts as were established in the preceding part of the act, and excludes the idea that a court of military commission can be one of them.

Whatever may be the force of Vallandigham's protest, that he was not triable by a court of military commission, it is certain that his petition cannot be brought within the 14th section of the act; and further, that the court cannot, with-

* Durousseau *v.* The United States, 6 Cranch, 314; Barry *v.* Mercein, 5 Howard, 119; United States *v.* Curry, 6 Id., 113; Forsyth *v.* United States, 9 Id., 571.

out disregarding its frequent decisions and interpretation of the Constitution in respect to its judicial power, originate a writ of certiorari to review or pronounce any opinion upon the proceedings of a military commission. It was natural, before the sections of the 3d article of the Constitution had been fully considered in connection with the legislation of Congress, giving to the courts of the United States power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which might be necessary for the exercise of their respective jurisdiction, that by some members of the profession it should have been thought, and some of the early judges of the Supreme Court also, that the 14th section of the act of 24th September, 1789, gave to this court a right to originate processes of *habeas corpus ad subjiciendum*, writs of certiorari to review the proceedings of the inferior courts as a matter of original jurisdiction, without being in any way restricted by the constitutional limitation, that in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. This limitation has always been considered restrictive of any other original jurisdiction. *The rule of construction of the Constitution being, that affirmative words in the Constitution, declaring in what cases the Supreme Court shall have original jurisdiction, must be construed negatively as to all other cases.** The nature and extent of the court's appellate jurisdiction and its want of it to issue writs of *habeas corpus ad subjiciendum* have been fully discussed by this court at different times. We do not think it necessary, however, to examine or cite many of them at this time. We will annex a list to this opinion, distinguishing what this court's action has been in cases brought to it by appeal from such applications as have been rejected, when it has been asked that it would act upon the matter as one of original jurisdiction.

* Marbury *v.* Madison, 1 Cranch, 137; State of New Jersey *v.* State of New York, 5 Peters, 284; Kendall *v.* The United States, 12 Id., 637; Cohens *v.* Virginia, 6 Wheaton, 264.

In the case *Ex parte Milburn*,* Chief Justice Marshall said, as the jurisdiction of the court is appellate, it must first be shown that it has the power to award a *habeas corpus*. *In re Kaine*,† the court denied the motion, saying that the court's jurisdiction to award the writ was appellative, and that the case had not been so presented to it, and for the same cause refused to issue a writ of certiorari, which in the course of the argument was prayed for. In *Ex parte Metzger*,‡ it was determined that a writ of certiorari could not be allowed to examine a commitment by a district judge, under the treaty between the United States and France, for the reason that the judge exercised a special authority, and that no provision had been made for the revision of his judgment. So does a court of military commission exercise a special authority. In the case before us, it was urged that the decision in Metzger's case had been made upon the ground that the proceeding of the district judge was not judicial in its character, *but that the proceedings of the military commission* were so; and further, it was said that the ruling in that case had been overruled by a majority of the judges in Raines' case. There is a misapprehension of the report of the latter case, and as to the judicial character of the proceedings of the military commission, we cite what was said by this court in the case of *The United States* v. *Ferreira*.§

"The powers conferred by Congress upon the district judge and the secretary are judicial in their nature, for judgment and discretion must be exercised by both of them, but it is not judicial in either case, in the sense in which judicial power is granted to the courts of the United States." Nor can it be said that the authority to be exercised by a military commission is judicial in that sense. It involves discretion to examine, to decide and sentence, but there is no original jurisdiction in the Supreme Court to issue a writ of *habeas corpus ad subjiciendum* to review or reverse its proceedings, or the writ of certiorari to revise the proceedings of a military commission.

* 9 Peters, 704. † 14 Howard, 103. ‡ 5 Id., 176. § 13 Id., 48.

And as to the President's action in such matters, and those acting in them under his authority, we refer to the opinions expressed by this court, in the cases of *Martin* v. *Mott*,* and *Dynes* v. *Hoover*.†

For the reasons given, our judgment is, that the writ of certiorari prayed for to revise and review the proceedings of the military commission, by which Clement L. Vallandigham was tried, sentenced, and imprisoned, must be denied, and so do we order accordingly.

CERTIORARI REFUSED.

NELSON, J., GRIER, J., and FIELD, J., concurred in the result of this opinion. MILLER, J., was not present at the argument, and took no part.

DUNHAM *v.* THE CINCINNATI, PERU, &c., RAILWAY COMPANY.

1. A mortgage by a railway company of their "road, built and *to be* built,"—the company, at the date of their mortgage, having built a part of their road, but not built the residue,—has precedence, even as regards the unbuilt part of the claim of a contractor who, in the inability of the company to finish the road, had himself finished it under an agreement that he should retain possession of the road and apply its earnings to the liquidation of the debt due him, and who had never surrendered possession of the road to the company. DAVIS, J., dissenting.
2. Where a mortgage given by a railway company to secure a number of bonds provides that in case of a sale or other proceedings to coerce payment of *interest* or *principal*, all bonds and the interest accrued shall be a lien in common therewith, and the interest accrued thereon shall be equally due and payable, and entitled to a *pro rata* dividend of the proceeds of sale,—with this superadded declaration, however, to wit, "but in *no case* shall the *principal* of any bond be considered as due *until twenty years from the date thereof*" (this being the term which the bonds on their faces had to run)—it is error, after a sale, under the mortgage, within the twenty years, to give precedence to the overdue interest warrants. The superadded clause will be interpreted only as excluding an inference that a bondholder *might bring an action* for the principal before it became due by its terms.

THIS was an appeal from a decree of the Circuit Court of the United States for the District of Indiana, made in a case

* 12 Wheaton, pp. 28 to 35, inclusive. † 20 Howard, 65.

in which Dunham was complainant, and the Cincinnati, Peru, and Chicago Railway Company, with one Walker, a builder of the road, and Ludlow, his assignee, under the insolvent laws of the State, were defendants. The facts were these:

The appellant, Dunham, on the 18th of April, 1860, filed his bill in the court below to foreclose a mortgage given to him as trustee by the said railway company, to secure the payment of certain bonds therein described. The respondent corporation was organized under a general law of the State of Indiana, for the incorporation of railroad companies,* one section of which provides that "such company may from time to time *borrow* such sums of money as they may deem necessary for completing or operating their railroad, and *issue and dispose of their bonds*, for any amount so borrowed, for such sums and such rate of interest as is allowed by the laws of the State where such contract is made, *and mortgage their corporate property and franchises to secure the payment of any debt contracted by such company.*" They were authorized by their charter to construct a railroad from Laporte, in that State, by the way of Plymouth, &c., to Marion in the same State. The whole length of the railroad, as contemplated, was about ninety-seven miles, and for the purpose of constructing, completing, and equipping the entire route, the directors resolved to raise money by loans to an amount not exceeding $1,000,000, and to issue the bonds of the company, not exceeding one thousand in number, for the sum of $1000 each, payable in *twenty* years from date, and bearing interest not exceeding seven per cent. per annum. They also decided to construct the road by sections, and, with that view, divided the route into four parts, designated and numbered as sections one, two, three, and four. Section one extended from Laporte to Plymouth, a distance of about twenty-eight and a half miles: this was the only one that was built, and is the one which constitutes the subject-matter of the controversy in this suit. Intending

* Act of May 11, 1852, § 19; 2 Revised Code, 409.

to construct the road in sections, they apportioned the loan and the bonds to be issued upon the several sections. Three hundred thousand dollars were apportioned to the first section, and the residue to the three other sections. Having arranged these preliminaries, they resolved to *mortgage the road to secure the payment of the interest accruing on the bonds, and for the ultimate discharge of the principal.* The complainant was appointed trustee for the purpose of such a conveyance, and on the 20th of February, 1855, a mortgage was made to him as such trustee, his successors and assigns, of the following property of the company, that is to say, "their road built, *and to be built*," "including the *right of way*, and the *land occupied thereby, together with the superstructures and tracks thereon, and all bridges, viaducts, culverts, fences, depot grounds and buildings thereon, and all other appurtenances belonging thereto, and all franchises, rights, and privileges of the company to the same.*" Pursuant to the previous determination of the company, the proper officers thereof, on the 1st of March following, issued the three hundred bonds apportioned to the first section of the road, and which had been duly set apart for its construction and equipment. They were the only bonds ever issued under the first mortgage. The allegation of the bill of complaint was that the interest warrants had not been paid, and that the railway company had failed to furnish any means whatever for that purpose as stipulated between the parties. The bill also alleged that the company, on the 26th of February, 1855, made to the complainant, as such trustee, another mortgage of their railroad, to secure the payment of bonds proposed by them to be issued for another sum, not exceeding $1,000,000, for the same purpose. An apportionment of that sum also was made upon the different sections of the road in the same manner as was done under the first mortgage, but none of the bonds were issued, except those apportioned to the first section. The railway company did not appear, and as to them the complainant took a decree *pro confesso*. The defendants, Walker and Ludlow, appeared and filed separate answers. The defence of Walker was, that the company being *wholly*

unable to complete the road, he, the respondent, on the 28th of November, 1855, *entered into an agreement with them to complete the first section and furnish all the materials*, and that the company agreed to pay him the full value of the materials so furnished, and a reasonable compensation for his services; that, as *part of the arrangement*, the company engaged to deliver to him, from time to time, ninety-nine of the first mortgage bonds, and two hundred and ninety-nine of the second mortgage bonds, at $400 for each $1000 bond, and that *he*, the contractor, *was to have and keep possession and control of that section of the road and its earnings until the company should make full payment to him of what they should owe him under that agreement.* The answer then averred that he expended for materials and labor in completing the contract, $302,000, and that the company, on the 8th of April, 1858, confessed a judgment in his favor for the balance due him under the contract, amounting to $\$129{,}491\frac{43}{100}$, which, as he insisted, was entitled to *a preference in payment from the earnings and income of the road*, and from the proceeds of the sale of the same *over the first mortgage bonds.*

The stipulations of the contract purported to give to the contractor *the absolute control* of the first section of the road and its earnings, from its opening until the *company should make full payment for its construction*, and the contractor was to disburse its earnings,—

1st. To pay the expenses of operating the road.

2d. *To reimburse himself for all the money which he might advance.*

3d. To pay the *interest on the first and second mortgage bonds*, and if there was any surplus, to apply the same to the other objects therein specified.

The answer of the other respondent, Ludlow, set up the same defence.

The mortgage of the complainants had been duly registered, March 9, 1855, more than eight months before the contract was made with Walker and Ludlow.

The court below rendered a decree directing that the road should be sold, and that the proceeds, after the payment of

costs, *should be paid over to Ludlow, as assignee of the contractor*, to the exclusion of the trustee, and *in preference to the mortgage on which the suit was founded.*

The decree also ordered that coupons past due on the bonds should take precedence over the principal of the bonds; the ground of the decree being a clause in the mortgage held by the complainant as trustee, in these words: "In case of default in the payment of interest or principal of any bonds, and a sale or other proceedings to coerce the same, all bonds which shall then be a lien in common therewith, and the interest accrued thereon, shall be considered, and shall in fact be equally due and payable, and entitled to a *pro rata* dividend of the proceeds of said sale or other proceedings; *but in no case shall the principal of any bond be considered due until twenty years from the date thereof.*"

From this decree, Dunham, a creditor under the mortgagee, appealed, and now sought to reverse the decree.

Messrs. Major and Black for Walker and Ludlow:

1. The question is, whether Walker—having made the road by the expenditure of his own means, without which expenditure the road was worthless to the company and the bondholders, and made it under a written agreement with the company that he should retain possession of the road, and apply its earnings to the liquidation of the debt due him, until such debt was paid; and having never surrendered possession to the company—holds a prior lien upon it, and is entitled in equity to a priority in the distribution of the proceeds on sale of it? We think that he is.

1. Railroad mortgages made to secure the payment of bonds which are sold for the purpose of obtaining means with which to construct the road, are different from mortgages on land, to secure money borrowed. In the latter the *security* is *in esse*, and belongs to the party making the mortgage; in the former, the *road*, which is the only security, is *not in existence* and does not belong to the mortgagor, but on the faith that the company will in future construct it, the bonds are purchased.

There is no evidence that this company owned the soil. No deed is shown. The presumption is against ownership. It is contrary to the policy of the law to allow railroad companies to acquire any greater interest in the land than a right of way.* A grant of a right of way confers no right to the soil. It is but an incorporeal hereditament; a right issuing out of the soil, not a right to or in it. It has been decided in Louisiana,† that a railway is not an "immovable," by nature or destination, if the soil over which it passes belongs to another, and that the rails do not become immovable by being laid down. In an article given to one of our periodicals by Mr. Theron Metcalf, always one of the best lawyers, as now one of the eminent judges of our country, he says,‡ in reference to that case, "As the company has no right of soil to the land embraced by the railroad, but a mere easement, a mortgage by the company cannot pass the right of soil, and consequently timber and iron, afterwards acquired and laid down upon the road, cannot be considered as passing by the mortgage merely because of their being fixed to the soil."

It is a general rule that nothing can be mortgaged that is not *in esse*, and that does not at the time of making the mortgage belong to the mortgagor.§

But equity, it is said, will attach the lien of the mortgage to the subsequent superstructure, when by the terms of the mortgage it is stipulated that the mortgage shall cover it. Still, this result will not attach until the company shall have acquired title to such superstructure; and this title the company cannot acquire so long as the person who made the superstructure keeps possession thereof, unless the company pays to that person the amount due for the work. Especially is this true where, by agreement between the company and such person, he is to keep possesssion of the road and its

* Redfield, 124, 125.

† The State *v.* The Mexican Gulf R. R., 3 Robinson, 514.

‡ 4 American Law Magazine, Jan., 1845, p. 278.

§ Seymour *v.* C. & N. R. R., 25 Barbour, 301; Pierce *v.* Emery and cases cited, 32 New Hampshire, 505.

earnings until the company should pay him all it might owe him. Now, decided cases show that the company could not acquire any right to the road until Walker was first paid all that was owing to him by the company. In a Georgia case, *Collins* v. *The Central Bank*,* certain contractors had constructed a part of the railroad, and the company made them a mortgage thereon to secure to them payment for the work. A bank, which was the holder of bills issued by the company to contractors who built the road, claimed a priority in the proceeds of the road, under a law which authorized the issue of those bills by the company, and created the same a lien on the *road built* by the company. It was held that the contractors had a prior lien on that part of the road which they had built. The court says:

"Nor was the company entitled to the part of the road made by the contractors, until payment was made therefor. It was competent for the company to stipulate, by express agreement, that the contractors should have a lien on that part of the road which they contracted to build, to the extent of the work furnished, until payment was made by the company. This lien, until payment for the work and materials furnished, does not at all conflict with the lien created by the statute on that part of the road built by the company; nor would the company have been entitled to that portion of the road built by the contractors above Griffin until payment made to them therefor. Certainly the billholders, who are the creditors of the company, cannot be considered as standing, at least in a court of equity, in a better condition than the company under whom they claim. If the company could not appropriate the road built by the contractors, to their own use and benefit, until payment for the work and materials, on what principle is it, the billholders, claiming under and through the company, can justly claim in a court of equity to have exclusively appropriated to their benefit the proceeds of the sale of such portion of the road and materials?"†

Thatcher, Burt & Co. v. *Coe*,‡ in the Federal court for Ohio,

* 1 Kelly, 457.

† See Redfield, 574, part 8, for the principle which he deduces from the decision.

‡ MS. report, in possession of a son of McLean, J.

is to the same effect. T., B. & Co. built a bridge for a railroad company upon piers and abutments made by the company, *without any agreement whatsoever as to lien or security* of any kind. When the bridge was completed, T., B. & Co., fearing that the company would not be able to pay them the balance due, refused to give up possession of the bridge to the company until they were paid the balance due them, or a mortgage made to them on the bridge to secure the payment. The company made the mortgage to T., B. & Co., who thereupon gave up the bridge to the company. Coe, the trustee of the first mortgage bondholders, claimed the proceeds of the road in preference to the claims of T., B. & Co. under that mortgage. McLean, J., held that T., B. & Co. were entitled to a *priority*. In his opinion in the case, that judge, replying to an objection that the company had no power to give the mortgage, says:

"The company had the power to make the contract for the bridge on such terms as they believed would best advance the interest of all concerned. This discretion was necessarily exercised by the company in the entire construction and equipment of the road. It was a trust vested in them, and could be exercised by no other power. But it is said the company could do no act to the prejudice of the bondholders represented by the complainant. This assumes that the act done impairs the security of the bondholders. This is not true, either in fact or in law.

"The contractors were not bound to perform the work and deliver it to the railroad company, unless the stipulated compensation was paid or secured to be paid. This they have a right to demand, under the circumstances, and a sense of justice and law induced the railroad company to give the security required. This was not under the mechanic's law, but the common law, which authorizes every man to retain possession of his own work, where no contract has otherwise provided, until he is paid for it, or the payment secured.

"The deed of trust secured to the holders the right of way and the road when constructed with all its equipments. But the equipments, the iron, and the structure of the road, had to be procured by the company with the means under their control, as

the best interests of the road required. If its funds were exhausted, and the company could not procure labor or materials on credit, must the enterprise be abandoned? And if these things could not be procured but by giving a pledge of the work and materials, so as to put the road in operation and enable it to pay an income, has not the company the power to do it? They take nothing from the bondholders, but on the contrary greatly benefit them by adding to the value and productiveness of the road."

McLean, J., further held that T., B. & Co., by keeping the bridge in their possession, preserved a lien on it for their compensation.

"The lien of the bondholders, in no legal or equitable sense, can be considered as paramount to that of the contractors. It was the contractor's labor and money which constructed the things mortgaged, and not the means of the company, so far as regards the balance due." . . . . "In this view, so long as the bridges remained in the possession of the contractors, the lien of the bondholders did not attach. But this right of possession by the contractors was surrendered for the special mortgage given. . . . . Had the contractors delivered the possession of the bridge to the company without a mortgage, the lien of the bondholders would have attached."

II. But suppose the company had the legal title to the land. This would not defeat the lien. A chattel attached to land with the consent of the owner of the land, will remain the property of the person placing it there, as in the erection of houses on another's land. So of the erection of a *fence*, though under an agreement by *parol:* held valid against a purchaser of the land, though without notice.* So of a paper-making machine.† So of salt kettles.‡ So of *iron rails laid in the track*, under an agreement it should not become the property of the company until paid for: held, that the iron was not covered by a subsequent mortgage.§

* Mott *v.* Palmer, 1 Comstock, 564.

† Godard *v.* Gould, 14 Barbour, 662.

‡ Ford *v.* Cobb, 20 New York, 344.

§ Haven *v.* Emery, 33 New Hampshire. 66.

Argument in support of the mortgage.

It is said that the assent of the trustee or bondholders to Walker's contract with the company was necessary to make it valid against them. The answer is, that if such *assent was necessary, the court will presume it*, under the circumstances presented in the case. The construction of the road was the primary object of the organization of the company. It was the purpose for which the bonds were sold, and the agreement was made with Walker. The bondholders and stockholders were the only persons personally interested in making the road. The road being the only security which the bondholders had for the payment of the bonds, they were more deeply interested in the construction than the stockholders. The right of way or right to the land, afforded them no security. The construction of the road was under the control and management of the company, who alone had to provide the means for its construction, and who alone, in its construction, represented the interest of every one concerned. The company was the agent or minister of the trustee, bondholders and stockholders, in the construction; and it was their duty to employ all available resources over which they were competent to exercise control, to prosecute it to completion. This authority may fairly be held to extend to everything which was necessary to the further construction of the road, and which was in no sense prejudicial to the interest of the bondholders.

2. The decree gives priority to overdue coupons. This is right. A clause of the mortgage provides that in "no case shall the principal of any bond be considered due until twenty years after its date."

Mr. Otto, who also filed a brief for Mr. Niles, contra:

1. The mortgage is, in substance and effect, a conveyance of the road as an entire thing. Subsequently acquired property annexed thereto became, by such accession, an inseparable part of the original subject of the mortgage.*

* Pierce *v.* Emery, 32 New Hampshire, 484; Pettingill *v.* Evans, 5 Id., 54; Pennock *v.* Coe, 23 Howard, 117.

Argument in support of the mortgage.

Repeated adjudications have affirmed, on general principles, the validity of such a mortgage by a railroad company against subsequent creditors and incumbrancers with notice. *Pennock* v. *Coe*,* in this court, may be said to be in point. The mortgage was executed in pursuance of a power conferred upon the company, and its validity is not drawn in question by the pleadings.

It is not alleged that the complainant consented to the arrangement in regard to the road for which the contract with Walker provided. That contract was later in date than the mortgage. Walker had full notice of the latter. His title to the possession of the mortgaged property or to the proceeds of the sale thereof cannot, therefore, be enforced so as to displace the prior and paramount lien of the mortgage, or to impair or postpone any of the rights or equities created thereby or arising therefrom.

Counsel on the other side insist that the consent of the complainant should be presumed, if such consent be necessary to the maintenance of Walker's contract. But the court will not presume that a party, whose rights were secured by a valid mortgage duly recorded, consented to waive them, nor that a fact existed, where there is no averment thereof in the record. If Walker relied upon such consent, he should have alleged and proved it.

The doctrine that fixtures attached to the soil at the time of the execution of a mortgage or subsequently acquired, will pass by it, is not controverted on the other side, but its applicability to this case is denied upon the assumption that the company had but a right of way and no title to the land. That assumption, if supported by the facts, would not affect the complainant's rights, but the mortgage does convey, in express terms, "their road built and to be built in the State of Indiana, including the right of way, *and the land occupied thereby*, together, &c., &c." The court will presume that the company had the property which it mortgaged, and Walker's answer does not set up the company's non-ownership of the land, in avoidance of the mortgage.

* 23 Howard, 117.

Neither of the two cases cited on the other side are *authorities* in this court. We think that the case from Georgia went in a large degree on the construction of a local statute. The one decided by McLean, J., is more in point; but it is a circuit case, and of course not binding here. As the case was never published by that judge during his lifetime, being now brought out from his MSS., it would seem that he was not absolutely sure, on reflection, how correctly he had decided it. *Pennock* v. *Coe*, as we have already said, *is* an authority, being in this court.

2. The decree of the court below gives precedence in payment to the *past due coupons*, over the principal of the bonds. This was in violation of a clear provision of the mortgage, in case a default be made in the payment of the principal or interest.

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

1. Appellant contends that the proceeds of the sale of the road, after paying the costs of suit, should be ratably applied towards the payment of the first mortgage bonds and the overdue interest warrants under the same, instead of being applied, as directed in the decree, to the payment of the judgment in favor of the contractor, and to the overdue interest warrants, to the exclusion of the principal of the bonds. Appellees insist that inasmuch as the contractor completed the road by the expenditure of his own means, under a written agreement with the company, purporting to secure to him the possession of the road and its earnings, he has a right to retain the same, and that the proceeds of the sale should be applied to the liquidation of the indebtedness of the company to him until the same is fully discharged.

Possession of the road having been delivered by the company to the contractor for the purpose of completing the road, the respondents insist that he, the contractor, having never surrendered the possession, now holds a prior lien upon the road, and in equity is entitled to a priority in the distribution of the proceeds of the sale. Attempt is made

to sustain that proposition, chiefly upon two grounds. 1st. It is insisted that the mortgage to the complainant, as trustee for the benefit of the bondholders, does not hold any part of the road except what was built at the time the mortgage was executed and delivered. 2dly. They contend that a contractor, expending money and labor in building a railroad, as in this case, under an agreement with the company that he shall have the possession of the road until he is fully paid, thereby acquires a priority over an elder valid mortgage.

Neither of the propositions is based upon any peculiar circumstances in the case, nor are there any such disclosed in the evidence to take the case out of the general rules of law applicable to similar controversies respecting railroad transactions. Nothing of the kind is pretended, and it is obvious that the pretence, if set up, could not be sustained, as there is nothing in the circumstances to distinguish the case from the ordinary course of events in that department of business. Certain persons procured a charter for a railroad, and wanting means to complete it, decided to issue their bonds as a means of borrowing money, and mortgage their road to secure their payment. Railroads, it is believed, have frequently been built in that way, and if it be true that such a mortgage holds no part of the road except what was completed, it is quite time that the rule should be distinctly announced, that the consequences of further misapprehension upon the subject may be avoided. But we are not prepared to adopt any such rule, or to admit that the proposition has any foundation whatever in the facts of this case. On the contrary, we hold it to be clear law that the complainant, as the trustee for the benefit of the bondholders, took "the road built and to be built," together with all the other matters and things specifically enumerated in the mortgage. Express authority was given to the company by the law of the State to borrow such sums of money as they might deem necessary for completing and operating their railroad, and to issue and dispose of their bonds for any amounts so borrowed. What they wanted was money to enable them to make the road, and the authority was expressly given to

authorize them to mortgage it for that purpose. Authorized as this mortgage was by express statute, the case is even stronger than that of *Pennock et al.* v. *Coe* (23 Howard, 128), where the rights of the parties depended upon the general rules of law.

Terms of the grant in that case were, "all present and future to be acquired property," and yet this court held, in a controversy between the grantees of a first mortgage and the grantees of a second mortgage, that the first took the future acquired property, although the property itself was not in existence at the time the first mortgage was executed. While enforcing the rule there laid down, this court said there are many cases in this country confirming the doctrine, and which have led to the practice extensively of giving that sort of security, especially in railroad and other similar great and important enterprises of the day. Several cases were cited by the court on that occasion, which fully support the position, and many more might be added, but it is unnecessary to refer to them, as the one cited is decisive of the point. 2 *Story Eq. Jur.* (8*th ed.*), §§ 1040–1040 *a.*

2. Failing to sustain that position, the respondents, in the second place, rely upon the terms of the subsequent agreement made by the company with the contractor for the completion of the route. Counsel of respondents concede that the mortgage to the complainant was executed in due form of law, and the case also shows that it was duly recorded on the ninth day of March, 1855, more than eight months before the contract set up by the respondents was made. All of the bonds, except those subsequently delivered to the contractor, had long before that time been issued, and were in the hands of innocent holders. Contractor, under the circumstances, could acquire no greater interest in the road than was held by the company. He did not exact any formal conveyance, but if he had, and one had been executed and delivered, the rule would be the same. Registry of the first mortgage was notice to all the world of the lien of the complainant, and in that point of view the case does not even show a hardship upon the contractor, as he must have known when he ac-

cepted the agreement that he took the road subject to the rights of the bondholders. Acting as he did with a full knowledge of all the circumstances, he has no right to complain if his agreement is less remunerative than it would have been if the bondholders had joined with the company in making the contract. No effort appears to have been made to induce them to become a party to the agreement, and it is now too late to remedy the oversight. Conceding the general rules of law to be as here laid down, still an attempt is made by the respondents to maintain that railroad mortgages made to secure the payment of bonds issued for the purpose of realizing means with which to construct the road, stand upon a different footing from the ordinary mortgages to which such general rules of law are usually applied.

Authorities are cited which seem to favor the supposed distinction, and the argument in support of it was enforced at the bar with great power of illustration, but suffice it to say, that in the view of this court the argument is not sound, and we think that the weight of judicial determination is greatly the other way. *Pierce* v. *Emery* (32 N. H., 484); *Pennock* v. *Coe* (23 How., 130); *Field* v. *The Mayor of N. Y.* (2 Seld. 179); *Seymour* v. *Can. and Niag. Falls Railroad Company* (25 Barb., 286); *Red. on Railways*, 578; *Langton* v. *Horton* (1 Hare Ch. R., 549); *Matter of Howe* (1 Paige, 129); *Winslow* v. *Mitchell* (2 Story, C. C., 644); *Domat*, 649, *art.* 5; 1 *Pow. on Mort.* 190; *Noel* v. *Burley* (3 Simons, 103).

Decree of Circuit Court not only gives precedence to the judgment of the contractor, but also to the past-due coupons or interest warrants over the principal of the bonds. Complainant objects to the decree in both particulars, and we think his objections are well founded. Terms of the mortgage are, that in case of default in payment of interest or principal of any bond, and a sale or other proceedings to coerce the same, all bonds which shall be a lien in common therewith, and the interest accrued thereon, shall be considered, and shall in fact be equally due and payable, and entitled to a *pro rata* dividend of the proceeds of said sale or other proceedings. Reference is made to another clause of

the mortgage, where it is said that in no case shall the principal of any bond be considered due until twenty years after its date; but it is quite obvious, we think, that the latter clause was inserted merely to exclude any possible inference that a bondholder under any circumstances might bring an action for the principal of a bond before it became due by its terms. Such was, doubtless, the intention of the provision, but it does not in any manner conflict with the suggestion already made, that in case of sale on account of default of payment of interest or principal, that all the bonds of the same class, and the interest accrued thereon, shall be entitled to a *pro rata* dividend of the proceeds.

The decree of the Circuit Court is, therefore, reversed, with costs, and the cause remanded for further proceedings, in conformity with the opinion of this court.

DECREE ACCORDINGLY.

Mr. Justice DAVIS dissented.

STURGIS *v.* CLOUGH.

Although the language of a *decree* in admiralty may declare a decision which might not, if it were construed by its exact words, be capable of being supported, still, if it is obvious from subsequent parts of the record that no error has been committed, the court will not reverse for this circumstance.

Ex. Gr. Where a *decree* allowed a certain sum for repairs to a vessel, and rejected (improperly, perhaps,) a claim for demurrage, the decree was not reversed on that account; it appearing from a subsequent part of the record that the judge had in fact considered the sum he allowed for repairs *eo nomine* was too large for repairs simply, but was "about just" for repairs and demurrage together.

ERROR to the Circuit Court of the United States for the Southern District of New York, the case being thus:

The steamer Mabey had injured the steamer Hector in a collision, and had been libelled for damages. It being referred by the court to a commissioner to assess these damages, the owners of the Hector claimed *the whole cost of the repairs*, and also damages for fourteen days' demurrage,

during which the repairs were getting done. The commissioner awarded,

For repairs, *being the full cost of them*, . .	$2162 80
For demurrage, fourteen days, as claimed, .	1099 50
	$3262 30

The Hector was an old vessel,—twenty years old, it was testified,—her guards and deck, which were now repaired, having been in a very decayed condition, and her whole hull, comparatively, worthless. Still she was a navigating vessel, and was engaged, at the time of the collision, in towing vessels to and from sea, about the harbor of New York. Several witnesses were brought, who testified that there was a great demand for labor at that time, and who gave their *opinions* as to what the vessel might have made per day, if engaged. But the owner did not exhibit, nor offer to exhibit, his books, to show what she actually had made previously; and some of the testimony was of a general, rather than of a special kind. The court below, in deciding the case, said as follows:

"We are not satisfied that the proofs bring the case upon the question of damages within the rule laid down by the Supreme Court, in *Williamson* v. *Barrett*.* A good deal of the testimony was general, and turned upon mere opinion as to the probability of employment in the towing business, and the amount of the earnings, if employed. This kind of proof is too speculative and contingent to be the foundation of any rule of damages: it is, at best, but conjecture. The true question within the case of *Williamson* v. *Barrett* was, what could the tug have been chartered for per day in the business of towing, regard being had to the market price in the city of New York? This would have brought the question down to some degree of certainty, and afforded ground for an intelligible allowance or not, of the loss which the libellant had actually sustained by the delay during the repairs. *We shall, therefore, strike out the item for demurrage,* $1099 50, *and confirm the decree for* $2162 80."

* 13 Howard, 101.

Application was afterwards made to the court to reconsider this decision, which it did; and after advisement said as follows:

"In passing upon the question of demurrage, and in refusing the taking of further testimony in respect to it, I was influenced, as to the latter result, from a conviction that the *repairs allowed were greater than justified upon the proofs.* These have to be watched, as in cases of collision there is an opportunity, and not unfrequently a disposition, by the successful party, to aggravate them. I should have been obliged, therefore, to set aside the whole report; and the withholding of the reference *in the demurrage* satisfied me the result would be *about just* between the parties *on the whole case.*"

The refusal in the decree below to allow anything for the detention of the vessel for the time she was detained, was the error assigned by the libellant.

Mr. Jones, for the libellant, contended that the language of the *decree* showed specifically that demurrage was rejected. The court here had to do with nothing but the decree. The course of thought passing through the judicial mind was hardly to be considered against a judicial record. There was no doubt as to what the *decree* was, and the exact sum awarded by the commissioner for *damages* was the exact *sum total* of the final decree. Demurrage was exactly and specifically rejected; yet there was no doubt that there ought to have been *some* demurrage. It is impossible to deny that the libellant did sustain a loss by reason of the detention of the vessel for the period of fourteen days. If the commissioner erred in awarding too large a sum for demurrage, or if any error was committed by him in the rule which he adopted in determining the amount on the evidence, or if there was any error in the manner in which such loss was attempted to be proved, an oppportunity should have been given to correct the error.

Mr. Justice GRIER delivered the opinion of the court:

From the manner in which this decree was drawn, it might

be inferred that the court had refused to allow anything for demurrage. But on reference to the record, it appears that this sum was allowed by the judge, because he thought that "the result would be about just between the parties on the whole case." The sum reported by the commissioner has not the effect of a verdict. The court may not concur in his conclusions upon the facts reported, and may modify or wholly reject it. The court did not decide that demurrage was not a proper item to be allowed in the computation of damages, but that the amount of his decree was a just allowance for all damages sustained by libellant. On reviewing the evidence, we are satisfied that the sum allowed in the decree was "just between the parties." The report of the commissioner, allowing the whole bill for repairs, was not just, because the repairs necessarily made were chargeable not wholly to the collision, but to the age and previous condition of the boat. The charge for demurrage allowed by him was not justified by the evidence, although there was testimony to support it, such as can always be obtained when friendly experts are called to give opinions. Besides, the libellant withheld the best evidence of the profits made by his boat, which would be found in his own books, showing his receipts and expenditures before the collision.

We believe the decree gave the libellant ample reparation for all damages, as well for demurrage as repairs.

DECREE AFFIRMED.

SEYBERT *v.* CITY OF PITTSBURG.

An authority given by act of legislature to a city corporation to subscribe for stock in a railway company, "*as fully as any individual*," authorizes also the issue by the city of its negotiable *bonds* in payment of the stock. The opinion of the Supreme Court of a State taking this view of an act of Assembly passed by that State, approved.

THE legislature of Pennsylvania incorporated a railway company, by act of Assembly, one section of which enacted that any incorporated CITY should have authority to *subscribe*

to the stock "*as fully as any individual*," but the act did not give such cities any power to issue *bonds* in payment of their subscriptions. However, the city of Pittsburg, in Pennsylvania, having subscribed for several shares of the stock, did *issue its negotiable bonds* in payment of the subscription. Some of these bonds having got into the ownership of the plaintiff, Seybert, and not being paid when due, he sued the city in the Circuit Court of the United States for the Western District of Pennsylvania, upon them; a case being stated for judgment. A person named Reinboth, who also owned some of the bonds, had about the same time sued the city in one of the State courts of Pennsylvania, and the question as to the right of the city to issue the bonds was pending in the Supreme Court of that State when the present case, of Seybert, came on for argument in the Circuit Court below. To expedite a decision, which the parties desired to have, in this, the Supreme Court of the United States, the Circuit Court entered a judgment *pro formâ* in favor of the city; so deciding, for the sake of form, that it, the city, could not, under the powers given, issue its *bonds* for payment of the stock subscribed for. Between the time, however, of this judgment in the court below, and the time when the case was called for argument here, Reinboth's case had been decided in the Supreme Court of the State.* That court said as follows: "The power given to the corporation to subscribe was a power to create a debt, and consequently to give an evidence of the debt. The authority given was to subscribe as fully as an individual; and as an individual (by agreement with the company) could have given his bond, the city corporation had the same power. That grants of powers to corporations are strictly construed in favor of the public, but it would be a perversion of the rule to permit a coporation to use it to defraud its creditors, or protect itself against its own assumed obligations. If they legally owe a debt, it follows that they can give a bond for it."

* Commonwealth, ex rel., Reinboth *v.* Councils of Pittsburg, 41 Pennsylvania State, 278.

Mr. Knox, for Seybert, submitted the case by brief.

Mr. Justice GRIER delivered, in a few words, the opinion of the court. He stated the case, quoted the language of the Pennsylvania decision as just given, and announced that "as this court fully concur in the construction of the act made by the highest tribunal of the State of Pennsylvania, it was unnecessary to make further remark." That the judgment of the Circuit Court was therefore to be reversed, and judgment entered for the plaintiff on the special verdict.

JUDGMENT ACCORDINGLY.

GREGG *v.* VON PHUL.

1. Whether a contract to give a deed with "full covenants of seizure and warranty," is answered by a deed containing a covenant that the grantor is "lawfully seized in fee simple, and that he will warrant and defend the title conveyed against the claim or claims of every person whatsoever,"—there not being a further covenant against *incumbrance*, and that the vendor has *a right to sell*—need not be decided in a case where the vendee, under such circumstances, made no objection to the deed offered, on the ground of insufficient covenants, but only stated that he was not prepared to pay the money for which he had agreed to give notes; handing the deed at the same time, and without any further remark, back to the vendor's agent who had tendered it to him.
2. Where a vendor agrees to give a deed on a day named, and the vendee to give his notes for the purchase-money at a fixed term from the day when the deed was thus meant to be given, and the vendor does not give the deed as agreed, but waits till the term that the notes had to run expires, and then tenders it—the purchaser being, and having always been in possession—such purchaser will be presumed, in the absence of testimony, to have acquiesced in the delay; or, at any rate, if when the deed is tendered he makes no objection to the delay, stating only that he is not prepared to pay the money for which he had agreed to give the notes, and handing back the deed offered,—he will be considered, on ejectment brought by the vendor to recover his land, to have waived objections to the vendor's non-compliance with exact time.
3. While it is true that in an executory contract of purchase of land, the possession is originally rightful, and it may be that until the party in possession is called upon to restore possession, he cannot be ejected without demand for the property or notice to quit; it is also true that by a failure to comply with the terms of sale, the vendee's possession becomes tortious, and a right of immediate action arises to the vendor.

Statement of the case.

A non-compliance with a request to pay money on the ground that the party is not prepared to do so, and a return to the vendor, without promise to pay at a future time, and without further remark of any sort, of a deed offered, is a failure to comply with such terms. And ejectment lies at once, without demand or notice, even though the vendor may not himself have been perfectly exact in the discharge of parts, merely formal, of his duty—such want of formality on his part having been waived by the vendee—and, though the vendee may have made valuable improvements on the land.

VON PHUL and Gregg entered into articles of agreement on the 6th of December, 1856, by which Von Phul agreed to sell and convey to Gregg certain premises in Peoria, which Gregg agreed to purchase, paying Von Phul for them $8550 as follows, to wit: $2800 on the 1st of March, 1857 (which was paid), and the residue in three payments of $1900 each in twelve, eighteen, and twenty-four months from the same day. Von Phul covenanted that he would convey the premises by deed in fee simple, "*with full covenants of seizure and warranty, on or before the first day of March*, 1857," and Gregg agreed to execute his three promissory notes (dated on that day), each for $1960, payable in twelve, eighteen, and twenty-four months, and secured by a deed of trust on the land sold and conveyed. On the 4th of May, 1860, one Purple, acting by the request and as the agent of Von Phul, tendered a deed to Gregg and demanded, not the *notes*, but the money due on the contract of purchase. The deed which was tendered covenanted "that the said Von Phul is *lawfully seized of a fee simple in the premises* aforesaid, and that he *will warrant and defend the title, &c.*, hereby conveyed, against the claim or claims of every person." Gregg looked at the deed and *made no objection to it*, but stated that he was not prepared to pay the money, and handed it back to Purple. Gregg, who was in possession, had gone into it under the contract of purchase, and had no other right of possession. Previous to the tender and demand he had improved the property, and built houses on it worth from $6000 to $7000. Von Phul was in Peoria while the improvements were being made. His residence, however, was in St. Louis.

On ejectment brought by Von Phul against Gregg, in the

Circuit Court for the Northern District of Illinois, to recover possession of the property, the court, upon the above facts, decided the law to be for the plaintiff, and the defendants excepted. The question in this court on error was, whether the court below had decided rightly.

Mr. Ballance, for Gregg, plaintiff in error:

1. To answer its requisitions of a deed "with full covenants of seisin and warranty," the document ought to have warranted against *incumbrances, and that the vendor had a right to sell.* The covenants in this deed would not have been broken, had it turned out that, by reason of judgments, mortgages or other incumbrances, the title conveyed by the deed had wholly failed: nor, if it should turn out that although he was seized of the premises, yet for any reason, he could not convey it to the vendee. Suppose, for instance, an order of a court of law or injunction in chancery had prohibited him from conveying, it is no answer to say that he covenants "that he will warrant and defend the title to said premises against the claim of every person whatsoever." This covenant is not equivalent to a covenant of a right to sell, or that the premises were free from incumbrances, because, in this case, although the vendor may have no title, there is no cause of action until there is an eviction; but in the other two cases there is a present cause of action, provided it be known that there are incumbrances, or that there is no power to sell.

2. The covenant was, that the said Von Phul should, "on or before the *first day of March next*, make said deed," whereas, it was not done until *May* 4, 1860. This was material; Gregg had paid part of the purchase-money, and had Von Phul made such a deed on that day, as he had agreed to make, Gregg could, on that day, have mortgaged the premises to raise the money, especially as he had expended several thousand dollars in building stores on the ground. But Gregg had not agreed to pay any *money* at this time. He was only bound, in case the deed with proper covenants had been made, "to execute his *three promis-*

sory notes, dated on said first day of March, 1857," "secured by a deed of trust on the premises." This he was not bound to do until the deed was executed. What, then, was Gregg's duty when the deed was tendered him (provided it had been a proper one)? Certainly not to surrender the ground on which he had paid $2850, and expended $6000 or $7000 in building houses. This was not pretended nor demanded; yet the effect of the decision of the court is to take the land and all the houses from the vendee, and give them to the vendor.

3. A tenant having gone into possession with the consent of the landlord, must be put in the wrong, by having a notice served on him to quit, and a refusal or failure on his part to do so. Here the possession was obtained under a contract of purchase, $2850 paid, and costly stores built on the premises by the vendee, with the knowledge of the vendor, and then comes a suit in ejectment, without any formal notice to quit! Had formal notice been given, perhaps the defendant would have surrendered. What right had plaintiff to mulct him with a heavy bill of costs without giving him an opportunity to do so if he liked? That all who have come into the possession of real estate rightfully, are entitled to notice to quit, before they are liable to be sued in ejectment, is well established. There is no English decision, nor decision of this court to the contrary. In England, *Doe* v. *Jackson** is like the present, except that no payment appears to have been made, and the court decided a notice to quit indispensable. *Right* v. *Beard*† was similar, except that a part of the purchase-money had been paid. The defendant contended, "that until demand and refusal of the possession, he was not a trespasser, as the declaration supposed him to be." In answer to which it was said that "the defendant had taken possession under a supposed title, and had not been let in under any tenancy, and therefore not as a tenant at will." "The learned judge concurred in thinking that the defendant's possession being lawful, required to be determined by notice to deliver it up." In the Court of King's Bench,

* 1 Barnewell & Cresswell, 448. † 13 East, 210.

Lord Ellenborough said, "that after the lessor had put the tenant into possession, he would not, without a demand of the possession, and a refusal by the defendant, or some wrongful act by him to determine his lawful possession, treat the defendant as a wrong-doer and trespasser, as he assumes to do by his declaration in ejectment."*

In the New York case of *Jackson* v. *Rowan*,† which was one of purchase, one payment was made, and possession taken, pursuant to an agreement between the parties. The residue not being paid, ejectment was brought for the premises. The court say, "At the date of the demise, the possession of defendant was lawful, and not tortious. He entered on the premises under an agreement with the lessor to sell. That agreement purported that possession was to be delivered on the payment of $100, and the defendant paid that sum on taking possession, under the agreement. He was consequently entitled to notice to quit, or a demand for possession, before suit was brought." Sugden says:‡ "As the possession is in these cases lawful, being with the assent of the seller, an ejectment will not lie against the purchaser without a demand for possession, and a refusal to quit." And authorities are quoted. The English decisions are as stated, and there is not one decision of the Supreme Court of either the State of Illinois, or the United States, annulling them. Certain New York cases, especially *Jackson* v. *Miller*,§ may be cited as establishing a contrary doctrine; but this case should have no weight with this court: Because 1st, the New York courts are not consistent on this subject. A number of New York cases, it may be true, lay down the law differently. In *Jackson* v. *Miller*, Savage, J., pretends to collect all the authorities on this subject, whereas, he omits those that would show his position to be fallacious. 2d. In this

* See also Jackson *v.* Niven, 10 Johnson, 335; Jackson *v.* Wisley, 9 Id., 267; Taylor *v.* McCrackin, 2 Blackford, 264; Maynard *v.* Cable, Wright's Ohio, 18.

† 9 Johnson, 330.

‡ Vendors and Purchasers, 249, bottom paging, 9 Lond. ed.

§ 7 Cowen, 751.

same decision he admits the English authorities to be against him. 3d. The English decisions are law in Illinois, and binding on this court, which, in this case, is to administer the law of Illinois; whereas, New York decisions have no efficacy in Illinois, only as they tend to show what the common law is.*

Mr. Noell, for Von Phul, defendant in error:

1. The deed tendered by Von Phul was such a deed as was stipulated for in the contract which preceded it. It contained all the covenants of warranty required by the agreement.

2. The covenants in the agreement are independent covenants. Von Phul covenants for himself to convey, and Gregg covenants to pay and execute his notes. The time for the tender of the deed was immaterial, as to the rights of Von Phul under the agreement. If Gregg desired it earlier, he had but to offer to comply with his part of the contract, and thereby protect himself against the enforcement of Von Phul's legal title. There is no evidence of any such offer.

3. The covenants in the agreement being independent, the remedy of Gregg is upon the covenants for damages, in case Von Phul has failed to comply. He cannot hold possession against the legal title after the time for the performance of the covenants on both sides has elapsed.

4. The plaintiff in error having refused to receive the deed and comply with the agreement, has thereby abandoned and waived, by his own act, any right of possession he may have had, and at the same time rendered a notice to quit unnecessary. He, by the act of refusing the deed, and refusing to perform the agreement, disavowed his tenancy under a

* The first legislature that sat in Illinois, enacted (*Revised Statutes of* 1845, p. 337), that "the common law of England and all statutes or acts of the British Parliament, made in aid of, or to supply the defects of the common law, prior to the fourth year of James I, shall be the rule of decision, and shall be considered of full force until repealed by legislative authority."

contract for purchase, and can claim no benefits from such a tenancy.*

5. A tenancy may be determined in three ways: 1st. By efflux of time, or the happening of a particular event. 2d. By notice to quit. 3d. *By a breach on the part of the tenant of any of the conditions of his tenancy, as non-payment of rent, or non-performance of covenants.* This latter mode meets the case at bar, and in such cases no notice to quit is necessary.†

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

In the view we take of this case it is not important to determine whether the deed tendered was such a one as Von Phul was bound to make, or Gregg obliged to receive. If the deed was justly liable to objections they should have been stated. Gregg is estopped now on the most obvious principles of justice from interposing objections, which he did not even name when the deed was tendered and the money due on the contract demanded. If the deed was defective and the defects pointed out, *non constat* but they could have been obviated. There is nothing in the evidence, even tending to show, that Von Phul did not act in good faith. The very silence of Gregg was well calculated to influence the conduct of Von Phul, and to convince him that the want of money was the only reason Gregg had for declining to perform the contract. And it would be against good conscience to permit Gregg *now* to avail himself of objections which his failure to make when the deed was tendered, must have induced Von Phul to suppose did not exist.

But it is said that Von Phul covenanted to make the deed on the *first day of March*, eighteen hundred and *fifty-seven*, when in fact it was not until *April*, eighteen hundred and *sixty*. If this is so, it does not appear how the delay has harmed Gregg. He was not asked for payment until long after the contract had matured, and it is fair to presume, in

* Lane's Lessee *v.* Osment, 9 Yerger, 86; Jackson *v.* Miller, 7 Cowen, 751: Den *v.* McShane, 1 Green, 35.

† Doe *v.* Sayer, 3 Campbell, 8; Doe *v.* Lawder, 1 Starkie, 246.

the absence of testimony, that he acquiesced in the delay. At any rate, as he made no complaint that the deed was not tendered in season, he has waived his right to object to the irregularity. The doctrine of estoppels *in pais*, or by the act of the party, is founded in natural justice, "and is a principle of good morals as well as law." "The primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted."* No one is permitted to keep silent when he should speak, and thereby mislead another to his injury. If one has a claim against an estate and does not disclose it, but stands by and suffers the estate sold and improved, with knowledge that the title has been mistaken, he will not be allowed afterwards to assert his claim against the purchaser.† And justly so, because the effect of his silence has actually misled and worked harm to the purchaser. And in this case the silence of Gregg concludes him. He cannot *now* take exceptions to a deed which he failed to perceive when it was tendered to him, or if he knew them, failed to disclose.

But it is contended that Gregg was entitled to notice to quit.

How far a notice to quit is necessary before an action of ejectment can be brought has been much discussed in England. In this country the authorities are not uniform. In some of the States the subject is regulated by statute law, or by rules of court. In New York the question has been fully considered. The courts of that State hold that where there is a contract of purchase and the vendee enters into possession with the consent of the vendor, that ejectment will lie at the suit of the vendor without a previous notice to quit.‡

Notice to quit is generally necessary where the relation of

* Hill *v.* Epley, 31 Pennsylvania State, 334; Simons *v.* Steele, 36 New Hampshire, 73; Todd *v.* Haggart, 22 English Common Law, 268.

† Hill *v.* Epley, 31 Pennsylvania State, 334; Breeding *v.* Stamper, 18 B. Monroe, 175.

‡ Smith *v.* Stewart, 6 Johnson, 46; Jackson *v.* Miller, 7 Cowen, 747; Whiteside *v.* Jackson, 1 Wendell, 418; Jackson *v.* Moncrief, 5 Id., 26.

landlord and tenant exists, and no definite period is fixed for the termination of the estate, but where a lease is to expire at a certain time, a notice to quit is not necessary in order to recover in ejectment, because to hold over would be wrong after the duration of the estate was fixed and well known to lessor and lessee. In an executory contract of purchase the possession is originally rightful, and it may be that, until the party in possession is called upon to restore it, he cannot be ejected without a demand or notice to quit. But the vendee can forfeit his right of possession, and if he fails to comply with the terms of sale, his possession afterwards is tortious, and there is an immediate right of action against him.* It would be an idle ceremony to demand possession, when to a previous demand for the money due on the contract of purchase, the vendee refused to respond. This refusal, unaccompanied by any promise to pay the money at a future day, was equivalent to a direct notice to Von Phul that Gregg declined to execute the contract.

This action is a possessory one, and it settles nothing but the right of possession. The equities between the parties must be determined in another proceeding.

JUDGMENT AFFIRMED WITH COSTS.

MALARIN v. UNITED STATES.

When the validity of a Mexican grant has been affirmed by a decree of the District Court, and an appeal is taken by the claimant seeking a modification of the decree as to the extent of land embraced by the grant, but no appeal from such decree is taken by the United States, the validity of the grant is not open to consideration upon the appeal.

When a grant of land, issued and delivered, is subsequently altered in the quantity granted by direction of the grantor, on the application of the grantee, and is then redelivered to the grantee, such redelivery is in legal effect a re-execution of the grant.

When a Mexican grant issued to the claimant is alleged to have been fraudulently altered after it was issued in the designation of the quan-

* Prentice *v.* Wilson, 14 Illinois, 92; Baker *v.* Lessee of Gittings, 16 Ohio, 489.

tity granted, a record of juridical possession, delivered to the grantee soon after the execution of the grant, showing that the quantity of which possession was delivered was the larger quantity stated in the grant, is entitled to great consideration in determining the character of the alteration, particularly when there has been a long subsequent occupation of the premises.

THIS was an appeal by Malarin and another, executors of Pacheco, from the decree of the District Court of the United States, for the Southern District of California; the case being thus:

Pacheco claimed a tract of land in California, known as the *Bolsa de San Felipe*, or Sack of St. Philip, under a grant alleged to have been issued to him in October, 1840, by Alverado, then Mexican Governor of the department.

In 1852, he presented a petition to the Board of Commissioners appointed by the act of Congress of March 3d, 1851, to settle the respective rights of the United States and claimants under the former government, asking for the confirmation of his claim. He produced in support of it, before the board, from the archives of the former government, his petition to the Mexican Governor, Alverado, for the grant specifically of the *Bolsa de San Felipe*, the reports of the local authorities, and their proceedings thereon. He produced, also, a formal grant to him, signed by the Governor and attested by the Secretary of State, bearing date on the 4th of October, 1840, with a record of juridical possession delivered to him.

This record contained,—

A deed by Governor Alverado, dated October 14, 1840, reciting that Pacheco had solicited the land known by the name of "*Bolsa de San Felipe;*" and that the necessary steps and investigations having taken place, and been made in conformity with the law and regulations, he, the said governor, had granted to him the said land, subject to the approval of the Departmental Junta, and to certain "conditions:" among these were two, thus expressed:

"He shall request the respective justice to give him juridical possession in virtue of this decree; *said justice will desig-*

nate the boundaries, at the limits whereof the grantee shall, besides placing the land-marks, plant some fruit trees, or wild ones of some utility.

"The land whereof mention is made comprises *two square leagues* (*dos sitios de ganado mayor*), a little more or less by the plat which accompanies the *expediente*. The magistrate who gives possession shall cause it to be measured according to law, *leaving the surplus which may result to the nation for the necessary uses.*"

Next follows, a memorandum by *Jimeno*, that "this title has been recorded in the respective book on the back of folio 3." Then a petition from Pacheco himself, dated 1st February, 1841, to the Señor judge of the district, reciting "that having obtained ownership of the land called *Bolsa de San Felipe*, which was granted to me on the 14th of October, 1840, as appears by the title and plat which I have the honor to accompany," he, Pacheco, begs that the judge, in virtue of his "attributions," would be pleased to fix a day for giving him, Pacheco, possession. A marginal decree, dated February 12, 1841, then follows. "Proceed," it orders, "to give the possession asked for, to which effect, Friday, the 19th inst., is appointed. Let the neighboring landholders be summoned; appointing previously measurers and counters, informing them thereof, that they accept and take oath."

Accordingly, on the 19th of February, the day which the justices had fixed, the neighboring landholders assembled—the record mentioned—on the ground; two citizens were appointed to measure the land; neighbors consented to the appointment; measurers were sworn "in the name of the Lord our God, and by the sign of the Holy Cross," to perform their duty truly; two other citizens were appointed and sworn as counters; the length of the cord was accurately ascertained in the presence of all parties. These preliminaries being all transacted, recorded, and duly attested, the measuring began. The quantity of the land was ascertained to be *two leagues*, or perhaps a little more, on account of the irregularity of the ground. "Thereupon," continued the record, "the neighbors being all satisfied with the measurement, they went, with the witnesses, the judge, and the peti-

tioner, to the centre of the land, where the judge ordered the petitioner to enter into possession, which the petitioner did by "*pulling up grass and making demonstrations as owner.*" This proceeding was ordered to be recorded, and the original "expediente" to be returned to the party: which order, as the record showed, had been obeyed; the proceedings being entered in the book of possessions.

The claimant proved that he had been in the use and occupation of the premises where he now was since the date of juridical delivery of possession.

The board adjudged the claim valid, and entered a decree confirming it to the extent of *two* square leagues; provided that quantity were contained within the boundaries called for in the grant and a map to which the grant referred; but if there were less than that quantity within such boundaries, then the confirmation was to be for such less quantity. In fact, the boundaries embraced a little more than two leagues.

Appeal was taken by the United States to the District Court, and while the case was pending there Pacheco died, and the executors of his will, Malarin and another, were substituted in his place, and the subsequent proceedings were conducted in their names. The District Court, while holding the title of Pacheco valid, limited it, notwithstanding, to *one* league. The court, it seemed, had been led to this decree by the fact that there was an erasure on the original grant. The Spanish word "*dos*," "two," in designating the quantity preceding the corresponding Spanish word for "leagues," it was plain, had been written upon an erasure, where it was said that the word "*uno*," "one," had been before. Experts being called, one of them, familiar with writing and with the effect of time on ink, thought that if the alteration had been made at the time of the execution it might have the appearance which it now presented, and he did not see anything which led him to believe that the alteration was of a later date, except that it was an erasure. Another expert, judging from the difference in the color of the ink, thought that the alteration had been

made at least five years after the rest was written, although if ink of different consistencies had been used, it might have been written at the same time, and bear the present appearance.

Governor Alverado, who issued the grant, and a clerk in the office of the Secretary of State at the time, were examined. Alverado was examined twice. On his first examination, which was in May, 1858, he said: "I noticed, when the grant was presented to me for my signature, that the clerk had made a mistake by writing *one* league where he should have written two. I sent the grant back to the secretary's office to repair the mistake, and have the word 'two' inserted instead of 'one,' which he did, and reported to me to that effect." Alverado swore, also, that the order which he gave to the secretary was to issue a grant for *two* leagues, more or less; that this he remembered well, as likewise the order to alter the mistake that was made at the time. In his second examination, however, which was in January, 1861, nearly three years after the first one, he testified that the title, as given to Pacheco, was for one league, and that *he* (Pacheco) "made the reflection, that one league was not conformable, but in fact the title should and ought to have been for two leagues." "Then," continued the witness, "I gave the order that the title should be returned to the secretary's office, that that amendment should be made, and I was informed that the amendment was made accordingly." In answer to the question, *when* the title was returned to the secretary's office to be amended? he answered, that it was within *one*, *two*, or *three* days from the time the title was delivered; but that he could not say particularly. This last-given testimony of Alverado conformed to that given by the clerk in the office of the Secretary of State, who was examined on the same day and at the same place when Governor Alverado last testified. Alverado, also, in answer to a question, if he "recollected" by whom the deed was written, answered, by "Francisco Arcé, clerk in the office." Arcé himself swore, however, that it was not written by him, but was written by another clerk named Astrada, whose

handwriting resembled his own. This clerk was not produced, nor explanation offered for his absence.

Mr. Willes, for the United States, relied largely on the evidence of forgery and fraud, as exhibited by the erasures; upon the contradictory and untrustworthy character of Alverado's evidence, and upon the omission to produce the clerk, Astrada, who had drawn the deed.

Mr. J. S. Black, contra.

Mr. Justice FIELD delivered the opinion of the court:

In his petition to the Board of Land Commissioners, Pacheco represented that in October, 1840, a grant of a tract of land, known by the name of *Bolsa de San Felipe*, was issued to him by Alverado, then Governor of the Department of California.

The board adjudged the grant to be valid, and confirmed the claim of the petitioner under it to the extent of two square leagues. On appeal, the District Court modified the decree of the board, affirming the validity of the title of Pacheco, but limiting it to one square league. From this latter decree the present appeal is taken by the executors of the claimant, he having died pending the proceedings. The United States were satisfied with the decree, and did not appeal. The case therefore stands in this court upon the question, whether the parties representing the claimant are entitled under the grant to a confirmation of the title to one or two square leagues.

No question can be raised here upon the genuineness and authenticity of the grant to Pacheco. The Government having declined to appeal, the validity of the grant is not open for consideration.

In modifying the decree of the board, the District Court appears to have been influenced by the opinion that the grant had been fraudulently altered after it was issued, so as to purport to convey to the grantee two leagues, when it originally conveyed only one. It appears that preceding the term leagues the word *one* was originally written in the

instrument, and was subsequently altered to the word *two*, or to be more accurate, an alteration was thus made in Spanish terms, corresponding with these English words. But, as the counsel of the appellants very justly observes, the grant could not be operative for any purpose except upon the conclusion that the alteration was made before its execution, or if subsequently made, that it was made with the sanction of the granting power. If valid therefore to pass one league, it must be held valid to pass the two leagues which it purports on its face to pass.

It is not necessary, however, to rest our decision upon this consideration. Nor is it necessary to invoke the presumption which counsel insist the law raises as to the date of the alteration. The authorities upon the latter point are not uniform. Some of them hold, that where there are no particular circumstances of suspicion connected with the alteration, the presumption of law is that the alteration was made contemporaneously with the execution of the instrument, giving as the reason for the conclusion that a deed cannot be altered after its execution without fraud, which is never to be assumed without proof; other authorities hold the presumption to be the other way, and require an explanation of the alteration before the deed can be admitted in evidence.*

In the case under consideration the proofs remove all suspicion from the alteration, whatever may be the presumption of the law. The governor who issued the grant testifies substantially that the alteration was made by his direction, and that the grant was subsequently delivered or redelivered to the grantee. If this were the case, it is immaterial whether the alteration was made before the grant had received his signature or after it had been once delivered. The redelivery after the alteration, if such were the fact, was in legal effect a re-execution of the grant. That

* See 2 Taylor on Evidence, § 1616; 1 Greenleaf on Evidence, § 564; Doe *v.* Catomore, 16 Q. B., 745; Simmons *v.* Rudall, 1 Simons, N. S., 136; Administrators of Beaman *v.* Russell, 20 Vermont, 205; Jordan *v.* Stewart, 23 Pennsylvania State, 244.

some discrepancy should exist in the statements of the governor at different times, with reference to a transaction which had occurred more than eighteen years before, is not surprising. His statements are consistent and positive to the effect that the alteration was made by his direction, and that the grant was delivered or redelivered afterwards; and they disagree only upon the point whether the alteration was made before or after the grant had been once delivered. The clerk in the office of the secretary, who attested the grant, corroborates the testimony of the governor, that the alteration was made by his direction. The juridical possession of the two leagues, delivered to the grantee soon after the execution of the grant, and the subsequent occupation by him of the premises until his death, a period of nearly twenty years, dissipates whatever doubt might otherwise exist as to the truth of the statement of the governor in this particular.

When the grant to Pacheco was issued there still remained another proceeding to be taken for the investiture of the title. Under the civil, as at the common law, a formal tradition or livery of seizin of the property was necessary. As preliminary to this proceeding the boundaries of the quantity granted had to be established, when there was any uncertainty in the description of the premises. Measurement and segregation in such cases therefore preceded the final delivery of possession. By the Mexican law various regulations were prescribed for the guidance in these matters of the magistrates of the vicinage. The conditions annexed to the grant in the case at bar required the grantee to solicit juridical possession from the proper judge. In compliance with this requirement, within four months after the issue of the grant, he presented the instrument to the judge of the district, and requested him to designate a day for delivering the possession. The judge designated a day, and directed that the adjoining proprietors be cited, and that measurers and counters be appointed. On the day designated the proprietors appeared, and two measurers and two counters were appointed, and sworn for the faithful discharge of their duties. A line

provided for the measurement was produced, and its precise length ascertained. The measurers then proceeded to measure off the land, the judge and the proprietors accompanying them. The measurement being effected, the parties went to the centre of the land, and there the judge directed the grantee to enter into the possession, which he did, and gave evidence of the fact "by pulling up grass and making demonstrations as owner of the land." Of the various steps thus taken, from the appointment of the day to the final act of delivery, a complete record was kept by the judge, and by him transmitted to the grantee after being properly entered upon the "book of possessions." This record was produced and admitted in evidence, no objection being taken to its genuineness or authenticity. The first document in this record is a copy of the original grant produced to the judge, which specifies two square leagues as the quantity granted. That portion of the record which specifies the quantity measured also declares it to have been two square leagues, or a little more on account of the irregularity of the land. The solemnities attending this official delivery of possession were well calculated to make an impression upon the minds of the spectators, and to preserve the recollection of the act. The ownership, extent, and general location of the land were matters thus brought within the knowledge of the neighborhood, and were no doubt afterwards the subjects of frequent reference among the adjoining proprietors. It is possible, but highly improbable, that serious alteration in the grant as to the quantity of the land, would have escaped observation and exposure. No suspicion on the subject having been suggested for eighteen years, is a circumstance of no little weight to show that no grounds for suspicion ever existed.

The decree of the District Court must be reversed, and that court directed to enter a decree confirming the claim of the appellants to two square leagues under the grant to Pacheco.

DECREE ACCORDINGLY.

Statement of the case.

VAN HOSTRUP *v.* MADISON CITY.

1. An authority to a city to take stock in any chartered company for making "a road or *roads to* said city," authorizes taking stock in a road between other cities or towns, from the nearest of which to the city subscribing there is a direct road; the road in which the stock is taken being in fact a road in extension and prolongation of one leading into the city.
2. Where authority is given to a city to take stock in a road, *provided* the act be "on the petition of two-thirds of the citizens," this proviso will be presumed to have been complied with where the bonds show, on their face, that they were issued in virtue of an ordinance of council of the city making the subscription; the bonds being in the hands of *bonâ fide* holders for value. In the case before the court the minutes of council recorded that the citizens, "with great unanimity," had petitioned.

ERROR to the Circuit Court for the District of Indiana.

The suit was brought in the court below against the city of *Madison*, in Indiana, for moneys due upon coupons attached to certain bonds issued by the city authorities, signed by the mayor and the city clerk, and to which was affixed the seal of the corporation, by which the city acknowledged, that in virtue of an ordinance of the Common Council, passed 2d September, 1852, it owed and promised to pay the president of the *Columbus and Shelby* Railroad Company, *or bearer*, $1000, redeemable on the 1st of November, in the year 1872, with interest at the rate of six per cent. per annum, semi-annually, on the first days of May and November of each year, from the date of the bonds, at the banking house of Winslow, Lanier & Co., in the city of New York.

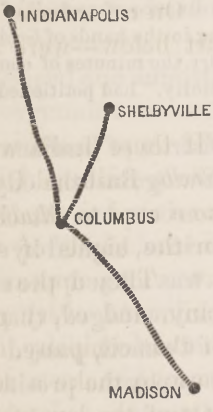
These bonds were negotiated and put into circulation by the Columbus and Shelby Railroad Company, and purchased in the market by the plaintiffs, *bonâ fide*, and for a valuable consideration. They had been issued to the railroad company for stock subscribed in *that* company by the city of Madison, aforesaid.

As respected the authority of the city to subscribe, it appeared that one section of its charter * authorized it "to take

* § viii, subdivision 38.

stock in any chartered company for making a road or roads *to* said city, *provided*, that *no* stock shall be subscribed, &c., unless it be *on the petition of two-thirds of the citizens* who are freeholders, &c., and *provided*, that in all cases where stock is taken, the Common Council shall have power to borrow money," &c.

At the time when the subscription to the Columbus and Shelby road was made and the bonds issued, a railroad called the Madison and *Indianapolis* Railroad, a road leading from *Indianapolis*, in the interior of the State, to Madison, was in operation, and brought down from one part of the interior where Indianapolis is, to Madison, on the Ohio River, the products of the State. This road passed *through* Columbus. The Columbus and *Shelby* Company (the company to which the subscription was made), was organized to construct a road from Columbus to Shelby County, terminating at Shelbyville. *But Columbus was forty-six miles from Madison;* Shelbyville being about twenty-three north of *it*. Through Columbus, and by means of the connection with the Madison and *Indianapolis* road, the Columbus and Shelby road did lead to Madison and nowhere else; though if regarded as an independent and isolated road, and as one between Shelby and Columbus only, it could not be said to be a road *to* the city designated. The diagram will elucidate the matter.



As respected the required "petition of two-thirds of the citizens," the matter rested apparently upon an entry on the minutes of the City Council, which stated that "the freeholders of the city of Madison, *with great unanimity*, had petitioned," &c.

The defences set up by the city, were "that the bonds were issued to the Columbus and Shelby Railroad Company, to pay for a subscription by the city to the capital stock of the *said* railroad company, and for no other consideration;

that the said Columbus and Shelby Railroad Company was not a chartered company for the purpose of making a road *to* the city of Madison aforesaid, but to make a road from Columbus to Shelbyville, the nearest terminus of said road being forty-six miles distant from Madison."

2. That the bonds were issued without the petition or memorial of two-thirds of the freeholders of said city requesting the Common Council to take the stock and issue the bonds.

The court below gave judgment in the case, which was upon the pleadings wholly, for the city. On error here, the validity of the defences—as in the court below—were the points in issue.

Mr. Johnson, for the city of Madison: If these bonds were issued, as alleged, to the *Columbus and Shelby* Railroad Company,—a company not chartered to make a road to *Madison*, but to *other* points,—they were void in the hands of said railroad company when delivered to it.* They appear on their face to be issued to such company, and every person must take notice of the charter of that company, and must know that it is a chartered company to make a road to Madison, because such charter is a part of the law of the land, and because it is the very thing that is required to exist to enable the city of Madison to act. Parties dealing with a corporation must know that the facts exist upon which its power to act is founded. The city of Madison, without special authority from the legislature, has no power to subscribe for stock in railroad companies. It cannot compel the citizens to become parties or stockholders in private corporations, nor pledge or incumber the individual property of the citizens in speculative undertakings. Its powers are only coextensive with its duties. The Common Council may borrow money for the special purposes of the trust and authority intrusted to them, and may levy taxes to raise money for these purposes, but none other.†

* Commonwealth *v.* Erie, &c., Railroad, 27 Pennsylvania State, 339.

† Beatty *v.* Knowler, 4 Peters, 153; Sharp *v.* Speir, 4 Hill N. Y., 87;

If the city of Madison may subscribe to a road whose nearest terminus is forty-six miles away from it, because *another* road leads from that terminus *to* the city, it may subscribe not only to a road in parts of Indiana the most distant from Madison, but to roads in the most distant parts of the United States. It may build a road between any towns in California, provided only, that any other road or series or concatenation of roads exists by which a traveller can get from either terminus of that California road by rail, *to* Madison. It is easy to see how capable of abuse is such a power.

There is no sufficient evidence of a "two-thirds" petition. The expression, "great unanimity," is loose. It is impossible to say, in reference to the population of a city, what it means. Whatever it may mean, it is no record of that fact which the act authorizing the subscription declares must pre-exist, and is therefore valueless.

Messrs. Porter and Roelker, contra:

1. In *La Fayette* v. *Cox* (5 Indiana, 38), it was held that the city had no power, under any circumstances, to subscribe for railroad stocks. In *City* v. *West* (9 Id., 74), that city had a power as this one has, "to take stock in any chartered company for making roads *to* the city." The Ohio and Mississippi Railroad Company was chartered to make a road between Lawrenceburgh and Vincennes, and to extend east to Cincinnati, and west to St. Louis. The city of Aurora, some five miles below Lawrenceburgh, on the Ohio River, was not mentioned in the charter; but the road was located *through* Aurora, and it was held that the city might subscribe for its stock as a road *to* the city. The court say, "This case is entirely different from that of *Lafayette* v. *Cox*. *There the charter did not confer the power to take stock*, but it was attempted to be *inferentially derived*. *Here the power is expressly granted*, and the question is merely *whether the road in which the stock was subscribed is one contemplated by the charter.*"

The geographical facts within the cognizance of the court,

Graves *v.* Otis, 2 Hill N. Y., 466; People *v.* Goodwin, 1 Selden, 568; La Fayette *v.* Cox, 5 Indiana, 38; Rex *v.* Sutton, 4 Maule & Selwyn, 546.

will not enable it to say, that the judgment of the people of Madison, in attempting to make the counties with which this road brought them into direct connection, tributary to the commercial and manufacturing interests of their city, was erroneous.

The city would undoubtedly have been authorized to take stock in a company for building a road from Shelbyville directly to the city line. But this would have secured her no greater commercial advantages, and would have involved a useless outlay of capital, since two-thirds of such a road must have run alongside the Madison and Indianapolis Railroad, already in operation. May not the city use the economical discretion that a natural person might? Must she pay three dollars instead of one, that the road to which she subscribes may fall within the *literal* description of the roads to which her privilege extends? Hills of solid rock surround the city of Madison. Did the legislature contemplate that the city should aid in making no roads except such as *unnecessarily* cut through them?

2. The City Council was the proper judge whether or not the required number of resident freeholders had petitioned for a subscription to the stock of the company to which the bonds were issued.* Conceding that the entry was not in the precise language of the proviso, we nevertheless submit, that the plain implication is, that a greater proportion than two-thirds had petitioned. The entry is, that "the freeholders of the city of Madison, with great unanimity, had petitioned," &c.

Mr. Justice NELSON delivered the opinion of the court:

One point of objection to the bonds is that the Columbus and Shelby Railroad does not, by the terms of its charter or in fact, terminate at the city of Madison; and hence, that the road is not within the description of one in which the city was authorized to take stock.

* Bissell *v.* The City of Jeffersonville, 24 Howard, 287; Commissioners of Knox Co. *v.* Aspinwall et al., 21 Id., 539; The Evansville, &c., Railroad Co. *v.* The City of Evansville, 15 Indiana, 395

The words are, "to take stock in any chartered company for making a road or roads to the said city." It is supposed that the authority to subscribe is tied down to a chartered road, the line of which comes within the limits of the city; and that the words are to be taken in the most literal and restrictive sense. But this, we think, would be not only a very narrow and strained construction of the terms of the clause, but would defeat the manifest object and purpose of it.

The power was sought and granted, with the obvious idea of enabling the city to promote its commercial and business interests, by affording a ready and convenient access to it from different parts of the interior of the State, and thus to compete with other cities on the Ohio River and in the interior which were or might be in the enjoyment of railroad facilities. This object and purpose, we think, should be kept constantly in view in giving a construction to the clause in the charter. For while it will operate to prevent a narrow and fruitless interpretation, it will have the effect of guarding against any abuse or unreasonable extension of the power.

We think it quite clear, a subscription to a road wholly unconnected with roads leading to the city, would not be within its fair meaning and intent, but are equally satisfied that a subscription to a road in extension and prolongation of one leading into the city is within it.

It will be admitted if a railroad had been chartered, originally, from the city of Madison to Shelbyville, by the way of Columbus, a subscription to the stock would have come within the very words of the charter, and what difference, in good sense or principle, or with reference to the object and purpose of the clause, is there between that case and the one before us? The object of the subscription in the first was to extend the facilities of railroad communication through the interior between the two towns, the termini of the road. In the second, as a road had already been made to Columbus, and in operation, the intercommunication is accomplished by a subscription to a line from Columbus to Shelby. The

difference between the two cases is simply a dispute upon words.

The terms of the clause do not limit the subscription to one road or to one company, "road or roads in any chartered company." The argument, therefore, against the power rests exclusively upon the effect to be given to the concluding words, "to said city." We have already considered and given our construction of them.

It was strongly argued, that upon this construction great abuses may be committed by the city corporation in subscriptions of stock to remote companies, in which it would have but little, if any, interest or advantage. In the construction of the grant of powers, extreme cases may be suggested against it, which it is difficult to answer. But in the present and kindred cases, something may be trusted to the wisdom and integrity, as well as the interest, of the body appointed to execute the power.

Another objection taken is, that the proviso requiring a petition of two-thirds of the citizens, who were freeholders of the city, was not complied with. As we have seen, the bonds signed by the mayor and clerk of the city recite on the face of them that they were issued by virtue of an ordinance of the Common Council of the city, passed September 2d, 1852. This concludes the city as to any irregularities that may have existed in carrying into execution the power granted to subscribe the stock and issue the bonds, as has been repeatedly held by this court.

Our conclusion upon the whole case is, that full power existed in the defendants to issue the bonds, and that the plaintiffs are entitled to recover the interest coupons in question. Even if the case had been doubtful, inasmuch as the city authorities have given this construction to the charter, and bonds have been issued and in the hands of *bonâ fide* purchasers for value, we should have felt bound to acquiesce in it.

JUDGMENT REVERSED WITH COSTS, AND CAUSE REMANDED, &c.

MILLER *v.* TIFFANY.

In an action for the price of goods which the purchaser by his own agents examined and selected, and which he himself afterwards received and kept without objection, it is no defence that the price as agreed on was above that of the market; there having been neither fraud, misrepresentation, nor warranty in the case.

A person contracting for the payment of interest may contract to pay it either at the rate of the "place of contract," or at that of the "place of performance," as one or the other may be agreed on by himself and the creditor; and the fact that the rate of the place at which it is agreed that it shall be paid is higher than the rate in the other place, will not expose the transaction to the imputation of usury, unless the place agreed on was fixed *for the purpose* of obtaining the higher rate, and *to evade* the penalty of a usurious contract at the other place.

TIFFANY filed a bill against Miller and wife, in the Circuit Court for the District of Indiana, to foreclose a mortgage which the last-named persons had given to Palmer, a merchant of New York, and Wallace, an attorney at law of Cleveland, Ohio, as assignees of two insolvent firms; which mortgage they, the said Palmer and Wallace, had assigned to him, the complainant.

The facts of the case were essentially these: Two mercantile firms, closely connected with each other and in part composed of the same persons—one in Cleveland, *Ohio*, and one in *New York City*—being unfortunate in business, had made an assignment of their effects, dry goods chiefly, to these two persons, Wallace and Palmer; Palmer being a large creditor of the firms. About $50,000 worth of the goods were at Cleveland under Wallace's charge, and about $73,000 worth in New York, under Palmer's.

In this state of things, Miller, a German trader, resident at Fort Wayne, in *Indiana*, who had a valuable, unincumbered real estate in that State, but who was largely in debt and much embarrassed for ready money, employed two personal friends, Turner and Rufner, to go to New York and raise him money. They went there in February, 1858, and after making, according to Rufner's account, "desperate efforts, for at least four weeks, by publication in the Herald

and Tribune," fell in with a broker, named Anthony, who introduced them to Palmer. The result was, that Palmer entered into a treaty to sell Miller $20,000 worth of that part of the assigned goods in New York, at six months' credit, and to receive in payment for them a mortgage on Miller's real estate in Indiana, payable in five years; the mortgage to provide, however, that if there should be any default in paying the interest, the principal should become due at once. Palmer wrote, on the 15th of February, 1858, to Wallace at Cleveland what he had agreed on, requested him to go to Fort Wayne in Indiana, examine the property and title, and if satisfied with both to have the papers prepared; after which the goods should be delivered to Miller or his agents. Wallace, accordingly, went to Fort Wayne, in Indiana, and being satisfied with the security, a note for the term mentioned was given by Miller, with interest at *ten* per cent., payable, not in New York, where Palmer lived, and where the goods were bought, nor yet in Fort Wayne, the residence of Miller, but in Cleveland (at the Commercial Branch Bank there), the residence of Wallace, with the current rate of exchange on New York.* Matters being thus concluded, Rufner, the friend of Miller, went to New York and selected the goods out of the assigned stock there. They were then shipped to Fort Wayne, where Miller received them.

Six per cent., it is necessary to state, was apparently the lawful rate of interest in Indiana. Ten was allowable in Ohio, under a statute of 14th March, 1850, at that time in

* The note was in these words:

$20,000. CLEVELAND, O., February 22, 1850.

Five years after date, for value received, I, George Miller, of Fort Wayne, Allen County, Indiana, promise to pay Courtland Palmer and Frederick Wallace, assignees, or their order, twenty thousand dollars, *with interest at the rate of ten per centum per annum*, payable semi-annually, after six months from the date hereof, and on failure to pay said interest when due, the whole of said note to become due and collectable; the above note, interest, and principal, *negotiable and payable at the Commercial Branch Bank, Cleveland, Ohio, with the current rate of exchange on New York*, and without relief from valuation or appraisement laws of the State of Indiana.

GEORGE MILLER.

force. Whether *on a sale of goods* ten was in New York, was not so clear. On the loan of money it was not.

The interest not being paid, and the present bill filed to foreclose the mortgage, Miller set up two principal defences:

1. That the goods were not worth anything like the sum at which they had been sold to him.

2. That the contract for ten per cent. was usurious and void.

As respected the *value* of the goods, the testimony was conflicting. *Evans*, a trader of Fort Wayne, who on Miller's invitation had looked through the goods, "without any special motive, but the same as he would look through any other stock of goods in town, to see what I had to compete with," when interrogated as to their value replied, "This is a difficult question to answer, *one in which, perhaps, no two men would agree.* Their value to any man depends upon *his facilities for getting rid of them. I* should estimate their value to *me*, considering the fact that the stock was an old stock of goods, a great portion of them out of style, being poorly assorted, a large quantity of goods of a particular kind, and few or none of other kinds necessary to make up an assortment in proportion to the whole amount of stock, at from *sixty* to sixty-five per cent. of the invoices."

Walker, another resident of Fort Wayne, who had been "engaged in trading goods for about seven years, railroading some, and a part of the time engaged in outside trading," confirmed this estimate between invoice and *cash* values; adding, "the principal objections to the stock were, that the goods were badly *selected;* large amounts of some kinds, and a few or none of others to make them saleable. A considerable quantity of them were out of style, which is a bad objection in selling goods. Part of the goods were worth more than the invoice price, and a part of them less, making the average value about two-thirds invoiced price."

Gilford, who was a clerk of Miller, when the goods arrived at Fort Wayne, thought that "the general character of the goods was not very good. The goods were principally old styles, and was a hard stock to sell, and the majority of them

were billed to Miller at too high prices for retailing purposes. They were worth, in my opinion, about sixty cents on the dollar."

As respected the matter of usury. It appeared that Mr. Hough, an attorney of Fort Wayne, where Miller lived, was employed by Wallace, on his visit to Fort Wayne, to draw the papers in the case. In giving an account of the circumstances under which the note was made payable, Hough's testimony was, that on the morning of the day when the note was drawn, Miller introduced him to Wallace. The witness stated as follows: "The note and mortgage were drawn up in my office on the 22d of February, 1858. I first wrote a note *payable in New York* for the amount specified, *with ten per cent. interest*, upon which some conversation ensued between Wallace and Miller, when Miller remarked in substance that he would rather pay it to Wallace: 'I know you, Wallace; you are a clever fellow; I would rather pay you, as I don't know Palmer;' and asked if it could not be paid in Cleveland, adding that he expected to trade there, and *it would be easier for him to pay it in Cleveland. Upon the request of Miller*, Wallace wrote a note, and made it payable at the Commercial Branch Bank at Cleveland, which was and is the residence of Wallace."

There was no evidence to contradict this, except so far as it might be found in a correspondence between Palmer in New York and Wallace in Cleveland. Palmer, after concluding the negotiation with Rufner and Turner (Miller's agents in New York), gave Rufner, then on his way through Cleveland to Fort Wayne, an open letter to Wallace—the one already mentioned, and dated 15th February, 1858—and to be delivered by Rufner to him. It ran thus:

"This will be handed to you by Mr. Rufner, one of the parties who have been negotiating with me for the purchase of part of our stock of goods here; the purchase-money to be secured by mortgage on Mr. Miller's property at Fort Wayne. My proposal to them is, to sell $20,000 of our goods, at our regular prices to the country, at six months' credit, and to receive in pay therefor, a bond and mortgage on Mr. Miller's property,—pro-

vided it affords satisfactory security for the amount, and the title is undoubted; the mortgage to be the first lien on the property, and payable on or before five years, bearing *ten* per cent. semi-annual interest; the first interest to be payable in twelve months from the date of the delivery of the goods here; the principal and *interest* to be payable *here*," etc.

On the 22d February, 1858, Wallace, who, in pursuance of this letter, went, as already mentioned, to Fort Wayne, in Indiana, having, as he says, "concluded the business for which I came here," writes to his co-assignee Palmer, from that place, late in the evening and when "tired," a long letter and "in full," "how he found things and what he had done." He gives an account of some accidents on the way, his being detained by "a blockade of snow," how he had examined the property thoroughly with Mr. Hough, a full account of the character and value of the property, &c., and after a mention of some other things proper enough to be reported to his co-assignee or principal, his letter contained this sentence, the only one having any reference whatever to the place where the interest on the mortgage-note was to be paid, or as to *why* Palmer's instructions on that point had been departed from:

"I have taken the liberty *to vary from your instructions in reference to the place where the note is made payable. Seven* per cent. being, as I understand, the legal rate of interest in New York, and *six* per cent. *being the rate in Indiana, the note would seem to be open to the plea of usury both here and in New York* if made for *ten* per cent. So, *to avoid this, I* made it payable *in Ohio*, and *dated it there, where ten per cent. is the legal rate with exchange on New York, which results the same.*"

Wallace, who was himself examined as a witness, gave this account. After confirming Hough's statement that the note was originally drawn so as to make interest payable in New York, and that it was by *Miller's* request that it was finally made payable in Cleveland, Wallace continued:

"Upon *this request of Mr. Miller*, I consented that I would take his note, payable as he had desired, with exchange on New York;

to which he agreed; and the note in suit was thus drawn up by myself, and executed by Mr. Miller. The note was so executed by Miller, and received by me in the utmost good faith, on my part, as to the place where it was dated and made payable, *and mainly for the reason expressed by Miller, that it would enable him to pay it in his home currency. Perhaps another reason* which induced me to consent to the change proposed by Miller was, that I understood that by the laws of New York seven per cent. was the legal rate of interest; and as Mr. Palmer had informed me that the note was to draw ten per cent. interest, it occurred to me that perhaps the contract *might upon its face be opened to the plea of usury if payable in New York; and not having time to examine the question, and as the laws of my own State allowed parties to contract for ten per cent. interest*, and beliveing that I had the same right to make the note payable at my place of residence (as we were joint assignees in both New York and Cleveland), as at the domicile of Mr. Palmer, I thought it would remove that *apparent* objection *upon the face*, if the note was made payable at *my* residence in Ohio."

A sharp cross-examination got no very different result. The witness said:

"I regarded my knowledge as very imperfect upon the subject, for I had no knowledge of the *construction* of the statute of New York. I only had *queries* in my mind in reference to it, and fears that the contract *might* be regarded *upon its face* as usurious. I knew that the legal rate of interest in New York was seven per cent., and at the same time I had that confidence in Mr. Palmer's experience as a business man that *he* must know the statute of his own State in respect to interest upon all contracts, that he would not have bargained blindly for an *illegal* rate. Hence my *doubts* as to whether or not it was usurious upon its face. I regarded the contract as important, and I had a good deal of interest; but I had less personal anxiety in regard to it, and did not *investigate* questions connected with it as I should have done, had I not known that Palmer, before consummating the sale, *would consult his lawyer* in New York, Mr. Charles Tracy."

On the other hand, there were some *indications* in the evidence that the whole business, so far as Miller was con-

cerned, was a scheme of his, and perhaps of Rufner's, to get the goods by fraud, and without paying anything to anybody for them. It appeared, at least, that after Wallace, late at night—near midnight—had written his letter to Palmer of 22d of February, 1858, a copy of it—either at his request and because he was tired, or at the request of Rufner, and for some purpose, honest or dishonest, of his—had been taken by Miller's clerk; and that copy, containing the remark as to the reason why the interest had been made payable at Cleveland, was now produced accordingly. Rufner also swore that when he and Turner were making the treaty or negotiation with Palmer, in New York, for the goods, nothing was said about the rate of interest: that *he* expected it was to be *seven* per cent., the New York rate; and that the first intimation he had to the contrary, was Palmer's open letter to Wallace, given to him, Rufner, to be delivered. Giving an account further on of the report, which, on getting to Fort Wayne, in Indiana, he had made to his principal and friend Miller, Rufner said:

"I did report to Mr. Miller the terms as were written to Mr. Wallace, *it being the only evidence in writing that we had in relation to the whole transaction up to that time.* Mr. Miller swore that by **** ten per cent. would eat him up; he might as well surrender at once, and that the idea of his wife joining in a mortgage and note was a thing he had never been called upon to do, and he could not consent to accept such a ****** proposition, and that he had better let his business go to ****. I told him of course he was the judge in the matter; that these were the terms; I knew they were hard, but it was the best and only thing I could do with Mr. Palmer, and that, in my opinion, if he objected to any portion of Palmer's written instruction to Mr. Wallace, he might as well abandon the whole; that I had understood *Mr. Wallace had no power to act in the matter. I said I thought that the contract with ten per cent. interest was a usurious one.*"

This conversation was just before Wallace arrived in Fort Wayne to examine and conclude matters, and at Miller's request changed the place of paying the interest.

It appeared that immediately after the mortgage was executed and forwarded to Palmer at New York, Rufner, who now went to New York to select the goods, wrote, on the 25*th of February*, to Miller, about the subject of his business there. The contents of his letter were to be inferred from the reply. Miller writes back on the 2d of March, 1858, that is to say, *ten days after* the conclusion of matters at Fort Wayne, between himself and Wallace, thus:

"*Friend Rufner:* Yours of the 25th February was received this morning, and contents particularly noticed, and in reply, have but little to say, knowing that your good judgment will enable you to see and do things for me and yourself far better at this late day than I could suggest, being so far from the place of action, and knowing so little of the surroundings and influences under which you will have to act, in order to accomplish the object of your visit to New York. . . . . *Be sure you preserve a copy of Mr. Wallace's letter to Mr. Palmer.*"

And he adds in a postscript:

"P. S. In regard to the ten per cent. matter, let the Palmer party do all the talking themselves, *and keep perfectly cool and shady* on that subject. Don't let Turner see this letter."

The court below made a decree of foreclosure, and from that decree the present appeal was taken; the questions here being the same as below.

Mr. Evarts and Mr. Gilette for Miller and wife, the appellants:

1. The testimony shows that the goods were not at all worth the prices charged. They were unmarketable goods, the residuum, after the season of sales, of a bankrupt firm. Palmer was a heavy creditor of the firm, nursing its assets from interest, as much as he was bound to nurse them from duty. The goods were bought before they were really seen. The selection took place after the mortgage was executed and in possession of Palmer.

2. The negotiations and the transactions were commenced and completed in the city and State of New York. Palmer

having for sale in the city of New York a stock of dry goods belonging to the assigned estate of a bankrupt firm of that city, treats there with Miller's agents, and concludes all the terms of the bargain, leaving open merely an inquiry into the value of Miller's property to be mortgaged. Upon the report of his agent in this inquiry, Palmer received the securities, now in suit, from Miller's agents in the city of New York, and there delivered the goods which formed the subject of the bargain. The circumstances and the motives under which the note, instead of being dated at Fort Wayne, Indiana, where it was made and signed, was dated at Cleveland, Ohio, and made payable there, instead of at New York, refute the pretension that it was an element or ingredient of the contract between the parties, and one upon which its terms were adjusted, that the price of the goods sold in New York was to be paid in Ohio. Palmer in his letter states the terms of the bargain to be, that the bond and mortgage were "to be drawn payable on or before five years, bearing ten per cent. semi-annual interest, the first interest to be payable in twelve months from the date of the delivery of the goods here; *the principal and interest to be payable here;*" and Wallace gives the whole reason of the *place of payment* being varied, on the face of the securities, as follows: "I have taken the liberty to vary from your instructions in reference to the place where the note is made payable. Seven per cent. being, as I understand, the legal rate of interest in New York, and six per cent. being the rate in Indiana, the note would seem to be open to the plea of usury, both here and in New York, if made for ten per cent.; so, *to avoid this*, I made it payable in Ohio, and dated it there, where ten per cent. is the legal rate, with exchange on New York, which results the same." The charge of "*exchange on New York*" being added to the face of the price, thus to be paid at Cleveland, shows that *New York remained the place of payment in the intent of both payer and payee, and as a term of the bargain*, notwithstanding the formal change in the tenor of the note.

The validity of the transaction, then, depends on the law of New York, the true "place of the contract;" and Cleve-

land having been made the "place of performance," not as a substantive item of the agreement, but only as one in evasion of the "place of the contract," cannot furnish the rule for the exposition or government of what was done.

[3. The counsel contended, under this head, that by the statute of New York the contract was usurious, whether it was regarded as a sale, with a note and mortgage given in payment, or whether considered in the light, which was its true one, of a loan, under the guise of a sale; the purpose being that Miller should sell the goods *en masse* at auction.]

Mr. Coombs, on the other side:

1. The defence set up from failure of consideration breaks down completely. The first witness produced to sustain it, *dis*proves it. The value of the goods, he says, is matter of opinion; a question, "in which, perhaps, no two men would agree." It would depend, he swears, on the party's "*facilities* for getting rid of them." "The goods were badly *selected*," says a second witness. But who selected them? Miller's own agents. Moreover, what did this witness, who had been engaged in "railroading some," and in "railroading" as much as in trade, know on the subject? A third witness considered that they were "billed" too high; but is every man who has goods "billed" too high to him to set up successfully, failure of consideration, after he has inquired the price, received the goods and disposed of them for himself? Trade would not flourish under such a rule.

2. The general principle in relation to contracts made in one place to be executed in another, is well settled. They are to be governed by the laws of the place of performance, and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalty of usury.*

We admit that there is one exception to this general rule, and that where the note is made payable at a place foreign

* Andrews *v.* Pond, 13 Peters, 78.

to the residence of either of the parties, and to the subject-matter of the contract, *for the purpose* of obtaining a higher rate of interest than the laws of the place of contract allow, with *intent to evade said law*, the contract will be usurious, if the rate of interest specified exceed the rate allowed by the *lex loci contractus*. Nor shall we dispute the proposition, that where the note is made payable at a place other than the residence of either of the parties, and foreign to the subject-matter of the contract, and a higher rate of interest is stipulated for than the laws of the place of contract permit, the parties will be *presumed* to have intended a fraudulent evasion of those laws. This presumption, however, can never arise when the note is made payable at the place of the domicile of one of the parties, especially when it is done at the request of the payor, and for his accommodation. In the case at bar, it will be hard to show any good reason, in law or in morals, why Wallace had not as good a right to require that the note should be made payable at the place of his domicile, as Palmer had to require its payment in New York; even if the payor had been indifferent, instead of desiring that it should be made payable at Cleveland, in preference to New York.

3. Under this head, the counsel replied to the argument on the New York statute; contending that the transaction was a sale, not a loan; and that being so it was protected by the case of *Cutler* v. *Wright*,* which recognized the English case of *Beete* v. *Bidgood*.†

Mr. Justice SWAYNE delivered the opinion of the court:

Two defences to the mortgage are relied upon:

1. That the goods sold to the defendant, which formed the consideration of the note secured by the mortgage, were worth largely less than the amount for which the note was given. It is claimed, therefore, that there has been a partial failure of consideration.

The evidence upon the subject is conflicting. It has failed

* 8 Smith, 472. † 7 Barnewall & Creswell, 453.

to establish to our satisfaction the fact alleged. Fraud or misrepresentation by the vendor is neither averred nor proved. It is in proof that the goods were carefully examined by the agents of Miller before they were bought, and that they were selected when the purchase was made. They were sold at the regular prices of the establishment. It does not appear that Miller made any objection, either to the prices or quality, when he received them; or that he ever made any objection, until it was set up in his answer in this case, more than a year after the goods were delivered to him.

The objection comes too late. The sanctity of contracts cannot thus be trifled with. The common law, unlike the civil law, does not imply a warranty from a full price. Where there is neither fraud nor warranty, and the buyer receives and retains the goods, without objection, he waives the right to object afterwards, and is finally concluded. In such cases the rule of *caveat emptor* applies.*

2. The defence chiefly relied upon is usury. The result of our inquiry upon that subject must depend upon the *lex loci* that governs the contract.

Palmer and Wallace, the payees of the note, were the assignees of an insolvent firm, which did business under one name in New York, and under another at Cleveland, Ohio. Palmer resided at New York and Wallace at Cleveland. About $50,000 worth of the goods, covered by the assignment, were at the former city, and about $75,000 worth at the latter. The negotiation for the sale was commenced by Palmer and concluded by Wallace. The note is as follows: [His Honor here read the mortgage-note, already described.†] Miller lived in Indiana. The note and mortgage were executed in that State. The mortgaged premises are situated there. Wallace was present at the execution of the securities. They were transmitted to Palmer, at New York, and the goods were thereupon shipped thence to Indiana. The note and mortgage have been assigned to the appellee.

We lay out of view the imputation upon Palmer and Wal-

* Hargous *v.* Stone, 1 Selden, 73. † See *ante*, p. 299, note.

lace, of a fraudulent purpose to evade by shift or device the usury statute of Indiana or New York. It is wholly unsupported by the evidence. They were acting in a fiduciary character, and could have had no motive to engage in such a transaction. There is no reason to believe that such a conception entered into their minds. On the other hand, we are by no means satisfied that it was not the deliberate purpose of Miller, when the arrangement was made, to involve them in the toils of this defence, and if possible to escape with the goods without paying anything for them. Our business, however, is to ascertain and apply the law of the case. We shall not discuss the evidence bearing upon the ethics of his conduct.

"The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the law of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury."* The converse of this proposition is also well settled. If the rate of interest be higher at the place of the contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate.†

These rules are subject to the qualification, that the parties act in good faith, and that the form of the transaction is not adopted to disguise its real character. The validity of the contract is determined by the law of the place where it is entered into. Whether void or valid there, it is so everywhere.‡

When these securities were executed the statute of Ohio of the 14th of March, 1850, upon the subject of interest, was

* Andrews *v.* Pond, 13 Peters, 77, 78; Curtis et al. *v.* Leavitt, 15 New York, 92; Berrien *v.* Wright, 26 Barbour, 213.

† Depeau *v.* Humphrey, 20 Howard, 1; Chapman *v.* Robinson, 6 Paige, 634.

‡ Andrews *v.* Pond, 13 Peters, 78; Mix et al. *v.* The Madison Ins. Co., 11 Indiana, 117; Corcoran & Riggs *v.* Powers et al., 6 Ohio State, 19.

in force. According to its provisions parties might lawfully contract for any rate of interest not exceeding ten per cent. per annum. The contract of Miller was therefore valid.

DECREE AFFIRMED WITH COSTS.

UNITED STATES *v.* D'AGUIRRE.

Where from a tract of land known by a particular name grants of two parcels had been made, and a petition for a grant of the surplus remaining was presented to the Governor of the Department of California, and to the description of the land solicited, these words were added, "the extent of which is about five leagues more or less"—*Held*, that these words were not a limitation upon the quantity solicited, but a mere conjectural estimate of the extent of the surplus.

The case distinguished from *The United States* v. *Fossat* (20 Howard, 413), and *Yontz* v. *The United States* (23 Id., 499).

APPEAL by the United States from the District Court for the Southern District of California; the case being thus:

D'Aguirre, in right of his wife Donna Maria Estudillo, claimed a tract of land in California under a grant from the Mexican Government. The tract was parcel of a larger tract, known as the "Rancho of Old and New San Jacinto." Two grants had been made of parts from this general tract; *the surplus embracing, in fact, about eleven leagues*, being that which was claimed by the respondent.

Having presented a petition to the Board of Commissioners, appointed by act of March 3d, 1851, to ascertain and settle private land claims in California, for a confirmation of his claim, D'Aguirre's title as it appeared before the board was thus:

His original petition to the prefect for the land, made in behalf of his wife, set forth "that there was remaining a '*sobrante*,' or surplus," in the tract or rancho of San Jacinto, and that his wife "requiring the said *remnant*, ... solicited the prefect's assistance to obtain the *mentioned land*, the extent of which was about *five* leagues" within the limits of the known rancho of San Jacinto, the general plat of which is

in the office of the Secretary of State, and shown in its total extent that *it is bounded thus: north by the ranchos of Jurupa and San Bernardino, south by Temecula, west by Unapia, and east by Gorgonia.*" The petition continued: "Your honor will also cause *previous observations* to be taken."

The petition to the prefect was followed by the report of that officer to the governor upon it. The report says: "The land petitioned for *is that remaining vacant from the land of the Old and New San Jacinto*, and which is bounded by the lands mentioned in the petition; and the copy of the plat, which I have under my eyes, proves to be correct with the original which exists in the government." The document proceeds: "Inasmuch as it does not appear to be strange property, that which is claimed as part overplus, and never to have been the same declared, &c., it seems to me that there can result no obstacle to this concession. Notwithstanding *that which is represented, your excellency, with more prudence*, will resolve upon that which becomes its superior will."

Next followed,—

THE CONCESSION OF THE GOVERNOR, PIO PICO.

ANGELES, May 9, 1846.

Having seen the petition with which commences this espediente, the report, &c., with the rest that has been reported, and finding the whole in conformity with the laws and regulation, &c., I declare to Donna Maria Estudillo d'Aguirre the property *in fee of the land remaining* in Old and New San Jacinto, conformably as shows the general map, which agrees with all the antecedents. Let the respective title be delivered to the claimant, and let this espediente be reserved to submit to the approbation of the most excellent Assembly, &c.

PIO PICO.

JOSE MATIAS MORENO, Secretary.

Coming after this document of "Concession" was, what is called the Grant, a document from the same governor, Pio Pico, in substance reciting that D'Aguirre, in the name of his wife, had solicited for her, "*the overplus land resulting from the rancho* of Old and New San Jacinto, concerning which, *the investigations being previously made*" the governor proceeds to

say, "I have decreed this day that it be conceded to her, *the mentioned land, declaring to her the property of the same in fee by these present despatches.*" The document continues:

"She shall solicit the respective judge to give her juridical possession in virtue of this decree, thereby establishing *the boundaries with the necessary landmarks.*

"The land of which donation is made to her, is that which remains as *overplus* in the ranchos of Old and New San Jacinto, as will appear by the general map of both ranchos, and which corresponds with their espedientes.

"The magistrate who shall give the possession *shall have it surveyed conformably to* the ordinanza, commencing the surveys from the boundaries of Jose Antonio Estudillo and of Don Miguel de Pedrorena, *and he will advise the government of the number of* (*sitos de ganado mayor*) *square leagues it contains.*"

Next came the report of the Committee on Vacant Lands, which, declaring that D'Aguirre's petition in relation to the tract remaining as overplus, having been granted to him in conformity with the laws on the subject-matter, the said concession "of the tract which remains as *overplus* from the ranchos of Old and New San Jacinto is *approved.*" An approval by the "most excellent Departmental Assembly of the foregoing decree" concluded the title of D'Aguirre.

The surplus which D'Aguirre had asked for, representing its extent as being about five leagues, more or less, contained in fact, as already mentioned, about eleven leagues.

The question was, of course, as to the amount embraced by the grant; that is to say, whether D'Aguirre's representation in his petition for the "surplus," that its extent was *five* leagues, more or less, would confine the grant to a surplus containing but five leagues, or whether the grant would carry the entire "surplus" in its full meaning, though that surplus contained eleven. The board of commissioners considered that it only carried five, and rejected D'Aguirre's claim for the entire surplus of eleven. But on appeal, the District Court was of a different opinion, and confirmed the claim; giving to D'Aguirre the surplus remaining within the boundaries of the general tract, to the extent of eleven square

leagues, unless there was less than eleven within such boundaries, in which case of such less quantity the confirmation was limited to it. It was from this decree that the United States took the present appeal.

Mr. Wills, for the United States: There has been here, to say no more, such plain misconception on the part of the Mexican government as to what it was granting—that misconception being brought about by misrepresentation *of facts* on the part of D'Aguirre—that the court will withhold its aid. Certainly the *quantity* of land which the government would convey entered largely into its determination, whether it would or would not convey it all; and when D'Aguirre represented that the "sobrante" or surplus contained *five* leagues or perhaps less, when in fact it contained more than double the amount of five, there is such error as the court will relieve against. The surplus is but the subject of the grant, and justice will be done by giving five leagues in the surplus described.

In *The United States* v. *Fossat*,* this court decided that where there is no natural boundary or descriptive call for the termination of lines of a tract of land, and the quantity called for in the grant is "one league of the larger size, *a little more or less*," the survey must include *only a league*. The words "*a little more or less must be rejected.*" It is also decided, in *Yontz* v. *The United States*,† that the generality of the grant may be sustained by the words of the petition; that the petition and the concession must be taken as *one act*, and the extent of the grant limited by the prayer of the petition. In that case the grant was limited to the *two leagues* prayed for in the petition.

Mr. Williams, contra: The papers in the case iterate and reiterate that the grant is for the surplus. There is not in one of them, except in the petition itself, which also is for the "surplus," an allusion to quantity; and the petitioner re-

* 20 Howard, 413. † 23 Id., 498.

quests the Mexican government to take "observations" previously to granting. Every part of the case shows also, that the government proceeded not less advisedly than it did in every case.

The cases cited do not apply. The decision in *The United States* v. *Fossat* was, that the call *in the grant* for "one league, a little more or less," must be taken as "one league" when located and surveyed by the United States. In the case at bar no quantity is named in the grant, and the only limitation is that prescribed by the colonization law, namely, eleven leagues.

In *Yontz* v. *The United States*, the petitioner confined his application to "two leagues, a little more or less." The grant named no quantity, but reserved the surplus. The surplus of what? Clearly of the two leagues applied for. But there is no reservation of the surplus in the grant to D'Aguirre. On the contrary, the petition was for the *surplus*, which surplus he *estimated* at five leagues, a little more or less. The distinction is plain.

Mr. Justice FIELD delivered the opinion of the court:

The only question for consideration in this case relates to the quantity embraced by the grant to the claimant. The District Court confirmed her title to lands lying within certain designated boundaries, not exceeding in extent eleven square leagues, if any surplus over that quantity existed. The United States seek to restrict the confirmation to five square leagues, and base their appeal on the language of the petition upon which the grant was made. It appears from the record that two previous grants had been issued for land situated within a tract known as the "Rancho of Old and New San Jacinto," and that a surplus still remained. For this surplus the petition was presented, and to the description of the land which it gives, these words are added: "the extent of which is about five leagues, more or less." It is upon these words, as showing that the petition was only for five leagues, that the counsel of the government rely. But it is evident that they constitute a mere conjectural estimate

of the extent of the surplus. The petition is for the grant of a specific tract, not for any particular quantity. The report of the prefect, to whom the petition was in the first instance presented, to be forwarded to the governor, describes the land "as that remaining vacant from the Old and New San Jacinto," and does not mention its extent. The concession of the governor declares to the claimant, "the property in fee of the land remaining in Old and New San Jacinto," and does not designate any quantity. The formal grant issued recites that the claimant has solicited "the overplus land resulting from the rancho of Old and New San Jacinto," and the third condition annexed describes the land "of which donation is made," in similar terms.

It is clear upon the face of the papers that the original concession and formal grant were for the entire surplus remaining within the designated boundaries, subject only to the limitation imposed by the colonization law of 1824, upon the power of the governor. As he could only cede to the extent of eleven square leagues, the grant could only convey that quantity whatever the amount of the overplus.

The case of *The United States* v. *Fossat*,* and the case of *Yontz* v. *The United States*,† have no application. In the Fossat case the grant was in terms restricted to one league, and it provided for the measurement of the quantity granted and the reservation of the surplus. In the case at bar no quantity is named, and the only limitation is that prescribed by the law of 1824. In the Yontz case the grantee expressly confined his application "to two leagues, more or less," according to certain designated boundaries. The grant did not mention any quantity, but provided for the measurement of the tract and the reservation of the surplus. The court in deciding the case very justly observed, that if the boundaries were conclusively defined in the grant, no surplus could be thrown off by a survey, and therefore construed the grant in connection with the petition, and held that the two leagues mentioned in the petition were to be surveyed within the larger tract; in this way only was the conditional

* 20 Howard, 413. † 23 Id., 499.

clause as to measurement and surplus made consistent with the previous language of the grant. The case at bar is entirely dissimilar. Here the grant mentions no quantity, and reserves no surplus, but on the contrary the third condition expressly requires the magistrate who gives possession to advise the government of the number of square leagues the tract may contain.

DECREE AFFIRMED.

GODFREY *v.* EAMES.

If an applicant for a patent choose to withdraw his application for a patent, intending, at the time of such withdrawal, to file a new petition, and he accordingly does so, the two petitions are to be considered as parts of the same transaction, and both as constituting one continuous application, within the meaning of the seventh sections of the Patent Acts of 1836 and 1839. CLIFFORD, J., dissenting.

The question of the continuity of the application is a question to be submitted to the jury.

THE Patent Act of 1836, provides* that on the filing of an application for a patent, "the commissioner shall make or cause to be made an examination of the alleged new invention or discovery, and if on any such examination it shall *not* appear to the commissioner that the same had been . . . in public use or on sale with the applicant's consent or allowance prior to the application, . . . it shall be his duty to issue a patent therefor, but whenever on such examination it shall appear to the commissioner that . . . the applicant was not the original and first inventor or discoverer thereof, or that what is claimed as new had before been invented or discovered, . . . or that the description is defective and insufficient, he shall notify the applicant thereof, giving him briefly such information and references as may be useful in judging of the propriety of *renewing his application*, or of altering his specification to embrace only that part of the invention or discovery which is new.

"In every such case," the act goes on to say, "*if the appli-*

* § 7, 5 Stat. at Large, 119.

cant shall elect to withdraw his application, relinquishing his claim to the model, he shall be entitled to receive back $20, part of the duty required by this act, on filing a notice in writing of such election in the Patent Office. . . . But if the applicant in such case shall *persist* in his claim for a patent, with or without any alteration of his specification, he shall be required to make oath or affirmation anew, in manner aforesaid, and if the specification or claim shall not have been so modified, as in the opinion of the commissioner shall entitle the applicant to a patent, he may on appeal, and upon request in writing, have the decision of a board of examiners," &c.

A subsequent act—an act of 1839*—provides that those who shall have purchased, sold, or made the thing patented "prior to the application of the inventor or discoverer for a patent, shall be held to possess the right to use and vend to others to be used" the same; and that "no patent shall be held to be invalid by reason of such purchase, sale, or use, prior to the application for a patent as aforesaid, *except* on proof of abandonment of such invention to the public, or that such purchase, sale, or prior use has been *for more than two years prior to such application for a patent.*"

With these enactments in force, Godfrey, on the 31st January, 1855, filed an application for a patent for boot-trees. This application the commissioner, on the 17th May, 1855, rejected for want of novelty. On the 24th April, 1857, within the time required by the rules, Godfrey submitted his case again. The old application was withdrawn, and a new one filed, *simultaneously;* the withdrawal fee of $20 going to make part of the new application fee of $30, and not in fact being received by the applicant. These different applications were made through different attorneys, and the description of invention, the claims of novelty, and the models, were in some respects different. It was admitted, however, at the bar, "that that which was finally patented might, if it had been properly introduced, have been engrafted as an amend-

* § 7; 5 Stat. at Large, 354.

ment to the first application." A patent was issued March 2d, 1858.

It was part of the case "that the patentee, in the summer and fall of 1854, and since, publicly manufactured and sold boot-trees containing his alleged invention."

On a suit by the patentee, Godfrey, in the Circuit Court for the District of Massachusetts, against Eames, for the use of the boot-tree patented, the question was, whether Godfrey had forfeited his patent by more than two years' public use or sale of his invention, prior to his application. The court below instructed the jury that he had; and accordingly that the plaintiff could not recover. The correctness of this instruction, was the matter now before this court on error.

Mr. Causten Browne, for the plaintiff in error: The proceeding of Godfrey was in pursuance of a settled practice sanctioned by the Patent Office, and amounting simply to amendment and rehearing, with $10 additional fee. From the spring of 1855 (only a few months after the introduction of the invention into use), until the grant of the patent, there was, in fact, never a moment when the inventor was not applying to the commissioner for his patent. The case is one of two consecutive applications (no time intervening) for patent for an invention. Why is the patent declared invalid upon the ground that the latter one—that which immediately preceded the grant—is the only one to which the statute relates?

There is no sufficient ground for such distinction upon the language of the statute, interpreted with reference to its reason and policy.

The provision of the act has been construed liberally to uphold the patent.* The terms, "his application for patent," mean not any particular paper application, but his applying; his making an application; his preferring a demand for a patent for his invention as new and useful.

Considered with reference to the policy of this provision,

* Pennock *v.* Dialogue, 2 Peters, 18.

it is still more clear that it will not bear the construction given to it in this case by the court below. This policy was, that at as early a period as possible, having due regard to the rights of the inventor, the public should be put in possession of the best mode of practising the invention, by the deposit in the Patent Office of an open description thereof by the inventor.* This description being lodged, together with demand for patent, the public were secure of the means of practising the invention when the exclusive right of the inventor should terminate, and the inventor was secure of his protection *unless he abandoned the pursuit of it.* Undoubtedly after an inventor has filed his application for patent, he may so conduct himself as to show an abandonment of it. If rejected, he may allow the rejection to stand so long as to show, itself or with other circumstances, an acquiescence therein and a final relinquishment of his claim. But having once filed an application, given the details of his invention to the public knowledge, and asserted his claim to a patent, he has satisfied the reasons of the law of 1836; and although he should afterwards withdraw that application, and *some time should elapse* before he renewed it, it is a question for the jury, whether he has abandoned his claim to a patent, on which question the fact of withdrawal is evidence only, to be weighed with other evidence. But in this case, although *no time intervened*, the court peremptorily directed the jury to find for the defendant.

2. If, indeed, the application was to patent something *not existing* in the first application, it cannot be considered a continuance of that application. But the fact that he changed his claim, or other part of his description, does not make it a different application; nor that he submitted new drawings; nor that he submitted a new model: if the drawings and model show a machine substantially the same as before, in construction and mode of operation. The same invention is disclosed in each, and might have been fully described and claimed in the first application; just as a reissue is a patent

* Pennock *v.* Dialogue, 2 Peters, 18; Ryan *v.* Goodwin, 3 Sumner, 518; Sparkman *v.* Higgins, 1 Blatchford, 208.

for the same invention as the original patent, if it was disclosed in the original application, and might have been then fully described and claimed. If the patentee in this case could have reissued a patent taken upon his original description and claim, so as to insert the present description and claim, the commissioner could have allowed a like substitution by way of amendment. A patentee is presumed to intend to claim all that is new with him. If it appears that the *thing* on which a patent was sought, was the same in the two cases, taking the model, description, and drawings together, then it is true that the inventor did, in 1855, put the public in possession of his invention, and of the best mode of practising it, and has ever since persisted in claiming a patent therefor; and the policy of the law, if rightly stated above, is satisfied.

Mr. Brooks, for the defendant in error: The real question presented is, *What became* of this application for a patent, which had been "once rejected," but which was "entitled to a re-examination?" Did the applicant "PERSIST in his claim for a patent, with or without any alteration of his specification?" "*His claim*" for a patent must, we suppose, be held to refer to the claim or application then before the Patent Office, and which had been once rejected. None other had been made, and none other could be persisted in. He did not persist in such claim; he did not ask for a "re-examination" of his application (the "renewing his application" mentioned in the act of 1836); but he took the opposite alternative course authorized by that statute (though not named by the commissioner of patents), viz., he *elected to withdraw his application*, and receive the return fee of $20. Having made such election, he, in fact, did *withdraw* his *said application* on the 24th April, 1857, under the act of 1836, and did receive back the return-fee; and the "*said application*" then withdrawn has never since been the subject of any action whatever anywhere.

His proceeding is analogous to a discontinuance by a plaintiff in a court of law, and the commencement of another suit

on the same day, in case the claims of invention and the causes of action were in each case the same. In both instances, one proceeding is ended, and another is begun, even though both depended on the same ground precisely. The case is different where only an amendment is made, and the same suit is prosecuted in an amended form, without new process or new papers, or even loss of time.

Now, it is a familiar principle, that an action at law must be commenced within the period limited for that purpose; and, if not so brought, it is not aided by the fact that another suit had been previously commenced within such time, and had been discontinued or dismissed. Were it otherwise, stale demands might be kept alive forever by means of suits not brought to trial. So in this case, if the doctrine of the plaintiff in error is correct, an inventor has it in his power, after putting his invention into public use, to apply for a patent, and taking care, in case of one rejection, to withdraw, and repeat the experiment *toties quoties*, he thus may, if finally successful, prolong the period of enjoyment much beyond that prescribed by law. In fact, if this view of the law is sanctioned by this court, it becomes the interest of inventors to delay the grant of patents as long as possible by this very method, in order to prolong the term of enjoyment. It is obvious, however, that the patent here in suit, like all others, was and could be founded upon one application only; and it appears that such application was made (April 24, 1857), more than two years after the public use and sale by the inventor of the alleged invention, whereby the said patent was made invalid.

We do not put our defence upon the ground, that the withdrawal of the first application was an abandonment of his invention. It was merely an abandonment of *that application*, and left him at liberty to make other applications as like or unlike that as he pleased; but inasmuch as, in cases of withdrawal, the model and application-papers are retained in the Patent Office, and further proceedings to obtain a patent require new papers, differing from former ones at least in time of execution and filing, and also perhaps presented to officers

not before having acted in the matter, a first application cannot, in the nature of things, be the second, nor a second be also the first.

It will not, of course, be claimed that what was done in April, 1857, amounted merely to an amendment of his first specification, by writing it out *anew*, as is sometimes allowed to be done. For that purpose, no second fee or new petition, oath or model, was necessary; and, in such case, no return of fee could have been allowed.

It is made the duty of the commissioner, by the act of 1836, to issue a patent upon an application duly filed, after due examination, if, among other things, it shall not appear that the alleged new invention had been in public use or on sale, &c., &c., (more than two years) "prior to *the application.*" "The application" must mean the one brought before him for examination, and not some previous application never perhaps known to him. The commissioner has no judicial discretion in receiving an application. The power of making one is given absolutely to the inventor. Can it, then, be pretended that the commissioner would or lawfully could have granted the patent in this case, had he known the fact of the public use and sale of the invention in 1854? "The application" means the several papers required by law to entitle an inventor to an examination of his alleged invention, and which, if the patent is granted, are annexed to the letters-patent to distinguish it and fix its character. In this case, these papers were those filed in 1857, and none other; so that the prior application of 1855 is wholly immaterial, except upon the question of abandonment, which is not raised at all in this case. The applicant voluntarily substituted one application for another, as he says. If both were the same, his motive could not be one favored by the policy of the patent laws. If they were not the same, and he elected to give up one for the other, and did so, and got the benefit of so doing, he cannot rely now on both. If, as we understand the law, the specification makes the patent what it is, it is manifest that the application of January, 1855, was not patented in the grant made in March, 1858.

[2. The counsel then contended that in fact the object for which a patent was applied for in 1855, was one so different from that one for which a patent did issue in 1858, that they could not be considered in substance the same thing; a matter involving a question of fact only.]

Mr. Justice SWAYNE, after quoting the statutes of 1836 and 1839, delivered the opinion of the court:*

In this case the patentee filed his application in the Patent Office on the 31st of January, 1855, and from that time it was constantly before the office, until the patent was issued on the 2d of March, 1858, except that on the 24th of April, 1857, it was withdrawn and refiled on the same day with an amended specification. It was admitted and proved "that the patentee, in the summer and fall of 1854, and since, publicly manufactured and sold boot-trees containing his alleged invention." The sales and use as thus shown were less than two years before the first application was filed, and hence, according to the letter of the act of 1839, cannot affect the validity of the patent.

In answer to this, two propositions are relied upon by the plaintiff in error:

1. It is said the original and the renewed application are for patents for different things.

Both specifications are before us, and it is our duty to construe them.

The act of 1836 gives the applicant a right to change his specification after receiving the suggestions of the commissioner. Doubtless, this right exists and may be exercised independently of such suggestions, at any time before the commissioner has given his formal judgment upon the application; and the inventor may "persist in his application for a patent, with or without any alteration of his specification." A change in the specification as filed in the first instance, or the subsequent filing of a new one, whereby a patent is still sought for the substance of the invention as originally

* Mr. Chief Justice Taney and Messrs. Justices Wayne, Grier, and Field had not been present at the argument.

claimed, or a part of it, cannot in any wise affect the sufficiency of the original application or the legal consequences flowing from it. To produce that result the new or amended specification must be intended to serve as the basis of a patent for a distinct and different invention, and one not contemplated by the specification, as submitted at the outset.

We are satisfied that there was here such substantial identity in the two specifications as brings the case within the rule thus laid down. This objection cannot be sustained.

2. It is said that the withdrawal of the first application broke the continuity of the claim, and that the case stands as if the only application were the one of the 24th of April, 1857.

This question could not have arisen upon the same state of facts, under the act of 1836. According to that act, and the prior legislation of Congress, the public use or sale by the inventor of the thing invented, at any time before the application, was fatal to his claim for a patent. The act of 1839 relieved him from this consequence and introduced a new and more liberal policy. It gave him the right to apply for a patent at any time within two years after the use and sale of his invention, "except on proof of the abandonment of such invention to the public." The provision in the act of 1836, allowing the withdrawal of the application, was intended only to provide for the disposition in such cases of the duty which had been deposited, and to enable the applicant to resume a part of it upon the condition prescribed; it is silent as to everything beyond this, and we do not feel authorized to interpolate into the statute so important a qualification. The new provision in the act of 1839, is wholly independent of the act of 1836; by necessary implication it repeals the conflicting provision upon the same subject in the earlier act. It must be examined by its own light, and so construed as to give the fullest effect to the beneficent purpose of the legislature.

In our judgment, if a party choose to withdraw his application for a patent, and pay the forfeit, intending at the time of such withdrawal to file a new petition, and he accordingly

do so, the two petitions are to be considered as parts of the same transaction, and both as constituting one continuous application, within the meaning of the law.

The question of the continuity of the application should have been submitted to the jury. In directing them to return a verdict for the defendant, we think the learned judge who tried the case in the court below, committed an error.

Mr. Justice CLIFFORD dissents.

JUDGMENT REVERSED AND VENIRE DE NOVO AWARDED.

UNITED STATES *v.* JOHNSON.

1. Objections to Mexican grants ought not to be taken as if the case was pending on a writ of error, with a bill of exceptions to the admission of every item of testimony offered and received below.
2. When there is any just suspicion of fraud or forgery, the defence should be made below, and the evidence to support the charge should appear on the record.
3. The want of approval of a grant by the Departmental Assembly does not affect its validity.

APPEAL from the District Court of the United States for the Southern District of California, the case being thus:

Johnson and others, the respondents, claimed title under the Mexican government, through one Chaves, to a tract of land called *Pleyto*, lying in the present county of Monterey, State of California, and containing about three leagues; which land he had petitioned for on the 2d of June, 1845. The deed to Chaves purported to be made on the 18th July, 1845, by Pio Pico, one of the Mexican governors of California; and it recited that "the necessary steps and investigations were previously taken and made in conformity with the requirements of laws and regulations." On the 8th May, 1846, the "expediente"* was laid before the Departmental

* This term *expediente* is a term of the Mexican land law, and of course not familiar to the reader of law reports in general, though it has now become so to those of the reports of this court.

"When complete, an expediente usually consists of the petition, with

Assembly, and was ordered to be referred to the Committee on Vacant Lands. The land asked for by Chaves having been once occupied by a community of priests, of the mission of St. Antonio, and being said to have a house upon it which they had built, the committee recommended that "the expediente be remitted to the authorities of that jurisdiction to be reported on, and to the person in charge of San Antonio, in order that he may say in what condition that house was at the time the grant was made, so that it might be valued, and that community be indemnified, to avoid questions relative to the expediente, to the end that, *after these proceedings are concluded*, the respective approval may be given." The Departmental Assembly, thus referring it, was soon afterwards dissolved, and nothing further done. The original grant made it a condition that Chaves should occupy the land, which there was evidence, though not wholly uncontradicted, that he did.

In some of the deeds through which the respondents claimed, the parties signing the deeds did not, apparently, sign them by the exact names with which, in the instruments, they were described. One deed, for example, purported to be made by Tomas Soberannes, and was signed *Thomas G.* Soberannes. Another purported, in the body of it, to be made by Tomas Guadaloup Soberannes; but said that the land was devised to the said Tomas Guadaloup *Sanchez*, under the name of Guadaloup Soberannes. It was signed T. Guadaloup Sanchez, and acknowledged T. Guadalupe Sobrannes; and so in other instances. Some of the witnesses to papers making part of the title were persons whose names had been before this court in former cases, and had

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the *diseño* annexed; a marginal decree approving the petition, the order of reference to the proper officer for information; the report of that officer in conformity to the order; the decree of concession, and the copy, or a duplicate of the grant. These several papers,—that is, the petition with the *diseño* annexed, the order of reference, the informé, the decree of concession, and the copy of the grant, appended together, in the order mentioned,—constitute a complete expediente within the meaning of the Mexican law." —*United States* v. *Knight's Admr.*, 1 Black, 245.

been spoken of, in judicial opinions reported, as not worthy of confidence.

With these documents and this evidence, Johnson and the other claimants having presented their petition to the Board of Commissioners established by the act of March 3d, 1851, "to ascertain and settle private land claims in the State of California," and that board having confirmed it, the United States took the case by appeal into the District Court, which court having also confirmed it, the case came here, as already mentioned; the question being whether the petition for confirmation of the claim was rightly granted and affirmed.

The title of Chaves was found among the archives. The deed of Governor Pico was authenticated below by proof of his handwriting, and that of his secretary, who witnessed it.

Mr. Wills, for the United States, contended that this deed was not properly proved by proof of the handwriting of the officers attesting it; that the signatures might be genuine, but the dates might be prior to the true ones; that the governor himself and his secretary should have been called; that the parties signing other deeds were not the parties described in them. He referred to decisions in this court and to local land history in Mexico, to show doubtful character in some of the witnesses in the case, and in a general way to infer fraud in some parts of the transaction; several of the objections made not having been taken in the court below, and being first made here.

Mr. Justice GRIER delivered the opinion of the court:

The title of Chaves is found among the archives. Its authenticity was not disputed before the commissioners or the District Court; but in this court the objection is first made that the handwriting of the public officers was proved, whereas the governor and secretary should have been called as the proper witnesses to authenticate their own acts.

In taking objections to these Mexican grants, it ought to

be remembered that the case is not brought here on a writ of error with a bill of exceptions to the admission of every item of testimony offered and received below. Nor is it a part of the duty of counsel representing the government to urge microscopic objections against an honest claimant, and urge the forfeiture of his property for some oversight of the commissioners, in not requiring proof according to the strict rules of common law. When there is any just suspicion of fraud or forgery the defence should be made below, and the evidence to support the charge should appear on the record. If testimony of witnesses is alleged to be unworthy of belief, the record should show some reason to justify the court in rejecting it. The former opinions of this court may be referred to in questions of law, but cannot be quoted as evidence of the character of living witnesses.

On the 2d of June, 1845, Antonio Chaves petitioned the governor for the grant of a place called *Pleyto*, containing three leagues, a little more or a little less. The record does not show the usual reference for information. But the grant by Pio Pico, dated 18th July, 1845, recites that "the necessary steps and investigations were previouly taken and made in conformity with the requirements of laws and regulations." On the 8th of May, 1846, "this espediente was laid before the Departmental Assembly, and was ordered to be referred to the Committee on Vacant Lands." The committee recommended "that the present espediente be remitted to the authorities of that jurisdiction to be reported on, and to the person in charge of San Antonio, in order that he may say in what condition the town was at the time the grant was made, so that it may be valued, and that community be indemnified to avoid questions relative to the espediente, to the end that after these proceedings are concluded the respective approval may be given." As this Assembly was soon after finally dissolved, nothing further appears to have been done. There is evidence that Chaves was in the occupancy of the land granted.

We have frequently decided that the want of approval by the Departmental Assembly will not affect the validity of the

grant. In this case the approval is not denied, but the question suspended.

Although some of the grants purporting to be made by Pio Pico, in the spring of 1846, shortly before his expulsion, have been shown to have been executed after that time, there is no evidence in this case to justify the court in deciding that this grant is not authentic.

DECREE AFFIRMED.

JONES v. GREEN ET AL.

A bill in equity will not lie on behalf of judgment creditors to subject real property of their debtor, held by a third party upon a secret trust for him, to the satisfaction of the judgment, until an attempt has been made for their collection at law by the issue of execution thereon.

APPEAL from the Supreme Court of the Territory of Nebraska, the case being thus:

In February, 1859, C. and J. Green and C. and I. Gill filed a bill in Chancery in the District Court of the Territory just mentioned, against one Jones and a certain Brown. It set forth that in March, 1858, the said Greens had obtained judgment in the District Court of the First Judicial District of Nebraska, against Brown, for $1155, and that in October of the same year, the other two complainants, G. and C. Gill, had obtained judgment against him in the same court for $450. It charged, that on the 15th of July, 1857, Brown was engaged in mercantile pursuits in the city of Omaha; that he was on that day utterly insolvent, and being about to suspend business and the payment of his debts, purchased certain real estate in the city just named; and in order to place it beyond the reach of his creditors, procured a conveyance to be made to the other defendant, Jones, who it was alleged now held the property upon a secret trust for *him*. The bill set forth also that executions had been issued and returned unsatisfied, and prayed that the premises might be sold and the proceeds applied to the payment of the judgments. *The*

answer denied that executions had been issued and returned unsatisfied; and there was no sufficient proof that they had been.

The District Court rendered a decree in favor of the complainants, and the Supreme Court of the Territory affirmed it. On the argument of the appeal in this court,—which was by *Messrs. Carlisle and Redick for the appellant, and by Mr. Woolworth contra*,—several objections were made to the decree; but the only one considered by the court was, whether the bill would lie before the judgment creditors had attempted to collect their judgments by execution at law.

Mr. Justice FIELD delivered the opinion of the court:

In March, 1858, two of the complainants recovered judgment against Brown, in one of the District Courts of the Territory of Nebraska, for upwards of eleven hundred dollars. In October following, the other complainants also recovered judgment, in the same court, against Brown, for upwards of four hundred dollars. In February, 1859, the judgment creditors instituted the present suit, the object of which is to subject certain real property situated in the city of Omaha to the satisfaction of their respective judgments.

The bill charges that on the 15th of July, 1857, Brown was engaged in mercantile pursuits in that city; that he was on that day insolvent, and being about to suspend business and the payment of his debts, purchased the real property in question, and in order to place it beyond the reach of his creditors, procured a conveyance to be made to the defendant Jones, who now holds the property upon a secret trust for him. The bill prays that the premises may be sold and the proceeds applied to the payment of the judgments. The District Court rendered a decree in favor of the complainants; the Supreme Court of the Territory affirmed the decree, and the defendant Jones has appealed to this court.

Several objections to the decree were urged upon the court on the argument, which we do not deem it necessary to consider. The objection that the complainants have not shown any attempt to enforce their remedy at law is fatal to the relief prayed. A court of equity exercises its jurisdiction

in favor of a judgment creditor only when the remedy afforded him at law is ineffectual to reach the property of the debtor, or the enforcement of the legal remedy is obstructed by some incumbrance upon the debtor's property, or some fraudulent transfer of it.

In the first case the court, when its aid is invoked, looks only to the execution, and the return of the officer to whom the execution was directed. The execution shows that the remedy afforded at law has been pursued, and of course, is the highest evidence of the fact. The return shows whether the remedy has proved effectual or not, and from the embarrassments which would attend any other rule, the return is held conclusive. The court will not entertain inquiries as to the diligence of the officer in endeavoring to find property upon which to levy. If the return be false, the law furnishes to the injured party ample remedy.

In the second case the equitable relief sought rests upon the fact that the execution has issued and a specific lien has been acquired upon the property of the debtor by its levy, but that the obstruction interposed prevents a sale of the property at a fair valuation. It is to remove the obstruction, and thus enable the creditor to obtain a full price for the property, that the suit is brought.*

In this case the bill alleges that executions were issued upon the judgments of the complainants, and were returned unsatisfied, but the allegation was not admitted, and no proof on the subject was produced at the hearing. The case, therefore, stands as a suit in equity commenced for the satisfaction of judgments before any attempt had been made for their collection at law by the issue of execution thereon. That the suit cannot be maintained under these circumstances is clear both upon principle and authority.

The decree appealed from must therefore be reversed, and the court below directed to enter a decree for the defendant, dismissing the suit.

REMANDED WITH DIRECTIONS ACCORDINGLY.

* Beck *v.* Burdett, 1 Paige, 307; McElwain *v.* Willis, 9 Wendell, 559; Crippen *v.* Hudson, 3 Kernan, 164.

BAKER *v.* GEE.

1. Under the act of Congress of June 10, 1852, giving to the State of Missouri certain lands for railroad purposes, and the act of that State of September 20, 1852, accepting them and making provision in regard to them, the location of the lands was not fixed within the meaning of those acts by the mere location of the *road;* nor was it fixed until the railroad company caused a map of the road to be recorded in the office for recording deeds in the county where the land was situated; this sort of location being the kind required by the last act.
2. Where Congress gives lands to a State for railroad purposes and for "no other," and the State granting the great bulk of them to such purposes allows settlements by pre-emption, where improvement and occupancy had been made on the lands prior to the date of the grant by Congress, and since continued; a purchaser from the railroad company of a part which the State had thus opened to pre-emption cannot object to the act of the State in having thus appropriated the part; the railroad company having, by formal acceptance of the bulk of the land under the same act which opened a fractional part to pre-emption, itself waived the right to do so. The United States as donor not objecting, nobody can object.

ERROR to the Circuit Court for the District of Missouri, the case being thus:

On the 10th June, 1852, Congress, by statute,* granted to the State of Missouri, to aid in building railroads from Hannibal to St. Joseph, the *right of way* through the public lands, and every alternate section designated by even numbers for six sections in width on each side of said roads. The statute directed that "a copy of the *location of the roads*, made under the direction of the legislature," should be forwarded to the proper local land offices and General Land Office at Washington; and that the lands thus given should be disposed of by the State for the purposes contemplated, and for "*no other.*"

On the 20th September of the same year, the legislature of Missouri, by an act passed to accept the bounty of Congress,† required that the lands should be selected by the company, under the direction of the governor, and that a

* 10 Stat. at Large, 8. † Session Acts, 1853, p. 15.

copy of the "*location of the road*" should be certified to the local land offices and the General Land Office, in conformity with the act of Congress.

One section of the act, *the fifth*, gave a pre-emption right, at a price specified to settlers in actual occupancy, and who had improved the land occupied, prior to the date of the gift, 10th June, 1852, by Congress; and to a certain extent, on any land embraced in the grant, provided certain conditions were complied with; among which was that the party claiming pre-emption should, "within *four months* from the date of the *location of the lands*," file, in the clerk's office of the Circuit Court of the county in which the land was situated, a notice to the corporation of the claim. Another section obliged the company, within one year after their road should have been located, *to file a map or profile of it*, and a map of the land obtained for the use of the road, in the office of the Secretary of State, and have *record made of the lands lying in each county in the office for recording deeds*. The act and all the grants contained in it were to cease and be void unless the acceptance of the company should within six months be filed in the office of the Secretary of State.

On the 23d November, 1857, a further act was passed, making it the duty of the land agents of the road to file, in the different counties through which their road passed, a descriptive list of their lands.

The location of the *line and route of the road* was made on the 8th March, 1853, and the acceptance of the company duly filed with the Secretary of State, on the 17th of the same month; but there was no proof of *the time when the lands were actually located*, nor any proof that descriptive lists were ever filed in the different counties until after the passage of the act of 1857.

In this state of the law and facts, one Gee having entered, in 1849, upon such part of one of the sections as the act of Missouri opened to pre-emption, and complied with the several conditions,—such as occupancy, &c., prior to the gift by Congress,—he instituted, on the 3d of January, 1854, the proper proceedings to establish his right to purchase the land. He

was denied, however, the right, on the ground that he had not made his claim *in due season.*

In the meantime one Baker purchased the land from the railroad company, and, setting up a title under that purchase, brought the present suit, ejectment, against Gee, to recover the land which the latter claimed by right of pre-emption,—a sort of title which in Missouri is recognized as sufficient to maintain or defend suit in ejectment,—the ground of Baker's claim being that Gee was obliged to show that he gave the notice required by the fifth section of the Missouri act of September 20, 1852, *within four months of the location of the road;* such location, as Baker contended, having been a location of the lands also; the whole region there having long been surveyed and subdivided by the United States; the sections designated by even numbers already laid down on the public maps; and the location of all the lands granted being made so soon as the railroad itself—which location was the rule and exponent of this also—was definitively fixed and marked on maps by the State. When this was done nothing additional, it was argued, could by intendment be necessary to give precision to the site of the lands, or to render *their* location more certain or more easy of ascertainment. The court below, however, was not of the opinion, and ruled "that the location of the land in question by the Hannibal and St. Joseph Railroad Company was not complete, as regarded this defendant, until the said company caused a map thereof *to be recorded in the office for recording deeds in which the said land is situated.*" Verdict and judgment were accordingly given in favor of the pre-emptor. On error here the correctness of the ruling just mentioned was one point in question; a second point raised and argued being the power of the State of Missouri, under the act of Congress, which gave the lands for railroad purposes and for "no other," to open any part of it to pre-emption purchasers.

Mr. Gant for the purchaser Baker; and Mr. Krum for the pre-emptor Gee.

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

The practical question involved in this case is one of easy solution. It is this: "When did the right of pre-emption, under the fifth section of the act of September 20th, cease?" Manifestly, after four months from the location of the lands. It is argued that Gee's right was at an end if he did not prove his claim within four months from the location of the road. But such a construction would render valueless a wise provision which the legislature of Missouri, in the exercise of an enlightened liberality, had conferred on a deserving class of people. It is not probable that a man whose necessities compelled him to claim the benefits of a pre-emption law, living in an interior county, away from the local land offices, would be correctly informed even of the location of the route of a railroad, and he certainly could not know what lands would belong to the company, unless he knew the exact line the road had taken. And the legislature, in order to render the provision for an actual settler a privilege, and not a delusion, directed the company, within one year after the line of the road was fixed, to have a map of their lands recorded in the different counties through which their road passed.

It is said that, owing to the accuracy of the government surveys, whenever the location of one of these land-grant roads is settled, it is an easy matter to ascertain the lands that would belong to it.

If the location of the road was always on section lines, it would not be difficult to select the even sections within six miles of each side of the road. But a railroad rarely runs on straight lines. It makes short curves very often, and frequently runs diagonally across sections. It is well known that the General Land Office has encountered great difficulties in making correct selections of the lands which the bounty of Congress has bestowed on the States to aid in works of internal improvement. The selection is not merely mechanical, but requires skill and familiarity with land plats and surveys. On inquiry of the Commissioner of the General Land Office, we learn that in this very case, the descriptive lists of the lands to which the road was entitled, were not approved and signed by the Secretary of the Interior until February

10th, 1854, which was more than a month after Gee filed his claim and accompanying proofs. And to make it more evident that it is not an easy task to make an accurate description of the lands really granted, we learn further that additional lists were afterwards certified to the State, in aid of said railroad, from time to time, and as late as the 15th of November, 1859.

It is contended that the legislature of Missouri had no power to grant the privileges of pre-emption. If this was a contest between the United States and the State of Missouri, the question of power would be a proper subject for examination. But the United States are not complaining, and no other party has a right to complain. If the act of the legislature imposed burdens, it nevertheless conferred great privileges, and if any right to object existed, it was waived when the company filed their acceptance with the Secretary of State.

It follows that the court below committed no error in holding "that the location of the land in question by the Hannibal and St. Joseph Railroad Company was not complete, as regards this defendant, until said company caused a map thereof to be recorded in the office for recording deeds in the county in which said land is situated."

JUDGMENT AFFIRMED WITH COSTS.

LEE ET AL. v. WATSON.

When, to authorize the re-examination of a final judgment of the Circuit Court, the matter in dispute must exceed the sum or value of $2000, that amount—if the action be upon a money demand and the general issue be pleaded—must be stated both in the body of the declaration and in the damages claimed, or the prayer for judgment. When the amount alleged to be due in the body of the declaration is less than $1000, an amendment merely in the matter of amount of damages claimed, so as to exceed $2000, will not give jurisdiction to this court, and enable it to review the final judgment in the case.

LEE and Leavit brought assumpsit in the Circuit Court for the Kentucky District, against Watson, declaring on a

promissory note for $610, with a count for $1000 money due for goods sold; $1000 money had and received; $1000 money due on account stated, &c. What damages exactly were claimed in the *narr.* as originally filed, did not clearly appear, but they were obviously less than $2000. Demurrer was put in to one part of the declaration and *non assumpsit* pleaded to the residue, and the court having sustained the demurrer, the record proceeded thus:

"On motion of the plaintiffs, and by consent of the defendants, leave is given plaintiffs to amend their declaration by striking out the amount of damages claimed in this cause, and insert $2100, which is done accordingly, and the declaration so amended."

A jury having been summoned to try the issue raised by the plea of non assumpsit to the money counts, a verdict was found by them for the defendants; whereupon the plaintiff having taken a bill of exceptions on the trial, applied for and obtained a writ of error to this court, under that section of the Judiciary Act which provides that final judgments in a Circuit Court, when the matter in dispute exceeds the sum of $2000, may be re-examined here;* the judge, however, who had heard the case and who allowed the writ, making this indorsement upon it:

"It was not without hesitation that the bill of exceptions was allowed, and this writ of error is now sanctioned. The writ and original declaration showed that the amount in controversy did not exceed $1000; the evidence offered on the trial by the plaintiffs showed that it did not exceed $700; and if the increase of the damages by the amendment of the declaration was intended for the sole purpose of giving the Supreme Court jurisdiction, the question is whether it ought to be allowed such effect. I however concluded that the counsel may proceed, because in this mode the question will be most conveniently presented where it will be at once and finally determined."

The question in this court now was whether the writ could

* See *ante*, Ryan *v.* Bindley, p. 67.

be sustained; a matter which was argued by *Messrs. Lee and Fisher for the plaintiffs in error, and by Mr. Fendall contra.*

Mr. Justice FIELD delivered the opinion of the court:

It appears from the certificate of the presiding judge of the court below, indorsed on the writ of error, that the writ and original declaration in the case showed that the amount in controversy did not exceed one thousand dollars, and that the evidence offered by the plaintiffs at the trial showed that it did not exceed seven hundred dollars; and that in the progress of the cause an amendment was made in the amount of damages claimed, for the purpose of bringing the case within the appellate jurisdiction of this court. It is hardly necessary to add that upon the facts thus stated—and the correctness of the certificate is not questioned—the court will not entertain jurisdiction of the case.

To authorize a re-examination of a final judgment of the Circuit Court, the matter in dispute must, with some exceptions, exceed the sum or value of two thousand dollars. By matter in dispute is meant the subject of litigation—the matter for which the suit is brought—and upon which issue is joined, and in relation to which jurors are called and witnesses examined. In an action upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed, and its amount, as stated in the body of the declaration, and not merely the damages alleged, or the prayer for judgment at its conclusion, must be considered in determining the question whether this court can take jurisdiction on a writ of error sued out by the plaintiff. It certainly would not be pretended that this court would hear a case where the plaintiff counted solely upon a promissory note of two hundred dollars, simply because he concluded his declaration with an averment that he had sustained damages from its non-payment of over two thousand, and prayed judgment for the latter sum. Reference must be had both to the debt claimed and to the damages alleged, or the prayer for judgment. The damages or prayer for judgment must be regarded, inasmuch as the plaintiff may seek a recovery

for less than the sum to which he appears entitled by the allegations in the body of the declaration.

Taking in the present case the certificate of the judge below as correct, the amount in controversy—that is, the debt alleged in the original declaration—did not exceed one thousand dollars; the jurisdiction is not therefore acquired by this court from the amendment in the amount of the damages claimed. The writ of error is

DISMISSED.

BLOOMER *v.* MILLINGER.

1. A grant of a right by a patentee to make and use, and vend to others to be used, a patented machine, within a term for which it has been granted, will give the purchaser of machines from such grantee the right to use the *machine patented* as long as the machine itself lasts; nor will this right to use a machine cease because an extension of the patent, not provided for when the patentee made his grant, has since been allowed, and the machine sold has lasted and is used by the purchaser within the term of time covered by this extension; the rule being distinguishable from that applied to the assignee of the right to *make and vend* the thing patented, who holds a portion of the franchise which the patent confers, and whose right of course terminates with the term of the patent, unless there is a stipulation to the contrary.
2. *Bloomer* v. *McQuewan* (14 Howard, 539), and *Chaffee* v. *The Boston Belting Co.* (22 Id., 217), approved.
3. How far parol proof may be introduced to show verbal agreements of the parties at the time when deeds were executed, and so to prove mistake or fraud in not executing what it was understood should be executed. The question raised on argument, but not decided by the court.

BLOOMER, the appellant here, filed a bill in equity in the Circuit Court for the Western District of Pennsylvania. He set forth in it that he was owner of the exclusive right to make and use, and vend to others to be used, within the county of Alleghany, in Pennsylvania, the patented planing machine of Woodworth; that subsequently *to the 27th December*, 1849, and about the 1st January, 1850, the respondent, Millinger, had put in operation in that county, three of these machines, and was continuing to use them without any law-

ful authority. The prayer was for an account, and for an injunction against the use of these three machines.

The case, as appearing by the bill and answer, was thus:

On the 27th December, 1828, letters patent were granted to Woodworth for an improved planing machine for fourteen years, that is to say, up to 27th December, 1842.

On the 16th November, 1842 (Woodworth himself being dead, but his estate being represented by an administrator), an extension of the patent was granted by the *Commissioner* or *Board of Commissioners of Patents*, for the term of *seven* years from the expiration of the original patent; that is to say, *from the 27th December*, 1842, *to the 27th of December*, 1849.

On the 2d June, 1843, the administrator of Woodworth, by deed (called, in the argument, Exhibit A), reciting "the extension of said letters patent for the term of *seven years* from and after the expiration of said patent," sold and conveyed to one *William* Lippincott, his heirs and assigns, the right to construct and use, and vend to others to construct and use, "during the *said* extension," the patented machine, within the county of Alleghany, in the State of Pennsylvania; covenanting that such right should be exclusive throughout the limits specified, during the "term aforesaid."

On the 26th February, 1845, *Congress*, by act, granted an extension of the patent for the term of *seven years from the expiration of the extension granted by the commissioner;* and on the 14th of March following, the administrator sold and conveyed his interest in the "letters patent and the franchises thereby granted and secured," for "the said term of *seven years created and extended by Congress*," to one Wilson; a second deed—not specially important in the case, but to the same effect exactly, that is to say, for the term of seven years created and extended by the said *act of Congress*—being made July 9, 1845, and after the patent had been surrendered for a defective specification.

Wilson was thus invested with the interest under the second or Congressional extension, but with nothing more.

In this state of things, *William Lippincott*, still holding his right under the deed of 2d June, 1843 (called Exhibit A), for

Alleghany County, under the extension granted by the *commissioner*, conveyed *it*, on the 10th April, 1846, to James Lippincott and one Millinger, the present defendant; and by a second instrument (called Exhibit B), dated three days afterwards (13th April, 1846), the *administrator*, reciting that in consequence of the surrender and renewal of the patent, doubts had arisen as to rights given by instruments executed prior to the reissue, licensed and empowered this same Lippincott and Millinger "to construct and use exclusively the patented machine in the county of Alleghany, ... and also within said territory to license and empower any other person or persons to construct and use machines *for the term of time for which the patent was extended by the Board of Commissioners hereinbefore referred to; being for the term of seven years and no longer from and after the expiration of the original term of fourteen years.*" The deed declared that the administrator intended thereby "to confirm . . . . all right, title, and interest to construct and use, and the right to license others to construct and use said machines," which had been granted *by the indenture of 2d June*, 1843 (Exhibit A), and concludes thus: "No other, or greater, or other, or further grant or conveyance is hereby made, &c., than was granted by the indenture aforesaid, and upon the same terms and conditions."

Lippincott and Millinger were thus vested with the right for Alleghany County under the commissioner's extension, in such way as given by the deeds already mentioned.

On the 24th June, 1847, the administrator granted to *Bloomer* (the complainant) his "full consent, permission, and license to construct and use, and vend to others to construct and use," the patented invention "during *the two* extensions," within that part of Pennsylvania, west of the Alleghany Mountains, "excepting Alleghany County, for the first extension;" this "first extension" being that which had been previously granted to Lippincott and Millinger, the respondent in this suit. And on the 2d September, 1847, this same Lippincott and Millinger, by indorsement upon the administrator's deed of 13th April, 1846, conveying it *to them*, conveyed

to him, Bloomer aforesaid, whatever rights in the patent they held; Bloomer, however, stipulating that he would in no way interfere with certain machines mentioned in the transfer as belonging, &c., one to A., and one to B., &c., "nor interfere in any manner with the use of the *three* machines now erected, and in operation and use by the said *Millinger;* but the right, title, and use of the machines of the persons hereinbefore named, shall remain and be in them or their assigns for and during the time limited by the *written instruments.*"

In addition to this deed indorsed—from Lippincott and Millinger to Bloomer, of 2d September, 1847—these same parties, Lippincott and Millinger, executed on the 10*th January*, 1848, still another deed to Bloomer, by which they assigned to him "all their right, title, and interest in and to the said planing patents . . . . within said county of Alleghany, as fully as the same is vested in us by force of the several hereinbefore recited conveyances,* and giving to the said Bloomer and his assigns full power and authority to construct and use, and vend to others to construct and use, said patent as aforesaid, within said county . . . . for and during the full end and term of time unexpired and yet to come of said extension of said patent, to wit, until the 27th day of December, 1849."

And on the same day, Bloomer, the complainant, executed a deed, giving to Millinger, the respondent, "his full consent, and permission, and license to construct and use, and vend to others to construct and use, *during the first extension herein set forth*, to wit, from the 27*th day of December*, 1842, *until the* 27*th day of December*, 1849, the right to use the said renewed patent, and to vend to others to use *three* planing machines upon the principle, plan, and description of the said renewed patent and amended specifications, within the county of Alleghany." *How far Millinger had accepted this deed was not so plain.*

* These were the deeds of June 2, 1843 (Exhibit A), that of 10th April, 1846, and that of 13th April, 1846 (Exhibit B).

In addition to the defence, as already indicated, from the pleadings, Millinger, the respondent, by his answer, averred and offered to prove that when the reassignment of 10th January, 1848, from Lippincott and himself to Bloomer, was executed, Bloomer agreed that he would execute to Millinger "a deed of assignment of the right to the said extension, so far as regarded the three machines," and "the said deed of assignment from the said Bloomer"—Millinger's answer went on to say—"was to be executed by the two parties, and was to be so worded as that respondent should have all the rights and privileges, and was to stand precisely in the position as to the rights, enjoyments, and privileges, as respected the patent right to said three machines, as if the assignment from respondent and Lippincott had never been made, and so as to place the respondent in the same situation as he would have stood under the assignment of the 2d of June, 1843, or by any other agreement between the parties, and to all the benefit of any renewals to which respondent would have been entitled under the assignment of said extension by the Commissioner of Patents, on the 2d of June, 1843, or any other agreement between the parties;" that the plaintiff, in fulfilment of the verbal agreement, did execute a deed, left it at the place of business of the respondent, and that he refused to accept or sign the same, because it did not carry out the alleged agreement.

Some parol evidence was taken on behalf of the respondent, to substantiate these allegations. But the complainant's general right, and the use of the three machines by the respondent, Millinger, *after the expiration of the term of extension granted by the commissioner*, was not denied.

The court below dismissed the bill; and on appeal here, two principal questions—in substance these—were made:

1. Whether, under the deeds of June 23d, 1843 (Exhibit A), conveying to the assignor of Millinger, in such strict terms, a right to the extension of the patent for but *seven years*, and the deeds of 10th and 13th April, 1846 (Exhibit B), by which this right was conveyed, in such like terms, to Millinger—taken in connection with Bloomer's stipulation

of 13th April, 1846, and his deed of 10th January, 1848, that Millinger should use his three machines during the said term for which the patent had been extended by the commissioner —Millinger could use his machines after the expiration of that term, and during the new term for which an extension had been granted by Congress.

2. If he could not do so under the deeds as set forth in the pleadings, he could introduce parol evidence to show what he alleged in his answer and offered to prove, as to the license intended to have been executed by Bloomer on the 10th January, 1848.

Messrs. Seward, Norton, and Blatchford, for the appellant, Bloomer:

1. The intent with which the agreement was made is but a convertible term for its legal operation, and that legal operation is to be affixed by the law to the language used by the parties, irrespective of the intent with which they used such language. The inquiry never arises upon the evidence —"what did the parties intend to do?"—if the written agreement which they made is susceptible of legal interpretation. The conclusion is, that they intended just what the law interpreting their agreement says that they have done. If this rule be so, it excludes from the consideration of the court the parol evidence introduced by the respondent, and leaves for the adjudication of the court, the single question of law, viz.: "Has the respondent, under these instruments, either by their proper interpretation or by operation of general law, the right to continue to use, *during the extension of the patent by Congress*, the three machines which he constructed and was lawfully in use of during the extension by the *commissioners?*"

2. The fact that the subject of the contract is a right in or an interest under a patent, does not take the case out of the law applicable to the law of contracts generally. The owner of a patent may make any agreement with regard to its enjoyment that he may make in regard to any other species of property. It is competent, therefore, for the owner of a pa-

tent right to carve out of his entire monopoly such fractional interest therein, either as to absolute right, or as to territorial extent, or as to duration of right, as he may see fit.

Applying this principle, it appears that the respondent never acquired, by voluntary grant from any of the owners of either the original or extended patent, any right to continue to use the thing patented during the extension of the patent *by Congress*. If there be language which can define the intent of the grantor to be, that he parts with a right under his patent for a specified number of years only, that language will be found in both of the instruments under which the respondent was rightfully in use of his three machines during the first extension of the patent. In Exhibit A, the first instrument (that of 2d June, 1843), by the administrator to William Lippincott, the respondent's assignor, the grant was of a "right and license to construct, use, and vend to others to construct and use, *during the said extension of the aforesaid patent*," that extension being the one granted by the commissioners, and which expired on the 27th of December, 1849.

In the confirmatory instrument to the respondent, of the 13th of April, 1846 (known as Exhibit B), which was intended to convey the right under the amended specification attached to the reissued patent, the language is, "doth license and empower . . . *for the term of time for which the patent was extended by the Board of Commissioners hereinbefore referred to, being for the term of seven years, and no longer, from the expiration of the original term of fourteen years.*"

Probably *Bloomer* v. *McQuewan*,* decided by this court, will be relied on to support an opposite view. But we submit—*first*, that that case is inapplicable, and *second*, that it is not, under the circumstances of its decision, a binding authority.

1. The act of Congress places the case in the position in which it would have been had the patent been originally granted for twenty-eight years. If it had been so granted,

* 14 Howard, 550.

what right would the respondent have acquired by virtue of Exhibits A and B, executed respectively in 1843 and 1846? Clearly, the beneficial enjoyment of the patent for the period therein specified, expiring on the 27th of December, 1849, and nothing other or beyond. If he acquired any other or further right, he must have acquired it by virtue of some general law, and not by virtue of the contract, or of the act extending the patent. The respondent did not know, in 1843, when the first license was granted, that the patent would be extended by act of Congress, but he knew that it might be. He did know, in 1846, when the second license was executed, that the patent had been extended; and he accepted an instrument on that date, which expressed, by the use of proper language, the intention of the grantor to terminate the right granted, on the 27th day of December, 1849.

The respondent never occupied, during the first term of the patent, the position of the defendant in *Bloomer* v. *McQuewan*,—that is, he was not an "assignee," or "grantee," during the *original* term of the patent, of the right to use the thing patented.

By the Patent Act of 1836 (§ 18), it is provided, that the benefit of the renewal by the commissioner shall extend "to assignees and grantees of the right to use the thing patented, to the extent of their respective interests therein." In *Wilson* v. *Rousseau*,* it was the opinion of a majority of this court that, without this provision, "all rights of assignees or grantees, whether in a share of the patent, or to a specific portion of the territory held under it, terminate at the end of the fourteen years, and become reinvested in the patentee by the new grant." And, in construing this very act of 1845, Nelson, J., said in one case:† "If the extension for the second term had been absolute, that is, if there had been no reservation in the general act of 1836 in favor of assignees, as there is not in the special act of 1845, the court would not have entertained a doubt that the exclusive right to the invention during the second term would have been vested in

* 4 Howard, 646.

† Gibson *v.* Gifford, 1 Blatchford, 529.

the administrator." So, also, in another case,* where the assignments were similar to Exhibits A and B, he held that the defendant had no right to continue to use the machines under the extension by act of Congress. This view has been confirmed in other circuits.†

II. But it is submitted that *Bloomer* v. *McQuewan* should be re-examined. The opinion of the court in that case was pronounced by the present chief justice, and was concurred in by Justices Catron, Daniel, and Grier. Justices Nelson and McLean dissented. Justices Wayne and Curtis did not sit. So that the decision was really that of less than half of the court, there having been one vacancy by the death of Justice McKinley. Justice McLean, at the close of his dissenting opinion, says: "Sustained by the authority of seven justices of this court, and by an argument of the Supreme Court above cited, which I think is unanswerable, I shall deem it to be my duty to bring the same question now decided, when it arises in my circuit, for the consideration and decision of a full bench." It cannot be presumptuous to ask the court to give to the question a new investigation, in order that it may be submitted "for the consideration and decision of a *full bench.*"

The counsel then examined the decision on principle and authority.

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

Counsel of the complainant concede that the machines

* Gibson *v.* Cook, 2 Blatchford, 144.

† In Bloomer *v.* Stolley, 5 McLean, 158, McLean, J., held that the defendant in that case acquired no right, under the act of Congress extending Woodworth's patent, to continue to use the machine which he had rightfully used during the second term of the patent. In Mason *v.* Talman (decided in Rhode Island, July, 1850), Woodbury and Pitman, JJ., followed the decision of Nelson and McLean, JJ., upon this point. The point was similarly decided by McKinley and McCaleb, JJ., in Bloomer *v.* Vaught (in Louisiana, February, 1850), by Ware, J., in Woodworth *v.* Barber (in Maine, April, 1850), and by Sprague, J., in Woodworth *v.* Curtis (in Massachusetts, January, 1850).

were constructed and put in operation by the consent and license of the assignees of the patentees, and that the respondent had the full right to continue to use and operate the same throughout the entire period of the extension granted by the Commissioner of Patents. But they deny that he had any right to continue to use or operate them under the second extension, which was granted by the act of Congress. All of those machines were constructed and put in operation before the act of Congress was passed, and of course under an authority founded upon the patent as it existed at the time the authority was conferred. Regarding the transaction in that point of view, the argument is, that the respondent could not lawfully continue to use and operate the machines under the extension granted by Congress, inasmuch as such a use of the invention was not in the contemplation of the parties when the respondent was authorized to construct them and put them in operation.

Two principal defences were set up by the respondent in the court below.

First, he insisted that inasmuch as he constructed the machines and put them in operation under the authority of the patentee or his assigns, with the right to continue to use and operate them during the entire term of the patent as it was then granted, he cannot now be deprived of the right to use the property which he was thus induced to purchase, and which he in that manner lawfully acquired.

Secondly, he insisted that the complainant, at the time the respondent transferred to him the right he acquired under the assignment to him of the 10th of April, 1846, agreed that he, the complainant, would execute to him, the respondent, a deed of assignment of the right to the extension in question, so far as respects the three machines now in controversy; and he insisted that parol proofs were admissible and sufficient to establish the fact of such an agreement. On the other hand, the complainant denies that any such agreement was ever made, and he also insists that parol proofs are not admissible to establish such a theory.

Confessedly, the latter question is one of difficulty, under

the circumstances, but it is wholly unnecessary to decide it in this case, as the respondent was and is clearly entitled to judgment upon the other ground. He constructed his machines, or caused them to be constructed, under the authority of the patentee or his assigns, and consequently must be regarded in the same light as a grantee or assignee under those who had the legal control of the patent. Builders of machines under such circumstances, have the same rights as grantees or assignees.

When the respondent had purchased the right to construct the machines and operate them during the lifetime of the patent as then existing, and had actually constructed the machines under such authority, and put them in operation, he had then acquired full dominion over the property of the machines, and an absolute and unrestricted right to use and operate them until they were worn out.

Patentees acquire the exclusive right to make and use, and vend to others to be used, their patented inventions for the period of time specified in the patent, but when they have made and vended to others to be used one or more of the things patented, to that extent they have parted with their exclusive right. They are entitled to but one royalty for a patented machine, and consequently when a patentee has himself constructed the machine and sold it, or authorized another to construct and sell it, or to construct and use and operate it, and the consideration has been paid to him for the right, he has then to that extent parted with his monopoly, and ceased to have any interest whatever in the machine so sold or so authorized to be constructed and operated. Where such circumstances appear, the owner of the machine, whether he built it or purchased it, if he has also acquired the right to use and operate it during the lifetime of the patent, may continue to use it until it is worn out, in spite of any and every extension subsequently obtained by the patentee or his assigns.

Provision is made by the eighteenth section of the act of the 4th of July, 1836, for the extension of patents beyond the time of their limitation. 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*, 125. Under that provision it has repeatedly been held by this court that a party who had purchased and was using a patented machine, during the original term for which the patent was granted, had a right to continue to use the same during the extension. *Wilson* v. *Rousseau*, 4 How., 646. Founded as that rule is upon the distinction between the grant of the right to make and vend the machine, and the grant of the right to use it, the justice of the case will always be obvious, if that distinction is kept in view and the rule itself is properly applied.

Purchasers of the exclusive privilege of making or vending the patented machine in a specified place, hold a portion of the franchise which the patent confers, and of course the interest which they acquire terminates at the time limited for its continuance by the law which created it, unless it is expressly stipulated to the contrary. But the purchaser of the implement or machine, for the purpose of using it in the ordinary pursuits of life, stands on different ground. Such certainly were the views of this court in the case of *Bloomer* v. *McQuewan*, 14 How., 549, where the whole subject was very fully considered. Attention is drawn to the fact that there was considerable diversity of opinion among the judges in disposing of that case, but the circumstance is entitled to no weight in this case, because the court has since unanimously affirmed the same rule. *Chaffee* v. *The Boston Belting Co.*, 22 How., 223. In the case last mentioned the court say, that when the patented machine rightfully passes from the patentee to the purchaser, or from any other person by him authorized to convey it, the machine is no longer within the limits of the monopoly. By a valid sale and purchase the patented machine becomes the private individual property of the purchaser, and is no longer specially protected by the laws of the United States, but by the laws of the State in which it is situated. Hence it is obvious, say the court, 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. *Webbs. Pat. Cases*, 413, *note p.*

Considering that the question has been several times decided by this court, we do not think it necessary to pursue the investigation. The decree of the Circuit Court is therefore .

AFFIRMED WITH COSTS.

UNITED STATES *v.* AUGUISOLA.

Where no suspicion, from the absence of the usual preliminary documentary evidence in the archives of the former government, arises as to the genuineness of a Mexican grant produced, the general rule is, that objections to the sufficiency of proof of its execution must be taken in the court below. They cannot be taken in this court for the first time.

The tribunals of the United States, in passing upon the rights of the inhabitants of California to the property they claim under grants from the Spanish and Mexican governments, must be governed by the stipulations of the treaty, the law of nations, the laws, usages, and customs of the former government, the principles of equity, and the decisions of the Supreme Court, so far as they are applicable. They are not required to exact a strict compliance with every legal formality.

The United States v. *Johnson* (*ante*, p. 326) approved.

THIS was an appeal by the United States from a decree of the District Court for the Southern District of California, confirming to one Auguisola a tract of land in California.

After the cession of California to the United States, Auguisola, who deraigned title from two persons (Lopez and Arrellanes) exhibiting a grant that purported to be from the Mexican governor, Micheltorena, laid his claim before the board of commissioners, which the act of Congress of March 3, 1851, appointed to examine and decide on all claims to lands in California purporting to be derived from Mexican grants. He here produced from the archives of the Surveyor-General of California a petition from the grantees; the petition being accompanied by a map of the land desired;

the reports of the different officers to whom the matter was referred for examination, and the concession of Governor Micheltorena, dated March 17, 1843, in which this governor declares that the petitioner is "*proprietad del terreno blanado*," or "owner of the land" in question. He produced, moreover, a formal grant of the governor, dated contemporaneously with the order of concession, and a record of possession delivered by the proper alcade in 1847. None of the parties, however, whose names appeared as grantors or actors in the various evidences of title, were called in the court below as witnesses, proof of all the fundamental documents having been made by a witness, who swore to the genuineness of the various signatures. Neither was the work known as "Jimeno's Index"—a list of Mexican grants between the years 1829 and 1845—introduced as part of the plaintiff's evidence of title, though the present grant purported, by memorandum at its foot, "to be registered in the proper book." The grant was produced from his private possession. Supposing the papers, however, to be all genuine—a matter about which no question was raised before the commissioners—the case was properly enough made out in respect of occupancy, improvement, cultivation, stocking with cattle, and other matters which were required by the Mexican laws; the only difficulty being that the boundaries of the land, as set forth in the papers and on the map, were so undefined that they could not be ascertained nor surveyed; and that the piece of land claimed had never been segregated from the national domain. Auguisola's claim was accordingly rejected by the commissioners. From this decision he appealed to the District Court; and having shown, by new evidence, more definite boundaries than he had shown before, the decree of the commissioners was reversed, and his claim established. To this judgment of the District Court the United States filed thirteen exceptions; being reasons, all of them, to show why the claim of Auguisola was a bad one. They were based on an alleged invalidity of the grant, on an asserted illegality of the juridical possession; on the situation of the land as respected the sea-coast; on the fact that it had

been occupied by missions and could not be colonized; that it was incapable of identification; that one deed was on unstamped paper; that the Departmental Assembly had not approved the grant; that the land had not been properly occupied and improved, and some other reasons of a similar kind. *Not one of the reasons, however, assigned fraud of any kind; of which, indeed, so far as the record showed, there was no suggestion anywhere below.*

Mr. Wills, for the United States:

1. The grant, if genuine, is not legally proved: i, because the evidence offered to authenticate it is secondary; and ii, because no legal basis was laid for its introduction. The parties whose names appear in the documentary evidences of title as grantor, or witnesses, were not called as witnesses. Nor was any legal ground laid for the omission. The only evidence offered to authenticate the paper title is the testimony of a witness, who swears to the genuineness of all the signatures to all the papers, from the grant down to the record of judicial possession.

But this is not sufficient without calling the parties or accounting for their absence: i, because it is a departure from the established order of proof; and ii, because the signatures may be genuine, and yet the papers be forgeries, because antedated.*

2. The grant is fraudulent and void. The first suspicious circumstance against it is the fact before referred to, viz., the failure to call or to account for the absence, as witnesses, of the original parties to the grant and accompanying papers. If fraudulent, it is an ingenious device, whereby forgery may be committed without perjury. In the absence of proof to the contrary, the legal presumption is, that all these parties were living and accessible. The fact that the governor, secretary, and others are not called as witnesses in support of the authenticity and validity of grants, when accessible, is a circumstance entitled to weight against a grant.*

* United States *v.* Teschmaker, 22 Howard, 404, 405; Fuentes *v.* United States, Id. 455, 456; Luco *v.* United States, 23 Id., 534.

The second suspicious circumstance against it is, that this grant is not mentioned in Jimeno's Index, nor is it shown to be registered in any other contemporary record. Registry is required by the regulations of 1828. Evidence of the registration of a grant must be produced, or its absence accounted for.* Jimeno's Index embraces all grants made from and including the year 1830, to December 24, 1844. As the grant purports to have been made March 17, 1843, and to be "registered in the proper book," if it had been made at that date, it must have appeared in that Index, or in some other contemporary record, in common with all other genuine grants of that date. But no such record is produced. Its absence, therefore, from those records, furnishes presumption that the grant is a forgery.

Mr. Justice FIELD delivered the opinion of the court:

The respondent deraigns his title from Lopez and Arellanes, the alleged grantees of the Mexican governor, Micheltorena. In support of his claim before the board of commissioners, created under the act of 1851, he produced from the archives in the custody of the Surveyor-General of California the petition of the grantees for the land, the reports of the different public officers to whom the same was referred for information as to the property and the petitioners, the sketch or map accompanying the petition, and the concession of the governor, made on the 17th of March, 1843, declaring the petitioners "owners of the land" in question. He also produced a formal grant of the governor, bearing the same date with the order of concession, and a record of juridical possession delivered by the alcalde of the vicinage in 1847. No question was raised before the commissioners as to the genuineness of the several documents produced, and with proof of the signatures attached to the above grant and record, and that the grantees had constructed a house upon the premises immediately after receiving the grant; that the house was occupied by one of the grantees until the

* United States v. Teschmaker, 22 Howard, 405; United States v. Bolton, 23 Id., 350.

sale to the claimant, and has been occupied by the claimant ever since, and that the land has been cultivated and used for the pasturage of cattle since its first occupation, the case was submitted. The board rejected the claim, not from any conclusion that the papers produced were not genuine, but solely upon the ground that the boundaries of the land granted were vague and indefinite, and that the land had not been segregated from the public domain. The case being removed by appeal to the District Court, the attorney of the United States, in answer to the claimant's petition for a review of the decision of the commissioners, set forth thirteen grounds for holding the claim invalid. Two of them related to the alleged invalidity of the transfer from the grantees to the claimant; two to the illegality of the juridical possession of the alcalde in 1847, and the remaining grounds were substantially these: that the land was situated within ten leagues of the sea-coast; that it was occupied by the missions of the territory, and therefore could not be colonized; that the grant had not the conditions required by the colonization law of 1824, or the regulations of 1828; that it did not give in itself, or with the aid of the map produced, any description by which the land could be identified; that it was not executed upon lawfully stamped paper; that it had not been approved by the Departmental Assembly, and that the grantees had not complied with the conditions annexed by constructing a house within a year, and inhabiting it and cultivating the land, and soliciting the proper judge for juridical possession. No objection was made that the title-papers produced were not genuine, or not executed at the time they purport to have been executed, and the additional evidence taken in the District Court was intended to show the location and boundaries of the land, and thus remove the objection to the confirmation given by the commissioners. The District Court reversed the decision of the board, and adjudged the claim of the respondent to be valid, and confirmed it to the extent of three square leagues. From this decree the United States have appealed, and in this court for the first time take the grounds, 1st, that the grant pro-

duced, even if genuine, was not legally proved; and, 2d, that the grant is fraudulent and void.

The first objection arises from the fact that the governor who signed, and the Secretary of State who attested the grant, were not called to prove it or their absence accounted for, and that the instrument was admitted upon proof of their signatures. The usual preliminary proceedings to the issue of a Mexican grant in colonization having been produced from the archives, there was no presumption against the genuineness of the grant in question, requiring the strict proof of its execution mentioned in the cases of *The United States* v. *Teschmaker*,* and *Fuentes* v. *The United States*.† Under these circumstances, the objection should have been urged before the commissioners or the District Court, and notice thus given to the claimant to procure further proof by calling the parties, or to show good reason for not calling them. Where no suspicion from the absence of the usual preliminary documentary evidence arises, as to the genuineness of the instrument produced, the general rule is, that objections to the sufficiency of the proof of its execution must be urged in the first instance before the inferior tribunal. In the present case, it is possible that the governor and secretary were without the jurisdiction of the court at the time the grant was produced, or the objection to the proof may not have been urged by the attorney of the government, who was present when it was given, because satisfied himself from other sources that the signatures were genuine, and that the grant was executed at the time it purports to have been executed, or because of his knowledge that the objection could have been readily obviated by testimony within the reach of the claimant.‡

The objection that the grant is fraudulent and void rests mainly upon the allegation of counsel, that it is not mentioned in the list of expedientes known as "Jimeno's Index." We say upon the allegation of counsel, for Jimeno's Index is

* 22 Howard, 392. † Id., 443.

‡ Pelletreau *v.* Jackson, 11 Wendell, 123; Jackson *v.* Waldron, 13 Id., 184.

not in evidence, nor was any proof offered of its contents; and, under the circumstances of this case, if the fact were as alleged, it would not be entitled to much weight.

To the objections urged by the appellants, and to all objections of a similar kind, the observations of Mr. Justice Grier, in the case of *The United States* v. *Johnson*, decided at the present term, are applicable. "In taking objections to these Mexican grants," says the learned justice, "it ought to be remembered, that the case is not brought here on a writ of error with a bill of exceptions to the admission of every item of testimony offered and received below. Nor is it a part of the duty of counsel representing the government, to urge microscopic objections against an honest claimant, and urge the forfeiture of his property for some oversight of the commissioners in not requiring proof according to the strict rules of the common law. When there is any just suspicion of fraud or forgery, the defence should be made below, and the evidence to support the charge should appear on the record. If testimony of witnesses is alleged to be unworthy of belief, the record should show some reason to justify the court in rejecting it. The former opinions of this court may be referred to, on questions of law, but cannot be quoted as evidence of the character of living witnesses."

To these observations we will only add, that the United States have never sought by their legislation to evade the obligation devolved upon them by the treaty of Guadalupe Hidalgo to protect the rights of property of the inhabitants of the ceded territory, or to discharge it in a narrow and illiberal manner. They have directed their tribunals, in passing upon the rights of the inhabitants, to be governed by the stipulations of the treaty, the law of nations, the laws, usages, and customs of the former government, the principles of equity, and the decisions of the Supreme Court, so far as they are applicable. They have not desired the tribunals to conduct their investigations as if the rights of the inhabitants to the property which they claim depended upon the nicest observance of every legal formality. They have desired to act as a great nation, not seeking, in extend-

ing their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the government they superseded.

DECREE AFFIRMED.

SCHUCHARDT *v.* ALLENS.

1. If no exception have been taken below to a question asked on trial, no objection can be made to it here.
2. If the answer to a question asked may *tend* to prove the matters alleged in the *narr.*—if it be a link in the chain of proof—the question may be asked. It is not necessary that it be *sufficient* to prove them.
3. In an action for false warranty, whether the action be in assumpsit or in tort, a *scienter* need not be averred; and if averred, need not be proved.
4. Authority without restriction to an agent to sell carries with it authority to warrant.
5. Where a contract of sale is complete, the vendor cannot hold the vendee to terms not agreed on, by sending him a bill or memorandum of sale, with such terms set out upon it, as that "no claims for deficiencies or imperfections will be allowed, unless made within seven days from the receipt of goods."
6. Whenever the evidence is not legally sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly. But if there be evidence from which the jury may draw an inference in the matter, the case ought not to be taken from them. It is not necessary, in order for the court properly to leave the case with the jury, that the evidence leads unavoidably to the conclusion that the plaintiff has no case. If there be evidence proper to be left to the jury it should be left; and a remedy for a wrong verdict sought in a motion for new trial.

THIS was an action on the case for false warranty, and for deceit in the sale of one hundred casks of Dutch madder; and was brought in the Circuit Court for the Southern District of New York. The declaration contained seven counts.

The first three were for *false warranty* (without any *scienter*),

1st. That it was a prime article.

2d. That it was pure and unadulterated.

3d. That it was good, merchantable Dutch madder.

The last three counts were for *deceitful representations* (with *scienter*) of the same facts. The fourth count, after stating

that *the plaintiffs were calico printers*, and *required* and were *accustomed to use Dutch madder*, avers that the defendants, *knowing this* and that *the madder was for use*, "by falsely and fraudulently representing it to be *fit and proper for use in their business*," sold the same, whereas it was not such, and so the defendants "deceived the plaintiffs."

The defendants pleaded Not Guilty to the whole declaration.

The facts were these: The madder was owned by merchants in Amsterdam, who consigned it to the defendants in New York for sale upon commission. The vessel containing the madder arrived at New York on the 6th April, 1856, previous to which the defendants had received, by a Liverpool steamer, a sample put up in the usual way in a small clear glass bottle, with a ground glass stopper, covered with bladder, and marked 1 to 100, according to the number of casks. The sample was handed to R. H. Green & Sons, who were regular brokers in drugs, &c., in New York, to be sold.

Mr. Green gave the following account: "I received from a young man in the employ of defendants a small bottle of madder, marked 1 to 100, *said to represent one hundred casks of Dutch madder*, with the injunction that it must not be opened. He left it with me. I asked him subsequently why he would not have it opened, and he replied, that it was the only sample bottle which they had, and that it would deteriorate by being opened; which is the fact. The vessel with the madder was here. They were urgent to have it taken from the wharf, and as I was about going eastward, I said I would try and sell it, but still I was told not to have it opened. It was *very handsome to look at*. I went to Providence, and called on the Allens. Mr. Allen is one of our best calico printers, and has always been in the habit of using the best madder. Young Allen went with me to the works; he wanted to see his overseer. We met his overseer, and the bottle was submitted to him; *he thought it was handsome*, and the conclusion was, they agreed to take it. The price was named. He inquired concerning the quality. I told him I knew no-

thing of it, except *that it came from one of our best houses; the standing of the house was the best guaranty.* The conversation carried the idea that it was very handsome madder. . . . The price named was 11¼ cents per pound for one hundred casks, without knowing the amount contained in them. He said he would take it, and I said he should have it. The price was fixed by the defendants. The sample bottle was in the usual form of such samples. It is usual to have one for every cask, but here there was but one. I brought the bottle back with me from Providence. Subsequently, I was applied to for the sample bottle, and sent it on; I have never seen it since. There was no objection to my giving the sample bottle to the plaintiffs after the sale; it then belonged to them. I promised to bring back the bottle from Providence. I did so, and afterwards sent it back to Providence." [This bottle, it appeared, had been lost by the Allens.]

The overseer testified as follows: "I saw the sample bottle in question in Mr. Green's hands, and was told not to open it. It was *very fair to look at*, and I said so at the time, but I told them that I could not tell anything about it *unless the bottle could be opened.* I was asked about it, and I said *it looked* very well; it could not be judged of by any one without opening the sample bottle. It is the custom to open and examine the sample bottles. There was no sand in the bottle apparent to the eye; I saw none in it. No one could have discovered adulteration from looking at the madder in the bottle. . . . . No wise man will buy madder without looking at it; this is the first I ever knew of a purchase being made where it was not examined. The madder in the bottle is always taken out, rubbed and examined. I have had an experience of forty-five years in the business. On the occasion of this purchase I told them that it was *impossible to tell what the quality of the madder was, unless I examined it;* I could only say that *it looked very well.*"

Without other examination, and without any knowledge of the quality of the sample, except as it appeared to the eye, and as inferred from "the standing of the house," the plaintiffs agreed to purchase the lot at 11¼ cents a pound. Accord-

ingly, upon his return to New York, April 17th, Mr. Green made an entry of sale in his sales book, and sent a copy to the defendants. The madder was afterwards weighed, a bill made out by the defendants, and, on the 28th of April, forwarded to the plaintiffs. This bill contained a memorandum notice, in small type, in one corner, reading thus: "*No claims for deficiencies or imperfections allowed unless made within seven days from receipt of goods.*" It appeared from the testimony of foreign witnesses that the madder in the flask was of the same quality as that in the casks. About three weeks after the madder was received by the plaintiffs at their print works, they began to use it, when they found it not equal to what they had been accustomed to use. It was "full of sand;" "they were obliged to shovel the sand out of the vats twice a day;" the quantity of sand "varied from two and a half ounces to four ounces in the pound;" "this variation took place in the same cask;" sand was found "in streaks" in it; it was "streaked through and through with sand;" it "was palpable as soon as it was opened;" "the streaks were both lengthwise and crosswise;" "they were strata."

It should be here mentioned that, as was here proved, there are different qualities of madder, such as *mull*, *little ombro*, *ombro*, and *crops*, but they are all known by the common term of Dutch madder, and also that all madder has in it more or less sand and other impurities. Even the first quality has in it from two to eight per cent.; but *this* madder "was out of all proportion, out of all character;" thirty to forty per cent. of impurity, fifteen to sixteen per cent. being sand.

The testimony being closed, the counsel for the defendants requested the court to instruct the jury as follows:

"1. The gist of the plaintiffs' action is an alleged false warranty and deceit, on the part of the defendants, in the sale of the madder in question; and to entitle them to recover against the defendants, they must establish, to the satisfaction of the jury, such alleged false warranty *and* deceit.

"2. That, in this form of action, the plaintiff cannot recover

without evidence to establish a *scienter* on the part of the defendants.

"3. That the broker had no authority or power to warrant that the bulk should correspond with the madder contained in the bottle, and thus bind the defendants. But even if he had such power, still he did not so warrant the same.

"4. That there was not such a sale by sample as in law amounts to a warranty that the bulk should correspond with the sample.

"5. That if there was any warranty, it was at most an implied one, under which the defendants are not liable for any adulteration of the bulk of the madder, unless the plaintiff have, by competent evidence, established fraud on the part of the defendant in respect thereto.

"6. If there was a warranty of any kind, still the terms stated in the bill rendered limited the defendants' liability thereon to seven days, and as no demand for damages was made by the plaintiff within that time, they are not entitled to recover in this action."

The court refused to give any one of the instructions asked for, and the counsel for the defendants thereupon excepted.

During the trial, the broker was asked by the plaintiffs' counsel what kind of madder he had been in the habit of selling the plaintiffs, to which the defendants' counsel objected. The court overruled the objection, and counsel for the defendants excepted. The witness, however, said nothing responsive to the question, until cross-examined by the defendants' counsel; and no objection appeared in the record to the testimony which he gave.

The jury rendered a verdict for the plaintiffs for $7333, being a deduction of thirty per cent. from the price paid for the madder, which reduced the same to 7⅞ cents per pound. Thereupon the defendants took a bill of exceptions.

Messrs. Owen and Stoughton, for the plaintiff in error:

1. The question about the kind of madder the broker was in the habit of selling to the plaintiffs was improperly allowed; for the defendants had never sold any madder before

the lot in question, and there is no evidence that they knew to what kind the plaintiffs had been accustomed.

2. As respects the exceptions:

The exceptions to the *first* and *second* instructions are not so strong as the others. We press them least.

The *third* is well founded.

The broker was not authorized to warrant that the madder to be sold was equal to that contained in the bottle exhibited, and of this the purchasers had notice at the time the article was offered to them. Madder, it appeared, is of several qualities; all contains sand, earthy matter, and other impurities; and in the best, these are found to the extent of from two to eight per cent. The presence or quantity of these impurities, the overseer testified, could not be ascertained from an inspection of the sample in the bottle without opening it, and he so told his employers. Thus we have notice to the buyers that the best and poorest of madder contains these impurities; and knowledge, also, that no one could tell by the inspection of the sample bottle whether it contained the best or poorest. The buyers also had notice that the sellers declined to permit the bottle to be opened, so as to allow of such an inspection as would enable them to ascertain from the sample what the bulk of the madder was to be; and from all this, it follows that the broker was not authorized, by means of the sample, to make any representation whatever of the quality of the article offered. Under these circumstances, if the buyers wished to protect themselves by a warranty, they were bound so to have informed the broker, that his principals might have exercised their own discretion on the subject, giving or withholding it as they should deem proper.*

No warranty was in fact made. The mere exhibition of the sample does not amount to a warranty that the bulk sold is like it. Representations must be superadded.† In the

* Parkinson *v.* Lee, 2 East, 314, 322; Welsh *v.* Carter, 1 Wendell, 190.

† Waring *v.* Mason, 18 Wendell, 425; Hargous *v.* Stone, 1 Selden, 73; Bradford *v.* Manley, 13 Massachusetts, 139, 145; Ormrod *v.* Huth, 14 Meeson and Welsby, 651.

present case there was no exhibition of a sample. To exhibit a sample, is so to show it that it is to be regarded as a representative of the bulk to be sold. The buyer examines the sample, as he would the bulk, if present; and in place of inspecting the whole, examines the part exhibited to show what the whole is. But in this case the sellers expressly declined to permit the madder in the bottle to be so examined that its quality could be determined, and, therefore, —as it was known to the buyers that whether it contained the best or poorest could not be ascertained without opening,—there was no measure of excellence known by either party to which a warranty could be applied, and, therefore, no agreement upon the subject.

The *fourth* exception as well as the third is disposed of by these remarks.

If it be urged that a warranty may be implied from the fact that the party buying had no opportunity to inspect the bulk, and, therefore, might rely upon an implied warranty that it should be as good as the sample *appeared to be from looking at it*, the answer is, that the buyers were told by their experienced overseer, and were bound themselves to know, that the appearance to the eye would not disclose any of the impurities known by all dealers in the article to exist in madder, even of the best quality. Hence, appearance to the eye cannot be separated from knowledge by the other senses; and, therefore, when the eye looked, the mind gave notice that imperfections existed which the eye could not discover. Whilst, therefore, to the eye, the madder looked fair, yet the ordinary dealer *knew* that it contained sand and other impurities; and that although fair to look upon, it might be of the poorest quality to be found in the market. Moreover, the law presumes every dealer in articles brought to market acquainted with the circumstances usually attendant upon such articles.*

If it should be held that a warranty existed, at the most it was but a warranty that the bulk should correspond with

* Sands *v.* Taylor, 5 Johnson, 405.

the *actual quality* of the sample produced; and this being so, it follows that there is a fatal variance between the contract as set forth and that proven. As the sample may, from the proof, have been of any quality—from the poorest to the best—the warranty could have been only, that the bulk ranged in quality between those degrees; and therefore, the delivery of any madder, merchantable within this range, would have satisfied the warranty.*

Thus, it is clear, that if a warranty of any kind was made, the plaintiffs were not entitled to recover; for there was no evidence to show what was the actual quality or value of the sample exhibited. The only evidence is the opinion of the overseer, that it was impossible to say anything about its quality. There is, therefore, no proof that the madder sold was not equal to the sample. Indeed, the rule of damages was assumed to be the difference, not between the value of the sample and bulk, but between the bulk and the very best quality of madder known. And this rule was adopted, not in view of the fact that the sellers had withheld or concealed the sample. It was forwarded by Mr. Green to the buyers, at their request, and after they had ascertained the character of the bulk by using from it. They had the means of showing whether it was of like quality or not; the burden of this proof was upon them. "The party who extinguishes the light, and precludes the other party from the means of ascertaining the truth, ought to bear the loss."

It is manifest from the rule of damages adopted, that the court below considered the warranty to have been established, and did not confine themselves to enforcing the principle that the bulk should in fact correspond with the sample exhibited.

As respects the *fifth* exception, the law is, that, if there be no warranty, the party seeking to recover must aver and prove that the seller *knew* of the defect insisted on; must accordingly, establish fraud. This is old law, as old as

* Weall *v.* King, 12 East, 452; Snell *v.* Moses, 1 Johnson, 96; Perry *v.* Aaron, Id., 129; Gardner *v.* Gray, 4 Campbell, 144; Fraley *v.* Bispham, 10 Pennsylvania State, 320.

Chandelor v. *Lopus*, reported by Croke, *temp.* 1 James I, and made familiar to all in this day by Smith in the Leading Cases.* "The defendant," says the syllabus in that case, "sold to the plaintiff a stone, which he affirmed to be a Bezoar stone, but which proved not to be so. No action lies against him, unless he either knew that it was not a Bezoar stone or warranted it to be a Bezoar stone." "For every one," says the report, "in selling his wares will *affirm* that his wares are good." Mr. Green, however, did not even do this. His conduct was very careful and upright.

As respects the *sixth* request for instructions: If the purchasers had not, in judgment of law, an opportunity to inspect the bulk at the time the contract was made at Providence, yet they had opportunity, and it was practicable to do so, while it was in New York before its delivery. At all events, they should have made such examination promptly after it was received at their print works, *and within the time specified in the notice*, and communicated the result to the defendants. Their neglect to do this operated to discharge the implied warranty, or, in other words, it estops the plaintiffs from insisting that the bulk did not so correspond.†

Mr. Strong, on the other side.

Mr. Justice SWAYNE delivered the opinion of the court:

1. As respects the question objected to and overruled. Until cross-examined by the defendants' counsel, the witness said nothing responsive to the question objected to. No objection appears in the record to the testimony which he gave. This is a sufficient answer to the exception. But if the testimony which the question sought to elicit had been given, its admission would not have been an error. The *fourth* count

* 1 Smith's Leading Cases, 238 (5th American edition, by Hare and Wallace). The American principles and authority are set forth by Judge Hare. See also Parkinson *v.* Lee, 2 East, 314; Hoe *v.* Sanborn, 21 New York, 552; Kingsbury *v.* Taylor, 29 Maine, 508; Emerton *v.* Mathews, 1 American Law Register, N. S., 231; 5 Law Times, 681.

† Vanderhorst *v.* McTaggart, 2 Bay, 498; Muller *v.* Eno, 3 Duer, 421, 425; Prosser *v.* Hooper, 1 Moore, 106; Hargous *v.* Stone, 1 Selden, 86.

averred that the plaintiffs "carried on the business of calico printers, and as such required for their use and were accustomed to use the best Dutch madder, and that the defendants, by falsely representing the madder in question to be fit for use in that business, and well knowing that it was bought by them for use in their business, sold it to the plaintiffs, whereas," &c. An answer to the question would have been directly applicable to this count. It would have tended to prove the kind of madder used by the plaintiffs. It was not necessary that it should be *sufficient* for that purpose. If such were its tendency—if it were "a link in the chain of proof," it was within the sphere of competency, while its effect was for the consideration of the jury.

2. The testimony being closed, the counsel for the defendants asked the court to instruct the jury as follows. (His Honor here stated the requests as given, *ante*, pp. 359–60.)

The exceptions to the *first two* instructions asked were properly abandoned at the argument in this court. They affirm propositions which are not legal truths.

The ancient remedy for a false warranty was an action on the case sounding in tort. *Stuart* v. *Wilkins* (1 Douglas, 18); *Williamson* v. *Allison* (2 East, 447). The remedy by assumpsit is comparatively of modern introduction. In *Williamson* v. *Allison*, Lord Ellenborough said it had "not prevailed generally above forty years." In *Stuart* v. *Wilkins*, Lord Mansfield regarded it as a novelty, and hesitated to give it the sanction of his authority. It is now well settled, both in English and American jurisprudence, that either mode of procedure may be adopted. Whether the declaration be in assumpsit or tort it need not aver a *scienter*. And if the averment be made it need not be proved.*

One of the considerations which led to the practice of declaring in assumpsit was that the money counts might be

* Williamson *v.* Allison, 2 East, 446; Gresham *v.* Postan, 2 Carrington and Payne, 540; Brown *v.* Edgington, 2 Manning and Granger, 279; Holman *v.* Dord, 12 Barbour, S. C., 336; House *v.* Fort, 4 Blackford, 293; Trice *v.* Cockran, 8 Grattan, 449; Laseter *v.* Ward, 11 Iredell, Law, 443.

added to the special counts upon the warranty.* If the declaration be in tort, counts for deceit may be added to the special counts, and a recovery may be had for the false warranty or for the deceit, according to the proof. Either will sustain the action.†

The *third* instruction affirms that the broker by whom the madder was sold had no power to give any warranty.

Authority, without restriction, to an agent to sell, carries with it authority to warrant.‡

The *sixth* instruction refers to the memorandum upon the bill of the madder transmitted by the broker who made the sale, from New York, on the 28th of April, 1856, to the plaintiffs at Providence, Rhode Island. The sale was entered on the broker's books on the 17th of that month. It was made previously to one of the defendants. The broker says in his testimony, "The price named was 11¼ cts. per pound for 100 casks, without knowing the amount contained in them; he said he would take it, and I said he should have it. The price was fixed by the defendants." The contract between the parties thus became complete, and nothing done subsequently by the defendants or their agent could affect the rights of the plaintiffs.

The *fourth* and *fifth* instructions sought in effect to take the case from the jury. A Circuit Court has "no authority to order a peremptory nonsuit against the will of the plaintiff."§ Where there is no dispute about facts, and the law arising upon them is conclusive against the right of the plaintiff to recover, it is proper for the court so to instruct the jury.‖ If the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accord-

* Williamson *v.* Allison, 2 East, 451.

† Vail *v.* Strong, 10 Vermont, 457; Brown *v.* Edgington, 2 Manning and Granger, 279.

‡ Andrews *v.* Kneeland, 6 Cowen, 354; The Monte Allegre, 9 Wheaton, 616.

§ Elmore *v.* Grymes, 1 Peters, 469; D'Wolf *v.* Rabaud, Id., 476; Crane *v.* The Lessee of Morris and Astor, 6 Id., 598.

‖ Toland *v.* Sprague, 12 Id., 300.

ingly. "This is equivalent to a demurrer to the evidence, and such an instruction ought to be given whenever the evidence is not legally sufficient to serve as the foundation of a verdict for the plaintiff."* This practice "has in many of the States superseded the ancient practice of a demurrer to evidence. It answers the same purpose and should be tested by the same rules. A demurrer to evidence admits not only the facts stated therein, but also every conclusion which a jury might fairly or reasonably infer therefrom."†

Where the evidence, or any part of it, if believed by the jury, is decisive of the case, it is proper for the court to instruct the jury to that effect.‡

In order to determine whether the court erred in refusing to give the *fourth* and *fifth* instructions, it will therefore be necessary to consider the state of the evidence before the jury.

At the time of the sale the agent produced a sample bottle. There was but one for the one hundred casks of madder. It was usual to have one for each cask. The broker was instructed by his principals not to allow the bottle to be opened, because the contact of the atmosphere would injure the appearance of the sample which it contained, and he acted accordingly. The arrival of the sample preceded the arrival of the casks from abroad. The sale was to be made and was in fact made by that sample. The agent says in his testimony, "The sample was very handsome to look at." "The conversation carried the idea that it was very handsome madder." There was no sand in the bottle. The sale was made at Providence, Rhode Island. The casks were at that time in New York, and it seems from the evidence still on shipboard. The plaintiffs had no opportunity to examine their contents. The transaction was a large one. The vendees had no means of forming a judgment of the quality of the madder in the casks but from the appearance of that in the bottle, which they were not allowed to open. From these facts we think the jury were well warranted in drawing

* Parks *v.* Ross, 11 Howard, 362. † Id., 373.

‡ Bliven *v.* New England Screw Co., 23 Id., 433.

the inference that it was the understanding of the vendees that they were buying under a warranty that the quality of the madder in the casks was equal to that of the sample in the bottle, and that the agent of the vendors intended to be understood as giving such a warranty. It is hardly credible in the presence of such facts that the understanding and intention of the parties could have been otherwise.

But it is not necessary that the state of the evidence should have been such as necessarily to lead to this conclusion. It is enough that there was evidence upon the subject proper to be left to the consideration of the jury. If the jury erred, the remedy was by a motion for a new trial, and not by a writ of error. This part of the case was argued as if such a motion were before us. The rules of law which would be applicable in that event are very different from those which apply as the case is presented. A motion for a new trial in the courts of the United States is addressed to the sound discretion of the tribunal which tried the case, and to grant or refuse it cannot be made the subject of exception.* Here the question is, whether the court erred in refusing to take the case from the jury. Upon that subject we concur in the opinion of the learned judge who tried the cause. If a motion for a new trial were before us we should overrule it. In our opinion right and justice have been done. The judgment below is

AFFIRMED WITH COSTS.

HARDY *v.* JOHNSON.

1. By the law of California, one tenant in common of real property can sue in ejectment, and recover the demanded premises entire as against all parties, except his co-tenants, and persons holding under them. But the judgment for the plaintiff in such case will be in subordination to the rights of his co-tenants.
2. According to the system of pleading and practice in common law cases which prevails in the courts of California, and which has been adopted by the Circuit Court of the United States in that State, a title acquired

* Brown *v.* Clarke, 4 Howard, 15.

Argument for the plaintiff in error.

by the defendant in ejectment after issue joined in the action can only be set up by a supplemental answer in the nature of a plea *puis darrein continuance*.

WRIT of error to the Circuit Court of the United States for the Northern District of California; the action having been ejectment, by Johnson against Hardy and wife, to recover a parcel of land in the city of Oakland, California. Johnson, in his complaint, as a declaration is there called, alleged a seizin in fee and a right to the possession of the entire demanded premises. The jury, however, by special verdict, found that the plaintiff was seized of a fractional part only; to wit, of an undivided twentieth interest. The defendants showed no title in any part; and the court gave judgment in Johnson's favor for the *entire* premises, "*in subordination to the rights of his co-tenants.*"

On the trial the defendants offered in evidence a deed, conveying the interest of some of the co-tenants, executed after issue joined; an issue amounting in fact to the general issue. The deed was admitted (the question of its admissibility under the pleadings being reserved), and the jury based one of its findings upon it. The court, however, finally held the evidence not competent, and, in entering judgment on the verdict, excluded the finding made upon its basis.

The questions in this court were:

1. Whether judgment could properly be given, as it was in favor of the plaintiff for the entire premises, in subordination to the rights of his co-tenants?

2. Whether the deed was rightly excluded?

Mr. Train, for the plaintiffs in error, relied, as respected the first point, on the familiar principles that the plaintiff must recover, if at all, on the strength of his own title, and not on the weakness of the defendant's; and that a recovery must be had *secundum allegata*, or not at all: arguing, from the last position, that even though the special verdict found the plaintiff entitled to an undivided twentieth, he could not have judgment therefor, except by amending the declaration or complaint. On the second point, he contended that the

title of the defendants acquired after issue was admissible; citing *Stockdale* v. *Young*, a decision in South Carolina,* in which it was held that, "in trespass to try title, the acquisition of title by defendant, since the last continuance, could not operate to prevent the recovery of damages to which the plaintiff might be entitled, and therefore that it was unnecessary to plead it *puis darrein continuance;* but that it might be given in evidence under the general issue."

Messrs. Hepburn and Hill, contra, relied, for the first point, on *Stark* v. *Barrett*;† and, for the second, on *Yount* v. *Howell*,‡ California decisions, both.

Mr. Justice FIELD delivered the opinion of the court:

This is an action of ejectment for the possession of certain real property, situated in the city of Oakland, in the State of California. The plaintiff below, the defendant in error in this court, alleges in his complaint a seizin in fee and a right to the possession of the entire premises. The proof established and the jury found that he was only seized of an undivided twentieth interest; but the court held that, as the defendants had shown no title, he was entitled to the possession of the entire premises, "in subordination," however, "to the rights of his co-tenants," and directed judgment to be entered in his favor as against the defendants for the same. The ruling of the court in this particular constitutes the principal error urged for a reversal of the judgment.

The ruling was in conformity with the settled law of the State. Under the allegation of seizin in the complaint, it was sufficient, as determined by repeated adjudications of the Supreme Court of the State, for the plaintiff to establish any interest in the premises which gave him a right of possession. The action of ejectment determines no rights but those of present possession; and that one tenant in common has such rights as against all parties but his co-tenants, or persons holding under them, is not questioned.§

* 3 Strobhart, 501. † 15 California, 371. ‡ 14 Id., 468.

§ See Stark *v.* Barrett, 15 California, 371; Touchard *v.* Crow, 20 Id., 162; Mahoney *v.* Van Winkle, 21 Id., 583.

On the trial the defendants produced a conveyance of the interest in the premises of some of the co-tenants of the plaintiff, executed after issue joined. The evidence was admitted, subject to the opinion of the court upon its admissibility under the pleadings, and the jury based one of their findings thereon. But the court, in directing the judgment to be entered upon the special verdict, held the evidence inadmissible, and excluded the finding. Its ruling in this particular constitutes the second error assigned for a reversal of the judgment.

This ruling was correct under the system of pleading and practice which prevails in the State courts of California, and which, with some slight modifications, has been adopted by the Circuit Court of the United States for common law cases. By a statute of the State the different forms of action known to the common law are abolished. The plaintiff is required to state in his complaint the facts constituting his cause of action in ordinary and concise language, with a prayer for the relief to which he may deem himself entitled. To the complaint the defendant must answer either by a denial of its allegations or by a statement of any new matter constituting a defence. The fictions of the action of ejectment at common law have no existence. The names of the real claimants and defendants must appear in the pleadings. The complaint must allege the possession or seizin of the premises, or of some estate therein by the plaintiff, on some day to be stated, the subsequent entry of the defendant thereon, and his withholding the same from the plaintiff. A denial of its allegations puts in issue the title of the plaintiff at the date alleged, or at least his title at the commencement of the action.* Any title acquired subsequent to the issue thus joined must be set up by a supplemental answer in the nature of a plea *puis darrein continuance*. No permission to file such supplemental answer was applied for, and there was no error in excluding the title subsequently acquired under the pleadings as they stood.

JUDGMENT AFFIRMED.

* Yount *v.* Howell, 14 California, 468.

IASIGI ET AL. *v.* THE COLLECTOR.

1. While goods remain in the ownership of the importer, the collector of the customs has a reasonable time to fix their true dutiable value; and his right to reappraise them under the act of May 28, 1830, in any case where, from neglect or want of evidence on the part of the appraisers, the appraisement has been under the proper dutiable value, is not lost, merely because they have gone through one form of appraisement, and been delivered to the importer with a memorandum on the invoice that the entry was "*right.*" But the court expresses no opinion on a case where the goods "had passed beyond the reach of the collector."
2. In a suit to recover duties levied on a reappraisement of goods under the act of May 28, 1830, § 2, and paid under protest—one ground of the suit being that the reappraisement was not made by the persons authorized by the act to make it—it is necessary that the objection be specified in the protest. Otherwise it will not be heard here.
3. An appraisement is conclusive upon the fact whether the appraisement of the goods imported was or was not made, as the act of March 3, 1851, § 1, directs that it shall be, as "of the actual market value or wholesale price thereof in the principal markets of the country, from which the same shall have been imported." If the importer alleges that it was not so made, and is dissatisfied, his remedy is by appeal to the "merchant appraisers." He cannot use the fact in a suit to recover the money paid as duties under protest.

ERROR to the Circuit Court for the District of Massachusetts.

Iasigi & Goddard imported a cargo of wool from the Cape of Good Hope to Boston, which was invoiced, and, on the 16th March, 1860, entered at a price or value at the place of exportation of less than twenty cents per pound, and hence duty free under the act of 3d March, 1857.* Certain packages —the "examination packages," as they are called—were examined by the appraisers, and the invoice certified "Right," and sent to the collector. All but the examination packages were delivered to the importers under the general bond at once; that is to say, on the day of entry, March 16th; and the examination packages on the next day. Subsequently one of the general appraisers at New York having come to Boston, informed the collector there that there had been

* 11 Stat. at Large, 194.

"some neglect," and in consequence of "information" now given to him, the collector directed a reappraisement. A certain Crocker, "one of the principal appraisers of the United States, at the port of Boston," assisted by Mr. Bausch, a wool examiner, of New York, accordingly, went to work to reappraise the wool. They found it in the warehouse of the importers; and having put the word "*Not*" before the word "*Right*" on the original invoice, returned it to the collector, with the following direction for reappraisement.

. "Add, to make market value at Port Elizabeth at date of exportation, on 186 bales, three farthings per pound; on 614 bales, ½*d.* per pound. CROCKER, Appraiser."

This addition brought the wool above twenty cents. A duty was accordingly imposed; and this being approved by the collector, notice was given to the importers of the reappraisement, with a demand for the redelivery of the wool under the bond. The importers declined to redeliver the wool, and having made protest, paid the duty, $16,571. The protest contained sixteen grounds of objection to what was done. Among them were these:

1. That the appraisement was not made as of the market value of the principal markets of the country from which the wool came (which statute requires it to be).

2. That it was not made (as statute also requires it to be) as of the date of exportation to the United States; a fact, however, upon which the court did not read the evidence as the counsel did.

No objection was made, in terms, to the fact that the reappraisement was not made "by the principal appraisers, or by three merchants;" in which way alone, it was contended, as will be seen hereafter, by the counsel of the importers, that it should have been made. But the protest did set forth and object that the appraisement was "unauthorized by law and illegal in *form* and substance," and that it was made "under the influence, direction and dictation of a person not holding the office of an appraiser for the port of Boston or any other port, and who was not authorized by

law to make any examination of the merchandise, or to make and direct any appraisement thereof."

Suit having been brought against the collector to recover the duties paid to him under protest, the court instructed the jury that, on the whole case, the plaintiffs were not entitled to recover; and the correctness of this instruction was the question on error here.

Mr. S. Bartlett, for the importers:

1. The first question raised is, whether, when an appraisement has been once made, and the merchandise surrendered to the importer, it can, in absence of fraud, afterwards, and for an indefinite time, be again subjected to appraisement, and the duties increased or levied anew?

The act of Congress of August 30, 1842,* providing revenue from imports, enacts that,

"It shall be lawful for the appraisers or the collector to call before them, and examine upon oath or affirmation, any importer or other person touching any matter or thing which they may deem material in ascertaining the true market value, or wholesale price, of any merchandise imported, and to require the production, on oath or affirmation, of any letters, accounts, or invoices in his possession relating to the same."

This court, in commenting on the effect of an appraisement, after citing a former case, has said as follows:†

"The appraisers are appointed with powers, by all reasonable ways and means, to appraise, estimate, and ascertain the true and actual market value and wholesale price of the importation. The exercise of these powers involves knowledge, judgment, and discretion. We hold, as was held in that case, that when power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are in general binding and valid as to the subject-matter. *The only questions* which can arise between

* § 17; 5 Stat. at Large, 564.

† Belcher *v.* Linn, 24 Howard, 508–522; citing Bartlett *v.* Kane, 16 Id., 272.

an individual and the public, or any person, denying their validity, are, power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive, legislative, judicial, or special, unless *an appeal or other revision is provided for by some appellate or supervisory tribunal prescribed by law.*"

So as to all questions of fact, even those which are to be derived from commercial information, this court has said:* "The appraisers are by law the tribunal to determine the question. Their decision is conclusive upon the importer *as well as the government.*"

The question, then, arises: Has the law provided for any "appeal or revision," *at the instance of the collector*, and if so, was the provision of law followed, or attempted to be followed, in this case?

An act of Congress, of May 28, 1830,† says as follows:

"If the collector shall deem any appraisement of goods too low, he shall have power to order a reappraisement, either *by the principal appraisers, or by three merchants designated by him for that purpose*, who shall be citizens of the United States, and cause the duties to be charged accordingly."

But when may he do this? Clearly but upon the return of the appraisers, and before the collector's *fiat* that all is "right,"—before, in short, a permit and delivery has been made to the importer. Otherwise, and if the right is unlimited in point of time, innocent vendees into whose hands the goods have passed, may be subjected to an unjust levy.

Again, by the act of Congress last quoted, such new appraisal is to be made "either by the principal appraisers or by three merchants." In this case it was done by one appraiser only (Crocker), assisted by an examiner of wool, Bausch, from New York. Consequently, it was not done as the act requires, and was void. If the act of August, 1842, as well as the authorities, did not make it clear that one appraisement,

* Stairs *v.* Peaslee, 18 Howard, 522–527. See, also, Rankin *v.* Hoyt, 4 Id., 327–335; Burgess *v.* Converse, 2 Curtis, 216–221.

† § 2; 4 Stat. at Large, 409.

confirmed and acted on, and surrender made of the goods to the importer, is final and conclusive against all parties, yet the entire policy of the revenue acts, sufficiently known without particular citation, which requires prompt action on the part of the importer to have his rights, in case of controversy, settled as against the government before the permit is granted and the property surrendered, demonstrates that nothing is intended to be left for revision or future action. Indeed, any view that should give the collector the right to order reappraisements, except as provided in the act of May 28, 1830, must include the power to exercise such right after duties have been paid and the merchandise distributed for consumption, if haply the collector can find them, as in this case, and of course being unlimited in time, might render the accuracy of such future appraisement wholly precarious.

2. But even if reappraisement, after permit and delivery, was authorized by law, the defects and irregularities of the reappraisement made in *this* case, are such that it could not be sustained:

I. It was not made as of the date of exportation, viz., the period of the ship's sailing, but is of a period twenty-eight days subsequently.

II. The act of March 3, 1851,* enacts that the appraisement shall be made as "of the actual market value or wholesale price thereof in the principal markets of the country from which the same shall have been imported in the United States." Now the only return of this reappraisement is on the invoice, and is in these words: "Add, to make market value at *Port Elizabeth* at date of exportation." (Then follows the statement of farthings added.) Now, although the court may not judicially know the fact that there are other ports of exportation in the colony of the Cape of Good Hope, and other principal markets of British Eastern Empire, yet the appraisement itself must clearly show that there are none other than Port Elizabeth, or that the appraisement was made in conformity to the statutes, or it is defective.

* § 1; 9 Stat. at Large, 629.

3. Is the plaintiff entitled to redress himself, as he sought below to do, by *suit?* It will be said on the other side that his remedy was by appeal to "merchant appraisers," under the act of 30th August, 1842.* That statute, indeed, "provides that, if the importer shall be dissatisfied with the appraisement, ... the collector shall select two discreet and experienced merchants to examine and appraise."

But the enactment does not apply to this case. For, if the reappraisement was illegal, then only the original appraisement remains, and from that the importer had no occasion to appeal, since it exempted the goods from duty. Independently of which, parties are not bound, in any case of irregular and improper discharge of their functions by appraisers, to make any appeal whatever, even to merchant appraisers. The law gives an appeal, not to correct irregular proceedings, but to correct, if need be, the errors of judgment or estimates of values committed by the original appraisement. In case of irregularities of conduct, all that is required of the importer is to point them out clearly by protest, and then, if not corrected, and he is compelled to pay the duties, he may at once sue the collector. *Burgess* v. *Converse*, in the first circuit,† is much to this point. Speaking of an appeal to merchant appraisers, Curtis, J., there says: "I consider the importer entitled to have *both* proceedings regular, but I do not think he is bound to take an appeal if the government appraisers have not proceeded in conformity with the authority conferred on them by law. In my judgment, he may, and should in such a case, make his protest and stand upon it, as the ground of refusal to pay the increased duty, and in such a case, the collector would not be justified in exacting the increased duty by an illegal assignment. But if he demands a reappraisement, and that is regular, he waives all objections to the first, which is superseded and rendered unimportant by the second."

* § 17; 5 Stat. at Large, 564; slightly modified by act of 3d March, 1851, § 3.

† 2 Curtis, 216–220.

Mr. Bates, A. G., contra:

1. There must exist, from a necessary respect to the government's rights, a power in the appraiser to review his appraisement, at least, while the goods remain unsold in the importer's hands. *Bartlett* v. *Kane*,* in this court, decides that it does exist. That the collector may direct a reappraisement is obvious from the statute of May 28th, 1830, quoted on the other side.

An appraisement unappealed from is conclusive evidence of the value of the goods. *Belcher* v. *Linn*,† cited by Mr. Bartlett, decides this. And in the term appraisement is included, of course, reappraisement. This *is* appraisement. If an importer is dissatisfied with the appraisement, he has his remedy by an appeal to merchant appraisers. What was said on the circuit in *Burgess* v. *Converse*, should be received with caution. It was not an opinion on a point arising in the case or essential to its decision; for in that case there had been an appeal. It is a view of the law not sustained by any case in this court, and is irreconcilable with the current of the decisions of this court upon the powers and duties of appraisers, and especially with *Belcher* v. *Linn*, the latest. In that case, this court, speaking of appraisers, says—this paragraph being quoted also on the other side—that "the only questions which can arise between an individual and the public, or any person denying their validity (*i. e.*, of their acts), are power in the officer, and fraud in the individual."‡

2. One of the points taken here—the incompetency of the persons who made the reappraisement—is not set forth distinctly and specifically in the protest. Any matter not so set forth will not be heard on suit. The statute of February 25, 1845,§ enacts:

"Nor shall any action be maintained against any collector to

* 16 Howard, 263.

† 24 Id., 516.

‡ And see Rankin *v.* Hoyt, 4 Id., 327; Greely *v.* Thompson, 10 Id., 225; Bartlett *v.* Kane, 16 Id., 268; Stairs *v.* Peaslee, 18 Id., 524; Sampson *v.* Peaslee, 20 Id., 571.

§ 5 Stat. at Large, 727.

recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of the said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."

3. As respects various matters set forth, the answer is the same already made. The report of the appraisers is conclusive, conclusive not only as to the result, the dutiable value of the goods, but also as to all the elements necessary to form this result; conclusive as to what are the principal markets of the country,* as to the date of exportation, the market value of the goods, &c. It is a conclusive finding upon all the facts on which the appraisers are obliged to pass, in order to discharge their duty, *i. e.*, to determine the dutiable value of the goods imported and submitted to them. If an importer is not content with the result, or with any detail of their finding, or with their conduct in any respect, his sole and his sufficient remedy is by an appeal to merchant appraisers in the mode pointed out by the statute. If he does not avail himself of the right of appeal, he has no reason to complain that the government exacts the duties assessed on his goods. His refusal to appeal indicates that in his opinion the appraisement is substantially correct, and that he must rest his claim to recover the duties solely on technical grounds.

Mr. Justice NELSON, after stating the chief facts, delivered the opinion of the court:

The only question of any difficulty in the case, is whether or not the collector has the power to order a reappraisement of goods imported, after one appraisement, and permit of delivery to the importer, and the actual delivery of the same?

The act of 2d May, 1830, authorizes the collector to order a reappraisement, either by the principal appraisers or by three merchants, &c. The board of officers to make the

* Stairs *v.* Peaslee, 18 Howard, 524.

examination and appraisal of the goods imported may have been changed, but this power of the collector remains unaltered.

It is true, that the appraisal and ascertainment of the dutiable value of the goods are made final and conclusive both upon the importer and the government. But the question still remains, what appraisal or ascertainment of the value is to be regarded as final? It is admitted, if the appraisal was infected with fraud or imposition, it could not be, and the collector would not only be justified, but it would be his duty to order reappraisement, even under the circumstances in which the present one was made.

The interest of the government, as well as a proper regard for the rights of the honest importer, require it. And it seems to us but reasonable, if, from neglect or want of proper evidence or information, on the part of the appraisers, the appraisal be under the proper dutiable value, this power of the collector should be permitted to correct the error. It is true, the exercise of it is usually, and doubtless with few exceptions, previous to the permit to deliver the goods; and must be so, generally, in order to be effective. But the act of Congress conferring the power on the collector, fixes no limit to the period within which it may be exercised, and we think a reasonable discretion should be allowed him.

We see no hardship to the importers in giving a liberal interpretation to this power; for, in practice and in point of fact, the permit has become more a matter of form than of substance. The bulk of the goods are usually delivered in the hands of the importer on their arrival, and previous to the permit under the delivery bond; and though, as a mere question of law, the collector doubtless possesses the power to recall the goods, yet he usually looks to the bond for the security of the duties.

It is not denied but that the goods found in the warehouse of the importer and reappraised were the same that had been entered at the customs, and from which packages had been selected for examination, and we think it would be too limited and rigorous a construction of the power of the

collector to hold that, under the circumstances of the case, he was not authorized to make the order complained of. If the goods had passed beyond the reach of the collector, a different question might have been presented. We express no opinion upon such a case.

It has been argued that the reappraisal was not made by the proper officers. The answer is, that, although the protest is quite voluminous, this objection is not specified. If it had been, it doubtless would have been answered by the proofs.

It is further argued, that the appraisal was not made as of the market value of the principal markets of the country from whence the wool was imported. The answer is, the appraisement is conclusive upon this fact, and the court cannot go behind it. The remedy is an appeal by the importers to the merchant appraisers.

It is further said, the date of the period of exportation was not the time adopted by the appraisers in ascertaining the dutiable value. This is a misapprehension. The report of the appraisers, indorsed on the invoice, confines the appraisal at date of exportation.

JUDGMENT AFFIRMED.

MEYER v. THE CITY OF MUSCATINE.

1. Where a charter gives a city power to borrow money for any object in its discretion, and a statute of the State where the city is enacted that "bonds of any city" issued to railroad companies "may have interest at any rate not exceeding" a rate named, and "may be sold by the company at such discount as may be deemed expedient"—*Held*, that the city had power to issue bonds to aid the construction of railways; even although the power to borrow, as given in the charter, was found among powers of a nature strictly municipal; such, in fact,—except as, under the decision now made, might respect the power to "borrow money,"—being the only powers given in the charter at all. The statute, in connection with the power, gives the requisite authority. MILLER, J., dissenting.
2. A city having power to borrow money, may make the principal and interest payable where it pleases.

Statement of the case.

3. Where a statute fixes the rate of interest per annum, a contract may lawfully be made for the payment of that rate, before the principal comes due, at periods shorter than a year.
4. The statute of Iowa, of January 25, 1855 (chap. 128), authorizes cities in that State to give their bonds in payment of subscriptions to railroad stock, and authorizes them to be sold at a price even greatly below their par value. MILLER, J., dissenting from the doctrine as applied.
5. Where the votes of three hundred and twenty-six citizens were given in favor of a municipal loan, and of five only against it, and the city issued the bonds, no one interposing to prevent the issue, all parties acting in good faith, the city cannot afterwards object to the regularity of the preliminary proceedings, and set up that the vote was not taken in the form in which, under the charter, it ought to have been taken. If the legal authority under which the agents of the city, in issuing the bonds, acted, was sufficiently comprehensive, a holder of them *bonâ fide* and for value has a right to presume that all precedent necessary requirements had been complied with.
6. *Gelpcke* v. *The City of Dubuque* (*ante*, p. 175), affirmed; the whole case asserting the validity of municipal bonds, made payable to bearer and issued for the construction of railroads, when such bonds are in the hands of innocent holders for value.

ERROR to the District Court of the United States, for the District of Iowa, the case being thus:

The city of Muscatine was incorporated, A.D. 1851, by the legislature of Iowa, and by its charter made "a body corporate, and invested with all powers and attributes of a municipal corporation." "The legislative authority of the city," says this charter by its 19th section, "is vested in a city council;" which council, the charter goes on to declare, "is invested with the following powers," the powers being set forth essentially as follows:

"1. To secure the inhabitants against fire, and violations of the law and the public peace; to suppress riots, drunkenness, gambling, and disorderly conduct; and generally to provide for the safety, good order, and prosperity of the city, and the health, morals, and conveniences of the inhabitants.

"2. To impose penalties for the violation of its ordinances.

"3. To establish and organize fire companies, and to provide them with fire apparatus.

"4. To regulate the keeping and sale of gunpowder within the city, and to provide that no building of wood shall be erected within designated parts.

"5. To have the control of the landing on the Mississippi River, and build wharves, and regulate the landing, wharfage, dockage, &c.

"6. To provide for the license, regulation, or prohibition of exhibitions, &c.; billiard tables, ball and ten-pin alleys, and places where any games of skill or chance are played.

"7. To make ordinances in relation to the cleanliness and health of the city.

"8. To regulate cartage and drayage within the city, and make prohibition of animals running at large within the city.

"9. To provide for the establishment and support of schools in the city, and for the government of the same.

"10. To audit all claims against the city; to provide for the keeping of the public money of the city, and the manner of drawing the same from the treasurer.

"11. To establish the grade of the streets, alleys, and wharves.

"12. To prescribe the manner of calling the meetings of the citizens, except for the election of officers.

"13. To appoint street commissioners and officers.

"14. To cause the streets and alleys of the city to be paved.

"15. ☞ *To borrow money for* ANY *object in its discretion*, if at a regularly notified meeting, under a notice stating distinctly the nature and object of the loan, and the amount thereof, as nearly as practicable, the citizens determine in favor of the loan by a majority of two-thirds of the votes given at the election.

"16. To fill vacancies occurring in any of the city offices by appointment of record, to hold, in the case of election officers, until the next regular election and the qualification of the successor."

In addition to the power thus given by the charter to borrow money, the legislature of Iowa had, on the 25th of January, 1855, passed certain acts; [the same acts referred to *ante*, p. 220, *Gelpcke* v. *The City of Dubuque*, No. 81.] One is entitled "*An act regulating the interest on city and county bonds.*"* The first section enacted, "that railroad companies might issue their bonds at such a rate of interest and sell them at such discount as might be necessary, and that they should

* Statutes of Iowa, p. 223; Revision of 1860.

remain legal and binding." The second section, "that whenever any company shall have received or may hereafter receive the bonds of any city or county, upon subscription of stock by such city or county, such bonds may have interest at any rate not exceeding ten per cent., and may be sold by the company at such discount as may be deemed expedient."

With this charter and these enactments in force, it was proposed by certain persons that the city of Muscatine, Iowa, should borrow money and subscribe to the stock of the Mississippi and Missouri Railroad; an ordinance was accordingly passed, July 23d, 1855, to take the vote of the citizens, in order to see whether two-thirds of them, as required by the article 15, *ante*, p. 386, were in favor of borrowing the money. The ordinance enacted essentially as follows:

The election shall be upon the following propositions:

1*st*. To rescind a vote given, &c., authorizing the council to borrow $45,000, to be subscribed on stock of the Iowa Western Railroad, and *also* to rescind a vote given authorizing the council to borrow $50,000, to be subscribed on stock of the Muscatine, Iowa City, &c., Railroad.

2*d*. To borrow for a term of years, not exceeding twenty, on the bonds of the city, at a rate of interest not higher than ten per cent. per annum, $130,000, to be subscribed on stock in the name of the city to the capital stock of the Mississippi and Missouri Railroad Company.

3*d*. The vote shall be given by ballot, written or printed, with the words "For the rescission and loan," and "Against the rescission and loan," and if the requisite number of votes are for the rescission and loan, the council shall cause the bonds to be issued.

Three hundred and twenty-six votes were given for the rescission and loan, and five against it.

The city accordingly issued its bonds, the form of them, somewhat special, being thus:

Bond of the City of Muscatine,

$1000. UNITED STATES OF AMERICA. No. 51.

Be it known that the city of Muscatine owes to Adam Ogilvie, or *bearer*, the sum of one thousand dollars for money borrowed,

the receipt whereof is hereby acknowledged, and which sum the said city of Muscatine hereby promises to pay, at the office of E. W. Clark, Dodge & Co., *in the city of New York*, on the first day of January, eighteen hundred and seventy-six (January 1st, 1876), with interest on said sum of one thousand dollars at the annual rate of *ten per cent.*, payable *semi-annually*, on the 1st day of January and 1st day of July in each year; and the faith of the city of Muscatine is hereby pledged for the semi-annual payments of interest and the ultimate redemption of the principal.

Upon the surrender of this bond to A. C. Flagg, treasurer in trust, at any time previous to said 1st January, 1876, *the holder hereof will be entitled to ten shares of the capital stock of the Mississippi and Missouri Railroad Company, in satisfaction thereof.*

Whereof J. H. Wallace, Mayor of the city of Muscatine, *does hereby certify that by a vote of the legal electors of the said city of Muscatine*, at an election held 13th August, 1855, *in accordance with an ordinance of the Common Council sanctioning the same*, that *the said city was authorized to borrow* the sum of one hundred and thirty thousand dollars, and to issue its bonds therefor, bearing interest at ten per cent. per annum, and that the above is one of the bonds given for said loan.

In testimony whereof, I have hereunto set my hand and affixed [SEAL.] the seal of said city this thirty-first day of December, A.D. 1858.

J. H. WALLACE,
Mayor.

Attested by
D. S. JOHNSON,
Recorder.

The coupons were in this form:

The city of Muscatine will pay *the bearer*, on the 1st day of January, 1860, twenty-five dollars, at the office of E. W. Clark, Dodge & Co., *in the city of New York, interest due* on their bond No. 51.

J. H. WALLACE,
Mayor.

A number of the bonds thus issued having got into the hands of the plaintiffs, and the interest being unpaid, they brought suit to recover it. The city set up various defences, as follows:

1. That there was no authority in the charter of the city of Muscatine under which money may be borrowed to aid in the construction of railroads.

2. Because the interest was made payable in New York city, instead of at the treasury of the city of Muscatine.

3. Because, in the stipulation to pay the interest semi-annually at the rate of ten per cent., the authority conferred by the vote which limited the rate of interest to "not higher than ten per cent. per annum," was transcended and a usurious rate agreed to be paid.

4. Because the stock of the Mississippi and Missouri Railroad Company, for which said bonds and coupons were issued, was, without authority from the city, placed in the hands of a trustee and entirely beyond its control.

5. Because, under the authority to borrow a sum of money, no money was ever borrowed by the city, but instead, these bonds were delivered to the officers of the Mississippi and Missouri Railroad Company, and by their agents and brokers sold to the plaintiffs at a price greatly below their par value.

[An amended answer to the claim averred, "that the said bonds were by the officers of said railroad company, and their agents and brokers, sold to the plaintiffs at a price greatly below their par value; that at the time said bonds and coupons were received by said plaintiffs, they had full knowledge of the fact that said bonds had been issued for the purpose of aiding in the construction of said Mississippi and Missouri Railroad."]

6. Because the ordinance on which the vote for a loan was taken was void, because it submitted three distinct propositions in one, and in such a manner as to cut off an effective opposition from all voters who were against the whole of the propositions.

7. Because, finally, the legislature had no constitutional power to authorize the issue of such bonds, and that hence they are void.

To these defences there was a demurrer, which demurrer the court overruled, giving judgment in favor of the city. On appeal, the questions here were the same as they were

below; that is to say, whether the defences set up by the city were sufficient defences to the claim for payment of the coupons in the hands of *bonâ fide holders for value.*

The case was submitted on briefs of *Mr. Cook for the bondholders, and of Mr. Richman and Butler for the city of Muscatine;* the arguments on both sides being much the same as those in one or the other of the three cases of *Gelpcke* v. *The City of Dubuque*, *ante*, p. 175, or in *Mercer County* v. *Hacket*, *ante*, p. 83. As every reader of this volume, and every inquirer into the obligation of railroad bonds will have read those cases, and will be possessed of the arguments applicable to this case, these arguments need not be repeated here. Some of the arguments in this case having, in fact, been transferred to that.

Mr. Justice SWAYNE delivered the opinion of the court:

The demurrer brings under examination the objections taken by the defendant to the validity of the coupons upon which this suit is founded.

These objections will be considered as we proceed.

I. "*That there is no authority in the charter of the city of Muscatine under which money may be borrowed to aid in the construction of railroads.*"

The charter gives the city authority "to borrow money for any object in its discretion, if at a regularly notified meeting under a notice stating distinctly the nature and object of the loan, and the amount thereof, as nearly as practicable, the citizens determine in favor of the loan, by a majority of two-thirds of the votes given at the election."

When the bonds and coupons were issued, the acts of the legislature of Iowa of the 25th of January, 1855,* were in force. These acts in connection with the provision of the charter furnish, in our judgment, a conclusive answer to this objection.

The effect of the acts was considered in the case of *Gelpcke et al.* v. *The City of Dubuque*,† decided at this term, to which we refer.

* Chaps. 128 and 149.

† *Ante*, 220, No. 81, note.

II. "*Because the interest was made payable in New York city, instead of at the treasury of the city of Muscatine.*"

It was according to the general usage to make such bonds and coupons payable in the city of New York. It added to the value of the bonds and was beneficial to all parties. No legal principle forbids it. The power of a municipal corporation to make any contract, does not depend upon the place of performance, but upon its scope and object. A city authorized to establish gas-works and water-works, and to gravel its streets, may buy water, coal, and gravel, beyond its limits, and agree to pay where they are found or elsewhere. The principal power, when expressed, draws to it by necessary implication, the means of its execution. This is a settled rule in the construction of all grants of authority, whether to governments or individuals. If the subject admitted of doubt, we should hold that the city, having acted upon its own construction, and drawn in others to take the securities and advance their money upon it, is now concluded from denying that construction to be the true one.*

III. "*Because in the stipulation to pay the interest semi-annually at the rate of ten per cent., the authority conferred by the vote which limited the rate of interest to 'not higher than ten per cent. per annum,' was transcended, and a usurious rate agreed to be paid.*"

This objection has no foundation. When a statute fixes the rate of interest per annum, it has always been held that parties may lawfully contract for the payment of that rate, before the principal debt becomes due, at periods shorter than a year.†

IV. "*Because the stock of the Mississippi and Missouri Railroad Company, for which said bonds and coupons were issued, was, without authority from the city, placed in the hands of a trustee, and entirely beyond its control.*"

This objection, though urged in the argument, does not arise upon the record. All that appears touching the subject is, that the bond of $1000, as set out in the exhibit at-

* Van Hostrup *v.* The City of Madison, *ante*, p. 291.

† Mowry *v.* Bishop, 5 Paige, 98.

tached to the complaint, besides binding the city to pay, provides that the holder, upon surrendering it at any time before maturity "to A. C. Flagg, trustee," should be entitled to ten shares of the stock of the railroad company. To such an arrangement there is no legal objection. The city had a right to apply the stock for which the bonds were given, or its proceeds, at any time, in discharge of the bonds.

V. "*Because, under the authority to borrow a sum of money, no money was ever borrowed by the city; but instead, these bonds were delivered to the officers of the Mississippi and Missouri Railroad Company, and by their agents and brokers sold to the plaintiffs at a price greatly below their par value.*"

The amended answer avers, "That the said bonds were by the officers of said railroad company, and their agents and brokers, sold to the plaintiffs at a price greatly below their par value; that at the time said bonds and coupons were received by said plaintiffs, they had full knowledge of the fact that said bonds had been issued for the purpose of aiding in the construction of said Mississippi and Missouri Railroad."

The city was authorized to issue the bonds in order to borrow money to pay for the stock. If the company chose to receive the bonds in payment for the stock, retaining a lien on the stock until the bonds were paid, there was no legal obstacle in the way of their doing so. The object of issuing the bonds was thus accomplished, and no injury was done to those who were to pay them. It is neither averred in the answer, nor claimed in the argument, that the railroad company took them at less than their face. It does not appear that any one objected then, and no one can object now. After the bonds passed into the hands of the railroad company, the company was at liberty to sell them on such terms as it might deem proper.

The act of January 25, 1855,* by a clear implication, authorizes cities to give their bonds in payment of their subscriptions of railroad stock, and expressly authorizes the

* Chap. 128.

bonds to "be sold by the company at such discount as may be deemed expedient." What is implied has the same effect as what is expressed.*

VI. "*The ordinance on which the vote for a loan was taken was void, because it submitted three distinct propositions in one, and in such a manner as to cut off an effective opposition from all voters who were against the whole of the propositions.*"

The record shows that all the votes cast, except five, were in favor of the loan. The city and citizens adopted and acted upon the ordinance as valid and sufficient. The citizens voted, and the city authorities issued the bonds. No one interposed to prevent their issue. It is not questioned that all the parties acted in good faith, and the city can not now be heard to object to the regularity of its own proceedings. A party taking the bonds was bound to look to the legal authority under which the public agents acted. If that were sufficiently comprehensive, he had a right to presume that those empowered to act and acting under it had complied with its requirements.†

VII. "*It is insisted that the legislature had no constitutional power to authorize the issue of such bonds, and that hence they are void.*"

This is sufficiently answered by the opinion of this court in *Gelpcke* v. *City of Dubuque*, decided at this term.‡

The judgment below must be reversed, and the cause remanded for further proceedings, in conformity to this opinion.

JUDGMENT ACCORDINGLY.

Mr. Justice MILLER, dissenting:

I dissent from the judgment and opinion of the court just delivered.

In the case of *Gelpcke* v. *City of Dubuque*, decided at this term,§ I have given the reasons which I thought required

* United States *v.* Babbit, 1 Black, 55.

† Commissioners of Knox Co. *v.* Aspinwall, 21 Howard, 539. [And see Mercer Co. *v.* Hacket, *ante*, 83. REP.]

‡ *Ante*, 175. See also Rowan et al. *v.* Runnels, 5 Howard, 134; Pease *v.* Peck, 18 Id., 599; State Bank of Ohio *v.* Knoop, 16 Id., 392; Jefferson Branch Bank *v.* Skelly, 1 Black, 436.

§ *Ante*, p. 175.

this court to follow the recent decisions of the Supreme Court of Iowa, in holding that all bonds given by municipal corporations for stock in railroad companies were void, for want of any constitutional authority in the legislature of that State to enact the laws under which said bonds were issued. I do not now propose to add anything to what I there said upon that subject, but refer to it as fully applicable to the present case.

In the case now before us, however, it is not claimed that there was any act of the legislature authorizing the city of Muscatine to take stock in railroad companies. The principle on which the validity of the bonds is sustained is, that the charter of the city confers on it an unlimited right to borrow money, and that having issued its bonds, which have been sold in the market, they must be held to be valid, although the purchaser knew they were issued for railroad stock.

The plea of the defendant is, that the city of Muscatine "had no authority to assist in building a railroad, or to take stock in the same, nor to issue the bonds of the city to pay for stock in the same," and that at the time said bonds were sold to plaintiffs by the officers of the railroad company, they had full knowledge that said bonds had been issued for the purpose of aiding in the construction of the Mississippi and Missouri Railroad. The plaintiffs demurred to this plea, and the District Court overruled the demurrer. This court holds the plea to be bad, and the demurrer well taken.

The authority to borrow money by the city of Muscatine is found in the 19th section of its charter. That section undertakes to enumerate, in sixteen subdivisions, all the powers intended to be conferred on the City Council. They are those which are usually conferred on such bodies, and none others.

Among them is the authority to establish fire companies, and provide them with engines, to build wharves, to provide for the establishment and support of schools, to audit all claims against the city, to establish the grade of streets and alleys, and wharves, and to cause them to be paved. The

fifteenth subdivision is in the following language: "To borrow money for any object in its discretion, if at a regularly notified meeting, under a notice stating distinctly the nature and object of the loan, and the amount thereof, as nearly as practicable, the citizens determine in favor of the loan, by a majority of two-thirds of the votes given at the election."

It seems to me that the discretion here confided to the council as to the objects for which money may be borrowed, must be construed in one or the other of two modes.

1. That the discretion is in its largest sense unlimited, except by the voice of two-thirds of the voters. This construction would authorize the city to borrow money to enter into the banking business, to speculate in gold, or flour, or grain, or to establish mercantile houses, or to build steamboats, and enter into the trade which flows past the city, on the waters of the Mississippi River, or to organize mining companies in Colorado. In short, to take the money or property of the citizen against his will, and employ it in any of the diversified pursuits by which the individual man makes, or fails to make, money.

A proposition which leads directly to such consequences cannot be supposed to have entered, for a moment, into the minds of the legislature. It makes every man's entire property, within the limits of the city, the common property of the community, and converts the citizen, against his will, into a member of one of those Shaker or French communities in which the individual merges his rights into those of the association. No such construction can be tolerated, unless it is impossible that the legislature could have meant nothing else.

2. That the objects on which this discretion may be exercised must be limited to the execution of some of the powers granted in the charter.

I do not propose to cite the numerous authorities which settle that, as matter of law, this is the rule of construction applicable to the case. It is so well known that it would be a waste of time to refer to adjudged cases.

To establish fire companies, and provide them with en-

gines, is a proper and indeed a necessary object to which the money or the credit of the city may be applied. The building of wharves also requires more money than can be well levied at one tax in such a town as Muscatine. And in building school-houses, and other expenditures necessary to establish schools, the citizens may well be consulted, whether the credit of the city may be used. So of grading and paving the streets of the city. All these are purposes, and perhaps there are others enumerated in the act, about which this discretion may well be exercised. It is not necessary, then, to impute to the legislature the injustice and absurdity of intending the first construction of the charter above mentioned. Here are certain powers conferred, objects to be accomplished by the council named in fourteen paragraphs. The fifteenth authorizes them to borrow money for any object in their discretion, if sustained by a two-thirds vote of the citizens. Nothing can be more reasonable than to suppose that the discretion so conferred was limited to the objects enumerated in the fourteen preceding paragraphs.

None of these include railroads; nor does any of them include anything from which railroad enterprises can possibly be implied. In order to get the power to borrow money to build railroads, some other authority than that given by this section must be shown. I do not think any such exists, nor has any been pointed to by counsel, unless it be that such a power is inherent in municipal corporations without regard to their charters. I do not think, at this day, any court can be found to hold such a doctrine.

But what is wanting in original power to issue these bonds is supposed to be supplied as a ratification or confirmation of them, by the act of January 25, 1855, which may be seen on page 223 of the Revision of 1860 of the laws of Iowa. This is entitled, "*An act regulating the interest on city and county bonds.*" The first section declares that railroad companies may issue *their own bonds* at such a rate of interest, and sell them at such discount as may be necessary, and they shall remain legal and binding. Section 2—the one relied on in this case—is as follows: "That whenever any company shall

have received, or may hereafter receive the bonds of any city or county, upon subscription of stock by such city or county, such bonds may have interest at any rate not exceeding ten per cent., and may be sold by the company at such discount as may be deemed expedient."

It is obvious that the whole purpose of the statute was to relieve such bonds as might have been, or might hereafter be issued, from liability to the charge of usury. This is not the language in which the legislature or any one else would undertake to make valid bonds, issued without any authority whatever in the municipal body. The bonds in this case were issued before the act passed. It says never a word about ratifying them or confirming them, or making good the want of power to issue them. It is said, however, that the act itself implies that there was authority to issue such bonds in the cities and counties. This is a clear *non sequitur*. An examination of the acts of the legislature will show that the cities of Dubuque, of Keokuk, of Davenport, and perhaps many others, had been authorized by the legislature to take stock in railroads, and to issue bonds in payment of it, and the Supreme Court of the State had then twice decided that, by a general law, *all the counties* in the State could do so.

These cities, then, and all the counties having the authority to issue bonds for stock, and some of them having done so, and others intending to do so, the legislature meant no more than to say, that in the cases where they had been, or might hereafter be issued lawfully, in other respects, they should not be held usurious because of the rate of discount at which they might be sold.

To infer from this act that the legislature intended to make valid the bonds of the city of Muscatine, issued without any authority, is a stretch of fancy, only to be indulged in railroad bond cases, and which it is hoped may be confined to them as a precedent. The act applies to bonds issued after its passage as well as before, and in precisely the same terms. Its effect is the same on both. Now will it be urged that this was intended to confer on all the cities whose charters had theretofore denied them such power, the right to take

stock in railroad enterprises? Is this the language in which an act of such importance, and affecting so many persons and so much property, would be framed? Yet it is by such latitudinary construction of statutes as this that it is attempted to fasten upon owners of property, who never assented to the contract, a debt of twenty millions of dollars, involving a ruin only equalled in this country by that visited upon the guilty participants in the current rebellion.

WOODS *v.* FREEMAN.

A judgment in Illinois for taxes is fatally defective if it does not in terms or by some mark indicating money, such as $ or *cts.*, show the amount, in money, of the tax for which it was rendered. Numerals merely, that is to say, numerals without some mark indicating that they stand for money, are insufficient.

FREEMAN sued Woods in ejectment, in the Circuit Court for the Northern District of Illinois, to recover possession of the southwest quarter of section three (3) of township eight (8) north of range three (3) west of the fourth principal meridian, situated in Warren County, in that State. At the trial, Freeman showed title in himself by a regular chain of conveyances from the United States. Woods, to defeat this title, insisted that the tract of land had been regularly sold for the non-payment of taxes for the year 1852, and the *validity* of the sale was the main question in the case.

By the statute law of Illinois, the collector of taxes reports to the proper court a list of lands on which the taxes remain due and unpaid, and if no good reason is interposed a *judgment* is entered on his assessment and return, in the name of the State of Illinois, against the several tracts of land for the sum annexed to each, being the amount of taxes, interest, and costs due thereon, and a precept to sell is ordered.

The following illustration of the collector's assessment and return will show the nature of the document on which judgment is in these cases given; though, in the present case,

the reader will observe that neither in the column meant to denote the "total" of the tax, nor in others where money is meant to be indicated, is the word "dollars" or "cents" given, nor any character, such as $ or *cts.*, or abbreviation representing them. And, that while a conjecture or inference may be made that the figures indicate dollars or cents, the conclusion rests finally on conjecture or inference only.

8 N. 3 W.

Patentee's name.	Part of section.	Section.	Acres.	Valuation.	State spro.	State special.	County tax.	Co. special.	Total.
Erastus Brown, .	W. S. N. E.	3	89[74]	180	1 09	72	1 08	. .	2 89
Elisha Sibree, . .	S. W.	3	160	320	1 93	1 28	1 92	. .	5 13

The tract of land in controversy had been sold for taxes, and a deed made to one Harding, through whom Woods claimed. To sustain the deed, Woods offered in evidence the record of the judgment of the county court of Warren County against the tract of land for the unpaid taxes of 1852, the same being in form as above. On the objection of Freeman, the court excluded the evidence, and Woods excepted. Verdict and judgment having been given for Freeman, the correctness of the refusal to admit the evidence was the chief point on error here.

Mr. Merriman, for the defendant in error:

Mr. Justice DAVIS delivered the opinion of the court, and after stating facts, proceeded thus:

There was no "mark, word, or character" on the record of the *judgment* to indicate the amount of taxes for which *it* was rendered against the land, which was undoubtedly the reason why the court rejected the evidence.

In the construction of local statutes affecting the titles to real estate, this court recognizes the binding force of the interpretation given by the highest judicial tribunal of a State.

This question has been expressly decided by the Supreme Court of Illinois. That court has held,* "that a judgment for taxes is fatally defective which fails to show the amount of tax for which it was rendered, and that the use of numerals, without some mark indicating for what they stand, is insufficient." The judgment was therefore void, and the court was right in excluding the evidence from the jury.

Judgment is

AFFIRMED WITH COSTS.

UNITED STATES *v.* MORENO.

1. Where there are no subscribing witnesses to a Mexican grant in colonization, the signature of the governor who executed the grant, and of the secretary who attested it, may be proved by any one acquainted with their handwriting. Such evidence is in no sense secondary. *United States* v. *Auguisola* (*ante*, p. 352), approved.
2. The cession of California to the United States did not impair the rights of private property. These rights were consecrated by the law of nations, and protected by the treaty of Guadalupe Hidalgo. The act of March 3d, 1851, to ascertain and settle private land claims in the State of California, was passed to assure to the inhabitants of the ceded territory the benefit of the rights thus secured to them. It recognizes both legal and equitable rights, and should be administered in a liberal spirit.

ON an appeal from the decree of the District Court of the United States for the Southern District of California, the record disclosed the following facts: On the 5th of April, 1845, Moreno submitted to Pio Pico, then Governor of the Department of California, a petition, wherein he set forth that he had "denounced, in due form, *a square league of land situate between Temecula and the Lagoon called Santa Rosa*, to which, after previous judicial investigation," he prayed "to be awarded the respective title, on the ground that it is absolutely vacant and without any availableness." The governor ordered the petition "to be sent for the report of" the pro-

* Lawrence *v.* Fast, 20 Illinois, 340; Lane *v.* Bommelmann, 21 Id., 147.

per officer. The officer reported that the land was "in an entire vacant state." The governor thereupon ordered the petition to be returned to Moreno, that he might annex a plat of the land,—the application to come again before the government. Moreno was authorized to occupy the land "provisionally," and it was added, "meanwhile the mentioned title-deed is being made out."

On the 31st of January, 1846, Moreno presented the governor a new petition with the required plat. In this petition he says: "In accordance with the decree your excellency thought fit to give in the month of April, in the year 1845, requiring me to present the plat of the land I occupy provisionally, *called Santa Rosa*, I hereby, with the deepest submission, accompany my petition and the plat, that your excellency may have the goodness to make out the title-deed of ownership to me of the land bordering on Temecula, the Lagoon, and Santa Margarita, *not naming the number of leagues*, as I might be mistaken, but I ask that the land which has no owner, and which I demand in due form, be set apart for my individual benefit and that of my family."

The governor ordered "the title-deed to be issued and given to the interested party with obligation to amend the plat." On the day last mentioned, a deed was issued, subject to the approval of the Departmental Assembly. It purported to be subscribed by the governor and secretary, *but there were no subscribing witnesses to it.* It contained with others the following clauses:

"The land donated to him is the same as exhibited in the plat attached to this expediente, and *borders on land of Temecula, on the Lagoon, and on Santa Margarita.*

"The judge who shall possess him of it will cause it to be measured conformable to ordinance, and give notice to the government of the number of leagues (*sitios de ganado mayor*) it may contain.

"Consequently, I order that this title-deed, being held firm and valid, it be entered in the respective book and delivered to the interested party for his security and other purposes."

The subject was submitted to the Departmental Assembly, and on the 3d June, 1846, that body approved and confirmed the grant.

It appeared by the testimony of one Foster, in early life a justice of the peace, but who had been for many years a "ranchero" in California, that "Santa Rosa" was the name given to a well-known tract; that it adjoined another well-known tract, called "Temecula," on the east, a second, known as "Santa Margarita," on the west, and that a third, called "La Laguna," stood off in a direction northeasterly. This was confirmed by two other witnesses.

Moreno resided upon and cultivated the land from the time he was authorized to occupy it until the acquisition of the country by the United States.

After the acquisition he presented a petition to the Board of Commissioners, established by the act of Congress of 3d March, 1851, to ascertain and settle private land claims in California, to have his title confirmed, pursuant to the provisions of that statute. The commissioners having confirmed it, an appeal was taken by the United States to the District Court; and that court having affirmed the report of the commissioners, the United States brought the case here by appeal.

It was objected on behalf of the United States to the decree of the District Court:

1. That the "grant is proved, by secondary evidence of handwriting, without the legal basis for its introduction having first been laid;" *this objection being made in the case, however, in this court only.*

2. That the location and quantity of the land are entirely uncertain both in the grant and in the diseño.

Mr. Willes, for the United States.

Mr. Justice SWAYNE delivered the opinion of the court:

The first objection refers to the proof of the signatures of the governor and secretary to the deed to Moreno, which was made by persons acquainted with their handwriting, without those officers being called or their absence accounted for.

There are no subscribing witnesses to the deed. It was therefore allowable, according to the common law, to prove the signatures by any one acquainted with their handwriting. Such evidence was as competent and valid as the testimony of the writers themselves. It is in no sense secondary evidence.* Were the rule otherwise, it is a sufficient answer to the objection, that it does not appear that the evidence was objected to when it was offered and received in the court below. If no objection be made, the existence and contents of a record may be proved by parol evidence, and a court of errors will not for that reason reverse the judgment.† The testimony is found in the record, without any exception, and must have its legitimate effect. In this class of cases, where the documentary proof of title is plenary, and no suspicion is raised as to its genuineness, it is the settled rule of this court to regard such evidence as both competent and sufficient.‡ We have no doubt of the genuineness of all the papers composing this espediente. No question was made upon the subject in the court below.

It is further objected to the decree that "the location and quantity of the land are entirely uncertain, both in the grant and the diseño."

The tract is described in the titulo as known by the name of Santa Rosa, and as bounding upon Temecula, the Lagoon, and Santa Margarita. The petitioner asked for a title to all the vacant land in that locality, and it was conceded to him accordingly.

It is proved by the testimony of three witnesses that Santa Rosa was a well-known rancho; that Temecula, the Lagoon, and San Margarita were well-known contiguous ranchos, and that there was not the least difficulty either in identifying Santa Rosa, or in ascertaining its boundaries. There is no contradictory evidence upon the subject. The District Court held the evidence to be sufficient, and we concur in that opinion.

* 2 Phillips on Evidence, 4th American edition, 604.

† Newberry *v.* Lee, 3 Hill, 523.

‡ United States *v.* Auguisola, *ante*, p. 352.

The record presents every link in the chain of a perfect espediente. There is a petition with a diseño, an order of reference, an informe by the proper officer, a decree of concession, a titulo, and the approval of the Departmental Assembly.*

The Surveyor-General of California certifies that the espediente is copied from the archives in his possession. It is not necessary to the validity of the title that the land should have been surveyed and the quantity ascertained.†

California belonged to Spain by the rights of discovery and conquest. The government of that country established regulations for transfers of the public domain to individuals. When the sovereignty of Spain was displaced by the revolutionary action of Mexico, the new government established regulations upon the same subject. These two sovereignties are the spring heads of all the land titles in California, existing at the time of the cession of that country to the United States by the treaty of Guadalupe Hidalgo. That cession did not impair the rights of private property. They were consecrated by the law of nations, and protected by the treaty. The treaty stipulation was but a formal recognition of the pre-existing sanction in the law of nations. The act of March 3d, 1851, was passed to assure to the inhabitants of the ceded territory the benefit of the rights of property thus secured to them. It recognizes alike legal and equitable rights, and should be administered in a large and liberal spirit. A right of any validity before the cession was equally valid afterwards, and while it is the duty of the court in the cases which may come before it to guard carefully against claims originating in fraud, it is equally their duty to see that no rightful claim is rejected. No nation can have any higher interest than the right administration of justice

The decree of the District Court is

AFFIRMED

* United States *v.* Knight's Adm'r, 1 Black, 245.

† Fremont *v.* United States, 17 Howard, 542; United States *v.* Maca, 18 Id., 556.

Syllabus.

BRONSON & SOUTTER, Complainants and Appellants, *v.* THE LA CROSSE AND MILWAUKEE RAILROAD CO.; THE MILWAUKEE AND MINNESOTA RAILROAD CO., CHAMBERLAIN ET AL. [Appeal.]

ALSO,

THE MILWAUKEE AND MINNESOTA RAILROAD CO., Appellants, *v.* SOUTTER, who survived BRONSON & SOUTTER, Trustees, &c. [Cross Appeal.]

An act of Congress (July 15, 1862) repealed all Circuit Court powers given to certain District Courts of the United States. A subsequent statute (March 3, 1863) enacted, "That in all cases wherein the District Court had rendered *final judgments or decrees* prior to the passage of the act, said District Court shall have power to *issue writs of execution*, or other *final process*, or to use such other powers and proceedings as may be in accordance with law, *to enforce the judgments and decrees aforesaid*," anything in said act of July 15th, 1862, to the contrary notwithstanding:

1. *Held*,—

I. That the District Court acquired only such powers as might be necessary to insure the execution of any final process that it might issue; that is to say, such powers as might be necessary to regulate and control its officers in the execution of their ministerial duties.

II. That the words "judgments and decrees," within the meaning of this act, were such judgments and decrees as disposed of the whole case, so that nothing remained to be done but to issue "final process."

III. That even if the statute in question conferred larger powers, and gave the court more general jurisdiction over its former cases, such court could not, pending an appeal by a party in whose favor it had decreed, exercise them on the application and in favor of such party; the Supreme Court, however, in order to guard against misconstruction, saying, that where a decree had been rendered affecting property in litigation, the court below, being in custody of such property, had full power to adopt proper measures to protect it from waste or loss; and where a railroad was the property, reasonably to apply its revenues for its conservation, but not to appropriate them beyond this, and among litigating parties.

2. In a case where this court, after an examination of very voluminous records, did not doubt that the court below was acting upon a sincere conviction that it possessed full power and authority to make certain orders, which this court now decided that it had made under a misapprehension of its powers, and without authority of law, and that it was influenced by a high sense of duty, and by what it believed to be for the best interests of all parties concerned, in what this court characterized as "a most complicated, difficult, and severely contested cause," and that it needed but to be advised by the *opinion* of this court, on a motion

Statement of the case.

which had been made for a writ of prohibition against it, the said court below, this court, for the present, withheld the appropriate remedy, giving its *opinion* that the court below had no jurisdiction, and was acting against law, with liberty to counsel to apply hereafter to this court if necessary. CATRON, J., dissenting.

BRONSON along with one Soutter had filed their bill in the District Court of the United States for the District of Wisconsin (*the Circuit Court system not being at the time introduced into that region, but the District Courts having Circuit Court powers*), to foreclose a mortgage which had been given by the *La Crosse and Milwaukee* Railroad Company on a portion of their road, called the Eastern portion; the *Milwaukee and Minnesota* Railroad Company being also made defendants in the suit. The mortgage had been given to secure the holders of bonds which the former company had issued in large amounts. The evidence in the case was very voluminous, the issues complicated, and the cause severely contested. The court below had given to it patient investigation. On the 13th January, 1862, a final decree of foreclosure was entered in the said *District* Court, *in favor* of the complainants in the suit, and an appeal was taken by those complainants to this court on the 17th of the same month. The *Milwaukee and Minnesota* Railroad Company also, one of the defendants in the suit, took a cross-appeal on the 14th of September following.

On the 12th of June, 1863, *pending the above appeals*, the District Court entered an order in the cause of Bronson and Soutter against the companies, &c., on the petition of a third company, the Milwaukee and *St. Paul* Railroad Company, not a party to the suit, directing a receiver, into whose hands the La Crosse and Milwaukee Railroad and its assets had been placed, on filing the bill for the foreclosure of the mortgage, to turn over the road, its appurtenances and rolling stock, to them, the petitioners; and also directing that this last-named company, subject to the orders of the court, should operate this Eastern division of the road (the one covered by the mortgage), in connection with the Western division; and further, that the same company should, out of the revenues of

the road, keep the rolling stock in good order and condition, and defray all running expenses, &c.

On the 5th day of October, 1863, another order was entered in the same cause, purporting to be on behalf of the appellants, directing that after disbursements of moneys arising from revenues of the Eastern division of the road to previous incumbrances and necessary expenses, the receiver pay to the holders of the bonds secured by the mortgage their proportionate share of the surplus, if any; all such payments to be credited on the decree of the court in the cause, or on such decree as might be eventually made, if the present decree should be reversed or modified; and on the 26th October another order was made directing the receiver to report, on the first Monday of January, the amount of moneys in his hands after paying previous incumbrances, &c.

A motion was now made in this cause by the appellees in the first appeal, and appellants in the cross-appeal, to this court, for a writ of *prohibition* to the District Court, enjoining it against any further proceedings on the order of the 12th of June, and of the 5th and 26th of October. The motion was placed mainly upon the ground that the *District* Court possessed no jurisdiction to entertain the motion or to make the orders; and that its proceedings are *coram non judice* and void.

The question involved the construction of two acts of Congress: the first passed *July* 15, 1862,* the second passed *March* 3, 1863.†

The first act provided for extending the *Circuit* Court system of the United States to the State of Wisconsin, and which included it in the Eighth Circuit. One section of this act—the second—provides that so much of any act of Congress as vests in the *District* Courts of the United States (of which the district in question is one) the powers and jurisdiction of the *Circuit* Courts, be and the same is hereby repealed. Another section—the third—provides that all actions, suits, prosecutions, causes, pleas, process, and *other*

* 12 Stat. at Large, 576. † Ib., 807.

proceedings, relative to any cause, civil or criminal (which might or could have been originally cognizable in a Circuit Court), *now pending in or returnable to the several District Courts* (of which the district in question is one), acting as Circuit Courts, on the first day of October next, shall be and are hereby declared to be *transferable*, *returnable*, *and continued* to the *Circuit* Courts, &c.

[This court had already held, at the last term, in a case in which the question arose, that the second section repealed in terms all the Circuit Court powers and jurisdiction of the District Courts.]

The *second* of the two acts referred to was entitled "An act to enable the *District* Courts of the United States to issue executions and other final process in certain cases," and provides, "that in all cases wherein the District Courts *had rendered final judgments or decrees prior to the passage of the act of 15th July*, 1862, and which cases might have been brought in the Circuit Courts, the District Courts shall have power to issue writs of execution or other final process, or *to use such other powers and proceedings as may be in accordance with law, to enforce the judgments and decrees.*"

Against the motion it was argued that the act of July, 1862—the first act—gave the *District* Court, in terms, the right not only to issue writs of execution and other final process, but the right to use such "*other* powers and *proceedings*" as would enforce decrees which they had rendered prior to July 15, 1862; that the decree of foreclosure in this case was rendered prior to that date,—was made on the 13th of January preceding,—more, therefore, than six months prior; that it came accordingly within the very terms of the act.

Mr. Carpenter, contra.

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

The question involves the construction of two acts of Congress.

After the decision of this court at the last term, it cannot

be pretended that the District Court possessed any power, after the act of 15th July went into effect, to grant the orders complained of, unless it is found in the subsequent act of 3d March, 1863.

It is supposed that the orders are warranted by the last clause of the act, namely, "or to use such other powers and proceedings as may be in accordance with law, to enforce the judgments and decrees." We do not agree to this construction. The obvious meaning and intention of this clause is, to provide for the use and exercise of such powers as might be necessary, after the issuing of execution or other final process, in order to insure the execution of the process; such as are necessary to regulate and control the ministerial duties of officers in the execution of final process. The exercise of such powers are frequently necessary, and are familiar to the profession and the courts, and when authority was given to the District Courts under this act to issue execution on final judgments or decrees that had already been rendered in their courts, it was fit and proper to confer this additional power, otherwise the final process might be unavailable. But if other powers, beyond the enforcement of the ministerial duties of the officers, in the execution of final process, become necessary, recourse must be had to the jurisdiction of the Circuit Court. We are also of opinion that, according to the true construction of the act, the judgments or decrees there referred to are those disposing of the whole case, so that nothing is left to be done but to issue the final process; that if any proceedings remain to be taken for the purpose of completing the final disposition of it, the case or suit pending is not one within the provisions of the act. It belongs to the cognizance of the Circuit Court.

Another reason why this particular case is not within the provisions of the act of the 3d March is, that the District Court, even if it had jurisdiction of the proceedings, would not be warranted in taking any steps in the execution of the decree in favor of the appellants. They having appealed from the decree, it would be against all reason and principle to permit them to proceed in the execution of it, pending the

appeal. They assert the decree is founded in error, and for that reason should not be executed, but should be reversed and corrected in the appellate tribunal. The appeal suspends the execution of the decree. This is not a case where security is to be given in order to supersede the execution. That rule applies in cases where the decree or judgment is against the party appealing, and who desires to suspend the issuing of execution by the adverse party until the appeal is heard and determined. It is true that the adverse party in this cause has entered a cross-appeal, but, as the appeal already taken had superseded the execution, a bond in the cross-appeal would have been an act of supererogation. It would have been otherwise if the complainants, in whose favor the decree was rendered in the court below, had not appealed.

To guard against misconstruction in respect to the powers of a court having jurisdiction over the subject-matter, and where a decree has been rendered affecting the property in litigation—the road in this case—and an appeal is taken to this court, as the property in controversy is not brought into the appellate tribunal, but remains in the custody and care of the court below, it is agreed that full power exists in that court, pending the appeal, to adopt all proper and judicious measures to protect and preserve it from waste or loss. For this reason there can be no well-founded objection in the present case to the running of the road, and the reasonable application and expenditure of its revenues for that purpose. Beyond this, any appropriation of the revenues is not warranted. They should be reserved for such disposition as may be directed by the final decree in the cause.

For the reasons above given, we are entirely satisfied, on the facts set forth in support of this motion, and upon which it is founded, that the District Court has not only misconstrued its powers under the acts of Congress in question, but has overlooked the effect of the appeal from the decree in their favor by the complainants below in the first entitled cause, and is acting under that decree upon a misapprehension of its powers, and without authority of law.

The only remaining question in the case is as to the proper

remedy to be applied. We do not doubt but that the learned court below is acting upon a sincere conviction that it possesses full power and authority to make the several orders complained of, and that it is influenced by a high sense of duty, and what is believed to be for the best interest of all parties concerned in this most complicated, difficult, and severely contested cause, and that it needs but to be advised by the opinion of this court on the motion, to conform to the views of the court as there expressed. For the present, therefore, we shall withhold the appropriate remedy, with liberty to the counsel to apply hereafter to the court if necessary in the matter.

Mr. Justice CATRON:

1. I agree that no writ of prohibition ought to issue on this cause, and that the motion for such writ must be refused.

2. As to the *advice* proffered in the court below, I do not agree. There are no facts before us on which we can, judicially, make any order binding the parties or the District Court, nor is any motion before us calling for action on the part of this court, except the motion for a writ of prohibition. I am, therefore, unwilling to give any opinion (or rather advice), offered by the majority of the court.

NOTE.

Besides the branches of the case presented as in the preceding pages, another part of the case, involving chiefly questions of fact, and among these largely questions of accounts and of fraud—the *fact* part, as we may style it, of the controversy—was heard and decided in an equity suit at this term. It is this part of the case which, in connection with the discussion upon it, invited, probably, the characterization above given of the suit as a "*most* complicated, difficult, and severely contested cause." The record of the case filled more than one thousand large 8vo. pages, of small pica type, set "solid;" a record, therefore, itself greatly larger than the whole of the present volume. The discussion of the case, too, by counsel, consumed no small fraction of a five months' term. The Reporter presumes that he need make but slight apology for not reporting this part of the case in existing circumstances. The hearing and discussion took place some months before he had the honor to enter upon the office which, by the gracious invitation of the court, he now holds. Without having heard the discussion it would be impossible for him to understand a case such as he has described; and without at least the belief that he understood it, absolutely so, he hopes, for him to attempt the presentation of it.

UNITED STATES *v.* YORBA.

1. Where the usual preliminary proceedings to the issue of a Mexican grant in colonization are preserved in the archives of the former government, the proof of the signatures of the grantor and attesting secretary will be deemed by the Supreme Court sufficient to establish the genuineness and due execution of the grant, unless objection is taken to its sufficiency before one of the inferior tribunals. *The United States* v. *Augusola* (*ante*, p. 352), approved.
2. The fact that Mexico declared, through her commissioners who negotiated the treaty of Guadalupe Hidalgo, that no grants of land were issued by the Mexican governors of California, after the 13th of May, 1846, does not affect the right of parties who, subsequent to that date, obtained grants from the governors whilst their authority and jurisdiction continued. The authority and jurisdiction of Mexican officers in California are regarded as terminating on the 7th of July, 1846. The political department of the government has designated that day as the period when the conquest of California was completed, and the Mexican officers were displaced, and in this respect the judiciary follows the action of the political department.
3. The absence from a Mexican grant in colonization of conditions requiring cultivation and inhabitancy and the construction of a house within a year, does not affect the validity of the grant.

THIS was an appeal by the United States from the decree of the District Court for the Southern District of California.

The respondent claimed a tract of land, called *La Sierra*, situated in the present county of Los Angeles, State of California; and in October, 1852, presented a petition to the Board of Commissioners, created by the act of March 3d, 1851, to ascertain and settle private land claims in California, asking for the confirmation of their title. In November, 1854, the board rejected his claim; but on appeal to the District Court the claim was, in December, 1856, adjudged valid, and confirmed to the extent of four square leagues. From this decree the appeal was taken.

In support of his claim the respondent produced, from the archives of the former government, in the custody of the Surveyor-General of California, his petition to the governor for the land, the reference by him to the local authorities for information, and their reports on the subject; also, various proceedings had with reference to an adverse interest in the land, asserted by the widow of his deceased brother, and a

draft or copy of the grant issued. He also produced the grant delivered to him, which was issued by Governor Pio Pico on the 15th of June, 1846. It is signed by the governor, and tested by his secretary of state; but neither the governor nor secretary were called to prove the execution of the grant. The genuineness of their signatures was proved by a third party, no objection being taken to its sufficiency at the time by the law agent of the United States, who was present at the examination of the witness.

The grant was, apparently, much in the form common to these grants, except that it had not the usual requirements or conditions, requiring cultivation, inhabitancy, and the construction of a house within a year.*

The respondent also proved that he had been for several years previous to receiving the grant in the occupation and use of the land in connection with his deceased brother.

* Its exact form, translated, was as follows:

PIO PICO, CONSTITUTIONAL GOVERNOR OF THE DEPARTMENT OF THE CALIFORNIAS:

Whereas, the citizen Bernardo Yorba has asked, for his personal benefit and that of his family, a piece of land which for many years he has legally possessed, called the Sierra, on the banks of the River Santa Ana, bounded by the said river and the rancho of Temiscal, the proper proceedings having been taken and inquiries made, in the exercise of the powers which are conferred upon me, in the name of the Mexican nation, I have, by a decree of this day, granted him the said land, declaring it his property by these presents, in conformity to the law of the 18th of August, 1824, and the regulation of the 21st of November, 1828, subject to the approval of the Departmental Assembly, and under the following conditions:

1st. He shall have power to inclose it, without injury to the crossings, roads, and servitudes; he shall enjoy it freely and exclusively, applying it to the use and cultivation which may best suit him.

2d. He shall solicit the proper judge to give him the judicial possession in virtue of this decree, by whom the boundaries shall be marked with the necessary monuments.

3d. The land of which donation is made is four leagues "de ganado mayor."

The judge who shall give the possession shall have it measured in conformity to the ordinance, leaving the surplus, if any remains, to the nation, for the purposes for which it may be required.

Wherefore I order that this title, being held firm and valid, be recorded in the proper book, and be delivered to the party interested for his security, and other purposes.

Given in the city of Los Angeles, on this common paper, for want of sealed, the 15th of June, 1846.

PIO PICO.

JOSE MATIAS MORENO, *Sec'y ad int.*

This superior decree is recorded in the proper book, dated as above.

MORENO.

Mr. Wills, for the appellants: The United States object to the decree of confirmation in this case for several reasons:

1. The grant is proved only by secondary evidence of the handwriting of the governor and his secretary, without any foundation having been laid for dispensing with the primary evidence.

2. It is void, as against the United States, because made after May 13, 1846. No genuine or valid grants of lands in California were made by Mexican authority after May 13, 1846. This fact may be proved, first, by the admission of the Mexican government during the negotiation of the treaty of Guadalupe Hidalgo.

The evidence on the subject is found in the diplomatic correspondence of our government in relation to the treaty.

Mr. Buchanan, Secretary of State, in his letter of April 15, 1847, to Mr. Trist, our diplomatic agent, while transmitting him a draft of the proposed treaty of peace with Mexico, instructs him as follows:

"The rights of the persons and property of the inhabitants of the territory over which the boundaries of the United States shall be extended will be amply protected by the Constitution and laws of the United States. An article, therefore, to secure those rights has not been inserted in the project; but should this be deemed necessary by the Mexican government, no strong objection exists against inserting in the treaty an article similar to the third article of the Louisiana treaty. It might read as follows: 'The inhabitants of the territory over which the jurisdiction of the United States has been extended by the fourth article of this treaty shall be incorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.' In the event of the insertion of this article, it would be proper to add to it the following: '*Provided*, That all grants or concessions whatever of any lands made or issued by the Mexican government since the thirteenth day

of May, one thousand eight hundred and forty-six, within the said territory, shall be absolutely null and void.' The date might, if necessary, be changed from the day when Congress recognized the existence of the war to the month of September, 1846, when the American forces took possession of California."*

Mr. Trist, in his letter of January 25, 1848, to the Secretary of State, transmitting the treaty of peace negotiated by him, on the point in question, says:

"With respect to grants of land made by the Mexican authorities, the proviso contained in my instructions was strenuously objected to upon a point of national honor and decorum. No such grants had been made since the 13th May, 1846. This they knew, and consequently the proviso could have no practical effect. But it implied that they had been made, or might have been made, and that, nevertheless, the government committed the injustice of revoking them; which, in fact, it had authority to do. Moreover, it involved an acknowledgment that, from the day when hostilities broke out on the north of the Rio Bravo, the Mexican government had lost the right to make grants of land in any part of its territory subsequently occupied by us. Feeling the force of these objections, I requested to make sure of the fact stated by them; and also in regard to no grants having been made in Texas since the revolution, which had been incidentally mentioned by one of them (the Mexican negotiators). And this having been done, in a manner which left no shade of doubt on their minds, the declaration which will be found at the end of ART. 10 was agreed upon, in lieu of the proviso."†

That declaration is in these words:

"The Mexican government declares that no grant whatever of lands in Texas has been made since the second day of March, one thousand eight hundred and thirty-six; and that no grant whatever of land, in any of the territories aforesaid, has been made since the thirteenth day of May, one thousand eight hundred and forty-six."‡

* Senate Doc., 1 Sess. 30 Cong., vol. 7, for 1847–48, No. 52, p. 83.
† Ib., p. 292.
‡ Ib., p. 50.

This declaration of the fact in question is the more valuable from the circumstance that while Mexico was unwilling to stipulate that all grants of land in California made after May 13, 1846, should be null and void, it was nevertheless willing to declare, and did declare the fact, that no such grants had been made. It is also entitled to credit because made by the party most interested in knowing, after examination, with the best sources of information within its reach, and with opportunity, during a period of nearly two years, to ascertain the truth of the fact.

But it may be objected that the tenth article of the treaty, which contained this declaration, was rejected by the Senate of the United States, and that, therefore, it is inoperative in a question of this kind. This objection misconceives the argument. If the invalidity of all grants of land in California made after May 13th, 1846, was urged on the ground of a treaty stipulation to that effect, the objection now made would be unanswerable. But it is not placed on that ground. Mexico was not willing to place it on that ground; neither are we. We place it on the ground of the fact, attested by Mexico herself. The rejection of the article of the treaty containing this statement of fact is, therefore, immaterial The fact still remains unchanged in all its original force, and with all its original consequences. Doubt on this point is dispelled when we learn the reason why the tenth article of the treaty was rejected. To the first clause of the first paragraph of the tenth article there was no objection. It simply declared the doctrine of international law in cases of the cession of territory, and was afterwards embodied in the treaty in another form. To the last paragraph containing the declaration quoted there could be, and there was, no objection on the part of the United States, because it was for their benefit, and was inserted, as we have seen, at the instance of our Secretary of State. The objection to the article, as a whole, was to *another* part of it, which stipulated for an *extension of time* in favor of the grantees of land in Texas, California, and New Mexico, under grants previously made, for the performance of the conditions contained

therein, to take effect from the exchange of the ratifications of the treaty.

This we know from a variety of sources.

I. From the message of the President of the United States, submitting the treaty to the Senate, in which he recommends the rejection of the tenth article of the treaty for the reason already stated. "To the tenth article of the treaty," says he, "there are serious objections, and no instructions given to Mr. Trist contemplated or authorized its insertion. The public lands within the limits of Texas belong to that State, and this government has no power to dispose of them, or to change the conditions of grants already made. All valid titles to land within the other territories ceded to the United States will remain unaffected by the change of sovereignty; and I therefore submit that this article should not be ratified as a part of the treaty."*

II. We know it from the letter of the Secretary of State of March 18, 1848, to the Mexican Minister of Foreign Relations, explaining the causes of the amendments to the treaty made by the Senate, and, among others, the rejection of the tenth article. Thus it reads:

"The third amendment of the Senate strikes from the treaty the tenth article. It is truly unaccountable how this article should have found a place in the treaty. That portion of it in regard to lands in Texas did not receive a single vote in the Senate. If it were adopted it would be a mere nullity on the face of the treaty, and the judges of our courts would be compelled to disregard it. It is our glory that no human power exists in this country which can deprive one individual of his property without his consent, and transfer it to another. If grantees of land in Texas, under the Mexican government, possess valid titles, they can maintain their claims before our courts of justice. If they have forfeited their grants by not complying with the conditions on which they were made, it is beyond the power of this government, in any mode of action, to render those titles valid, either against Texas, or any individual pro-

* Message of Feb. 22d, 1848, Ib., p. 34.

prietor. To resuscitate such grants, and to allow the grantees the same period after the exchange of the ratifications of this treaty to which they were originally entitled, for the purpose of performing the conditions on which these grants had been made, even if this could be accomplished by the power of the government of the United States, would work manifold injustice. These Mexican grants, it is understood, cover nearly the whole of the sea-coast and a large portion of the interior of Texas. They embrace thriving villages, and a great number of cultivated farms, the proprietors of which have acquired them honestly by purchase from the State of Texas. These proprietors are now dwelling in peace and security. To revive dead titles, and suffer the inhabitants of Texas to be ejected under them from their possessions, would be an act of flagrant injustice, if not wanton cruelty. Fortunately, this government possesses no power to adopt such a proceeding. The same observations equally apply to such grantees in New Mexico and Upper California. The present treaty provides amply and specifically in its eighth and ninth articles for the security of property of every kind belonging to Mexicans, whether held under Mexican grants or otherwise, in the acquired territory. The property of foreigners, under our Constitution and laws, will be equally secure without any treaty stipulation. The tenth article could have no effect on such grantees as have forfeited their claims but that of involving them in endless litigation, under the vain hope that a treaty might cure the defects in their titles against honest purchasers and owners of the soil. And here it may be worthy of observation, that if no stipulations whatever were contained in the treaty to secure to the Mexican inhabitants, and all others, protection in the free enjoyment of their liberty, property, and the religion which they profess, these would be amply guaranteed by the Constitution and laws of the United States. These invaluable blessings, under our forms of government, do not result from treaty stipulations, but from the very nature and character of our institutions."*

* Senate Doc., 30 Cong., vol. 7, for 1847–48, No. 60, pp. 69, 70. To the same effect, see also the President's message of February 8, 1849, to the House of Representatives, communicating the protocol signed at the exchange of the ratifications of the treaty, with the accompanying documents. Ex. Doc., 2d sess. 30th Cong., 1848–49, vol. 5, No. 50, pp. 7, 8.) Mr. Bu-

The declaration of fact contained in the last paragraph of that article remains, therefore, unaffected by its rejection as a part of that article.

The general fact for which we contend is further proved by the *second* admission of the fact by the Mexican government, in the protocol signed by its ministers before the exchange of the ratifications of the treaty of Guadalupe Hidalgo. After reciting the appointment of commissioners of the United States, with full powers to make to the Mexican republic suitable explanations in regard to the amendment of that treaty made by the Senate and government of the United States, that document declares that

"It was agreed, after adequate conversation respecting the changes alluded to, to record in the present protocol the following explanations, which their aforesaid excellencies, the commissioners, gave in the name of their government, and in fulfilment of the commission conferred upon them near the Mexican republic."

"2d. The American government, by suppressing the tenth article of the treaty of Guadalupe, did not in any way intend to annul the grants of land made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess; and the grantees may cause their legitimate titles to be acknowledged before the American tribunals. Conformably to the law of the United States, *legitimate titles* to every description of property, personal and real, existing in the ceded territories, *are those which were legitimate titles under the Mexican law in California* and New Mexico, *up to the 13th of May*, 1846, and in Texas up to the 2d of March, 1836. And these explanations having been *accepted* by the Minister of Foreign Affairs of the Mexican republic, *he declared, in the name of his government, that, with the understanding conveyed by them, the said government would proceed to ratify the treaty of Guadalupe as modified by the Senate and government of the United States.*"*

chanan's letter to Mr. Sevier, of March 18, 1848. (Ib., pp. 47, 48.) Debate in the Senate on the protocol, February 10, 1849. Remarks of Senators Rusk, Bradbury, and others. (Cong. Globe and Appendix, vol. 20, 2d sess. 30th Cong., pp. 500–502.)

* Ex. Doc., 2d sess. 30th Cong., 1848–49, vol. 5, No. 50, pp. 77, 78.

It will be observed that the solicitude of the Mexican government, so far as concerns land grants in California, relates to those made prior to May 13th, 1846. Having previously declared to our government that no grants of lands in California had been made after that date, in exacting an explanation from our government as a preliminary condition to the exchange of the ratifications of the treaty, it only required our commissioners to recognize and declare as "legitimate" "those titles which were legitimate under the Mexican law in California up to the 13th of May, 1846." No pledge was exacted in regard to grants made after that date, and for the obvious reason that Mexico had previously declared that none had been made. The explanation and definition of "legitimate titles" in California thus required by Mexico from the United States on the basis of its own previous statement is, therefore, equivalent to a redeclaration of that fact by Mexico. That declaration, therefore, is the measure of the obligations of the United States under the treaty in regard to land grants in California. We are not bound to recognize as genuine or valid any grants made or purporting to be made after May 13, 1846. This result follows, not directly, from any treaty stipulation to that effect, but indirectly, from the declaration of a fact by Mexico, which fact thus becomes the measure of our obligations under the treaty. No injustice, no want of good faith, can be imputed to us for executing the treaty on the basis of the general fact affirmed and reaffirmed by Mexico to the government of the United States, viz.: that no genuine or valid grants of land in California were made after May 13, 1846.

This fact is also confirmed by the journal of the Departmental Assembly for the year 1846, found among the archives of California. An examination of that document shows that it extends from March 2, 1846, to July 24, 1846; and that in the sessions held from May 13, 1846, to July 24, 1846, no grant was presented by the governor, for approval by the Assembly, dated later than May 2, 1846, although sessions were held successively May 15, June 3, June 10,

June 15, July 1, July 3, July 6, July 7, July 8, and July 24, 1846.*

This result, it will be seen, is in harmony with the declaration made by Mexico to the United States on the subject of land grants in California, after examination.

3. But admitting the competency of the governor to make the grant after May 13, 1846, the grant is illegal, because it does not contain the usual conditions, requiring *building within a year*, *cultivation*, *and inhabitancy*. By the regulations of 1828, "the governors of the territories are authorized (in compliance with the law of the General Congress of the 18th of August, 1824, and *under the conditions* hereafter specified) to grant vacant lands in their respective territories to such contractors, families, or *private persons*, whether Mexicans or foreigners, who may ask for them *for the purpose of cultivating and inhabiting them.*"† The governor, therefore, had no authority to grant lands, *except upon conditions* for the purposes of *cultivation* and *inhabitancy*, which he did not do.

Mr. Justice FIELD delivered the opinion of the court:

Three objections are urged by the appellants to the decree of confirmation.

1st. That the grant to the claimant was proved by secondary evidence.

2d. That the grant was issued by the Mexican governor of California, after the 13th of May, 1846; and

3d. That the grant does not contain conditions requiring cultivation and inhabitancy and the construction of a house within a year.

1. The first objection rests upon the fact that the governor who signed and the secretary who attested the grant were not called to prove its execution, and that the instrument was admitted upon proof of their signatures. This proof

* See "Record of Sessions of the Departmental Assembly" for 1846, appendix to appellant's brief in United States *v.* Bolton, pp. 221 to 253.

† Halleck's Report, appendix No. 5, § 1.

of their signatures by a third party is characterized by counsel as secondary evidence of the execution. Whether with strict accuracy it can be thus characterized is immaterial. Their testimony, or at least testimony establishing something more than the genuineness of their signatures, might have been required, if the usual preliminary proceedings to the issue of a Mexican grant in colonization had not been produced in the case from the archives of the former government in the custody of the Surveyor-General of California. In the absence of the preliminary proceedings, suspicion naturally arises as to the genuineness of any grant produced, and in such cases the strict proof mentioned in *United States* v. *Teschmaker*,* and in *Fuentes* v. *United States*,† may be demanded. But where the preliminary proceedings are preserved in the archives, and no doubts in consequence are created as to the genuineness and due execution of the grant, the proof of the signatures of the grantor and attesting secretary will, on appeal, be deemed sufficient by this court, unless objection is taken to its sufficiency in the first instance before one of the inferior tribunals. Such is the purport of the recent decision in the case of *The United States* v. *Augusola*.‡

2. The invalidity of grants issued by the Mexican governors of California, after the 13th of May, 1846, is asserted upon the declaration of Mexico, through her commissioners, who negotiated the treaty of Guadalupe Hidalgo, that no such grants were issued subsequent to that date. It is true that such declaration was made and embodied in the *projet* of the treaty originally submitted to our government. But as the clause containing it was stricken out by the Senate, it cannot be affirmed that the treaty was assented to by the United States on the faith of the declaration. Even if the case were different, and the treaty had been concluded in reliance upon the truth of the declaration, that fact could not affect the rights of parties, who, subsequent to the 13th of May, 1846, obtained grants from the governors of Cali-

* 22 Howard. 392. † Id., 443. ‡ *Ante*, p. 352.

fornia, whilst their authority and jurisdiction in the country continued. The rights asserted by the inhabitants of the territory to their property depend upon the concessions made by the officers of the former government having at the time the requisite authority to alienate the public domain, and not upon any subsequent declaration of Mexican commissioners on the subject.

The authority and jurisdiction of Mexican officials are regarded as terminating on the 7th of July, 1846; on that day the forces of the United States took possession of Monterey, an important town in California, and within a few weeks afterwards occupied the principal portions of the country, and the military occupation continued until the treaty of peace. The political department of the government at least appears to have designated that day as the period when the conquest of California was completed, and the Mexican officials were displaced; and in this respect the judiciary follows the action of the political department.*

3. The absence from the grant of conditions requiring cultivation and inhabitancy, and the construction of a house within a year, does not affect the validity of the grant. The omission to insert them probably arose from the fact that the grantee, together with his deceased brother, had been for years previous in the occupation and use of the premises. The object of the general colonization law of 1824, and the regulations of 1828, which were adopted to carry that law into effect, was the settlement of the vacant lands of the Republic, and to secure that object concessions like the one in this case were generally made subject to the conditions of cultivation and inhabitancy, although the conditions were not always inserted in the title-papers. It would be unnecessary to insert them when such cultivation and inhabitancy by the grantee already existed. In the grant to Sutter, the validity of which was affirmed by this court,† there was a similar omission, and no doubt for like reasons.

DECREE AFFIRMED.

* See United States *v.* Pico, 23 Howard, 326. † 21 Id., 170.

Statement of the case.

NISWANGER *v.* SAUNDERS.

1. The State of Virginia issued, in 1784, a warrant for a soldier of the Continental establishment, which was entered in her own borders south of the Ohio. The land having been surveyed, a patent issued; everything proceeding in ordinary form. But a part of the tract surveyed having been previously granted away by the State, never came into the soldier's possession or control, nor in any way benefited him—*Held*, in a case where the new entry and survey were free from objection on their face, that the warrants, which called for no specific tracts anywhere, were not so far "satisfied" or "merged" as that a new and effective entry and survey might not be afterwards made in another district open to the soldier, to wit, in the Virginia Military District in Ohio, and which would be protected against any subsequent location by the proviso of the act of March 2, 1807, providing that no location should be made on any tracts of the district which had been previously surveyed.
2. Where a survey of land, under the military rights referred to, is void for circumstances not appearing of record on its face, and which must be proved by extrinsic evidence from different sources, a second enterer is met by the statute, and cannot obtrude on the existing survey by a second location. *Saunders* v. *Niswanger* (11 Ohio State, 298), overruled.

SAUNDERS filed a bill in chancery, in the State District Court of Madison County, Ohio, to quiet the title to a tract of land in that commonwealth, in what is called the Virginia Military District, a region north and west of the Ohio, and which, by the act of cession of that territory to the United States and several acts of Congress, was reserved for the Virginia troops upon the Continental establishment of our Revolutionary war. The case was thus: In 1784, in the Book of Entries, kept by the proper officer in the State of Virginia, an entry, No. 70, was made in the name of David Ross & Co., on several military warrants, of one thousand acres of land on the Ohio River, in that part of Virginia then called the Green River Country, and now making Kentucky. The entry was surveyed, the survey returned and recorded; and on the 15th June, 1786, *a patent for one thousand acres of land was issued* by the Governor of Virginia to Ross accordingly; *the warrants themselves having apparently been returned into the land office in Virginia.* The warrants had described no specific tracts, but were addressed to the surveyor, authorizing him

Statement of the case.

"to survey and lay off, in one or more surveys," the quantity "set apart for officers and soldiers of the Commonwealth of Virginia."

It was afterwards ascertained that, in laying off and surveying this one thousand acres, a portion of the land, to wit, six hundred and forty acres of it, had been laid off within the bounds of a well-known body of lands that had been previously granted to Richard Henderson & Co.; and this being the older and better title, Ross *lost, or rather never acquired so much of his promised land;* that is to say, six hundred and forty acres. This fact being ascertained, a memorandum was subsequently made in the Book of Entries, opposite to entry No. 70,

"640 withdrawn, and entered in 197."

In 1790, Congress passed an act by which the soldiers of the Virginia line, on the Continental establishment, were authorized to obtain titles, on warrants issued to them, in what is now the State of *Ohio;* that is to say, in that region northwest of the Ohio River, between the rivers Little Miami and Scioto; and, in 1810, an entry was made in the office of the principal surveyor of the Virginia Military District in *Ohio* of six hundred and forty acres (the exact amount of Ross's patent covered by Henderson's prior grant), upon the *same warrants* upon which the patent issued in Virginia. On this entry a survey was made in 1817, which was returned and recorded; the Surveyor-General of the Virginia Military District within the State of Ohio certifying that the survey was founded on such and such warrants, which he specified by number and warrantee name, and adding, "That said warrants were entered originally in a thousand acre entry, No. 70, in the State of Kentucky, &c., and patented to said David Ross, by the State of Virginia, on the 15th of June, 1786; that said survey No. 70, *i. e.*, six hundred and forty acres of it, is *withdrawn*, by reason of its having been lost by interference with Henderson's grant, and entered and surveyed as above; that *said warrants were never before satisfied;* and that said patent on which this survey is founded is in my possession not satisfied." Thus things remained from 1816

till 1837, when a certain Samuel Saunders, the complainant below, entered a portion, to wit, four hundred and twenty-eight acres of this same land, which had been surveyed to Ross; the entry being surveyed on the day it was made. On the 20th November, 1838, a patent was issued by the United States to this *Saunders*, complainant as above stated, and on the same day another patent to Niswanger, defendant below, in whom had become vested the entry and survey of *Ross*. This patent to Niswanger, following the surveyor's certificate already mentioned, stated the number of each one of the warrants; "the same warrants,"—it went on to recite—"having been formerly located in the District of Kentucky, and patented by the Commonwealth of Virginia to the said David Ross, which has since been lost by interference with a prior claim, to wit, Henderson's grant, and the said warrants *withdrawn* and *re*located in the Virginia Military District of Ohio, upon *which* the said survey is founded."

A principal defence relied on to the bill below, was that even admitting some irregularity here, in the entry and survey of Ross of 1810, &c., yet as the case was one of great equity, and as an entry and survey had actually been made, the land thus entered and surveyed for Ross was protected from any subsequent entry and survey by others, in virtue of the proviso of an act of Congress passed March 2d, 1807, that Saunders's entry was accordingly void. This proviso enacted, "that no locations within the above-mentioned tract [the tract in Ohio] shall, after the passage of this act, be made on tracts of land for which patents had previously issued, *or which had been previously surveyed, and any patent which may nevertheless be obtained for land located, contrary to the provisions of this section, shall be considered as null and void.*" The proviso originally for three years had been subsequently extended.

The case being taken from the court where it originated to the Supreme Court of Ohio, that court, in *Saunders* v. *Niswanger*,* following the reasoning and argument in a case

* 11 Ohio State, 298.

previously decided by it, *Nisewanger* v. *Wallace*,* held that the warrants on which the entry of 1810, in Ohio, was made had been "merged and satisfied" in the previous patent for the 1000 acres in Virginia, and that this being so, they were nullities. The act of the surveyor, the court thought, did not improve the matter. It was a case of want of power in the officer. His authority was limited to a particular subject-matter. He could dispose of lands only upon specified evidence, to wit, a military warrant. Here he had done it on a "patent." The return or renewal of a warrant once surrendered was within the power of the Virginia legislature alone. The surveyor had no power to return or to renew, however equitable a claim for such return or renewal might be. By whom or by what authority the memorandum in the Virginia Entry-book, "640 *withdrawn*, and entered in 197," was made, did not appear. It was not certified as the official act of any officer in Virginia. If made by the surveyor in Ohio, the question of his power was to be settled. Had the entry of 1810 and the subsequent survey been a case of "irregularity" only, or even of "invalidity," the act of Congress of 1807 might cure it; but it was the case of a proceeding wholly void, a proceeding not based on a subsisting warrant at all, and therefore past the healing power of the statute. The court accordingly decreed that all that was done on Ross's warrants in 1810 and afterwards was a nullity, and that the land should go to Saunders or his heirs. On this part of the decision, which held the act of Congress of 1807 no protection, error was taken to this court, under the 25th section of the Judiciary Act of 1789,† which provides that a final judgment or decree in any suit in the highest court of law or equity of a State, where is drawn in question the construction of any clause of a *statute* of the United States, and the decision is *against* the title, right, &c., specially set up or claimed by either party under such statute, may be re-examined, &c., in *this* court.

The question in this court was, therefore,—as one question

* 16 Ohio, 557.

† 1 Stat. at Large, 85.

had been in the Supreme Court of Ohio—whether the entry of 1810 and the survey on it was or was not, under the facts of this case and the operation of the proviso of the act of 1807, to be treated as a nullity.

Mr. Stanberry, by brief, for the appellant: If this case were to be ruled by Ohio decisions and Ohio laws, we should have no standing in this court. But the case arises on a statute of the United States, and the decision below having been against the right set up under it, this court has final authority in the matter. The question rests on precedents here. In *Jackson* v. *Clark*,* an entry was set up by the defendants, on the land in controversy, made July 19, 1796. The plaintiffs attempted to overcome this entry, by showing that two prior entries had been made upon the same warrants, both of which had been patented. There was no evidence of any withdrawal of the two prior entries, or of any surrender or cancellation of the patents. So that the case presented the question of a re-entry on a satisfied warrant, satisfied by prior entries carried into grant without withdrawal or cancellation. The court sanctions the last entry, and holds, that however irregular or unauthorized it may have been, yet the land covered by it was effectually withdrawn from entry by any other locator. Our entry of 1810 stands upon a better foundation than the entry there held valid, for it appears that the 640 acres were "withdrawn" from the Kentucky entry; and that the 640 acres so withdrawn had been lost by interference with a prior claim.

The court below decided the case against us, on the ground that our entry of 1810 and the subsequent survey were nullities, and therefore not within the savings of the proviso. They are nullities, say the court, because warrants under which they were made, were satisfied by the original entry of 1784, and merged in the patent granted on that entry. Now, the first answer to this is, that to the extent of the 640 acres in Henderson's Grant, there was no satisfaction, and

* 1 Peters, 628.

Argument in support of the survey.

no merger. The matter may be plainly put thus: The State of Virginia granted to certain soldiers 1000 acres on warrants, to be satisfied by entry or location upon certain lands which the State then owned on the southwest side of the Ohio River. The warrants did not describe or grant any specific tracts. It happened that in laying off and surveying this 1000 acres, 640 acres were laid off within the bounds of a well-known tract of country called *Henderson's Grant.* Not an acre of land within that grant belonged to Virginia in 1784. It had been, prior to that date, granted by Virginia to Henderson. Besides this, by the very act of Virginia, passed in May, 1799, authorizing entries under military warrants, it was provided, that "no entry or location of land shall be admitted . . . . on the lands granted by law to Richard Henderson & Company;" the lands first taken.

What then was the effect of the entry of this 640 acres within Henderson's Grant? This court* has characterized such an entry as *void.* The language of Mr. Justice Catron, delivering the opinion in that case, is as follows: "If Clark's entry was made, however, on lands reserved from location by the act of 1799, then it is void, because the act did not open the land office for such purpose, nor extend to the excepted lands." In so far, then, as the entry of 1784 covered land in Henderson's Grant, it did not satisfy the warrants. It did not *quoad* the land in Henderson's Grant, pay the debt which Virginia had assumed to pay to her soldiers, for Virginia could only pay her debt or bounty from her own lands, and not out of lands belonging to others. Neither the entry, the survey, nor the patent of this 640 acres gave to Ross any title. The land not belonging to Virginia, could not be touched by the warrants, nor be conveyed or granted by patent. The whole thing was void from beginning to end, and the original right to the 640 acres remained untouched by satisfaction or merger.

In this state of things, upon finding that 640 acres of the entry was in Henderson's Grant, Ross was certainly entitled

* Porterfield *v.* Clark, 2 Howard, 76.

to relief in some form. The case was the case of a contract by vendor to convey, and a surrender of the contract upon a conveyance made and received in good faith, but covering land not intended to be conveyed and belonging to another. Under such a mistake, the contract not having been satisfied or merged in the conveyance—certainly not in a court of equity—our right was to have 640 acres of some other land belonging to Virginia and subject to entry. How then were we to be relieved? There was some course fit to be pursued, and what course more fit than the one that was pursued. Ross appeared before the principal surveyor of the military district, and made proof to the satisfaction of that officer, that 640 acres of the entry of 1784, fell within Henderson's Grant. Thereupon the surveyor allowed him to withdraw or amend the entry of 1784 to the extent of the 640 acres, and to re-enter the same quantity on vacant lands subject to entry in the State of Ohio. This was our entry of 1810, which is called a nullity. It is too late to question the verity of the memorandum that the former entry was "withdrawn." We must take it as established, that the entry of 1810 was made upon warrants never before satisfied.

It has been shown already by the case of *Porterfield* v. *Clark*, that the entry on Henderson, which is the foundation of all this satisfaction and merger, was itself a nullity. When we begin with a void act, it is of no moment how much is done in the way of mere confirmation. The cases in this court go to that extent. In *Stoddard* v. *Chambers*,* it is said: "The issuing of a patent is a ministerial act which must be performed according to law. A patent is utterly void and inoperative which is issued for land that had been previously patented to another individual." At the same time we may concede that the patent was good as to the 360 acres outside of Henderson; for a patent may be good in part and void in part.†

2. The proviso in the act of 1807, was intended to have a

* 2 Howard, 284. See also on this point, Polk's Lessee *v.* Wendell, 9 Cranch, 99; Patterson *v.* Winn, 11 Wheaton, 380.

† Patterson *v.* Jenks, 2 Peters, 216, 235.

curative operation; for no legislation was necessary to secure a valid entry and survey from a subsequent location. It was, therefore, intended to protect and save such entries and surveys as might otherwise be lost. But the range of the proviso was matter of doubt, and whether it should protect *all* surveys, or only such as had some equitable foundation, was soon made a question. Five leading cases in this court have settled all these doubts and fixed the construction. The case first in order of time, was *Taylor* v. *Meyers.** In that case the first survey had been withdrawn before the second location was made. The court held that, after the withdrawal, there was *no* survey upon which the proviso could operate. *Jackson* v. *Clark*,† already noticed, was next in time. In this case an entry and survey had been made on warrants which had been satisfied by prior location, still unwithdrawn and subsisting. The court held that the survey was protected by the proviso, because, although the warrants were satisfied by the first location, yet it was in the power of the locator to withdraw them at any time from the first location, and so make good the second location. Marshall, C. J., says: "If it be conceded that this proviso was not intended for the protection of surveys which were, in themselves, absolutely void, it must be admitted that it was intended to protect those which were defective, and which might be avoided for irregularity. If this effect be denied to the proviso, it becomes itself a nullity." Again, "A survey made by the proper officer, professing to be made on real warrants, bearing on its face every mark of regularity and validity, presented a barrier to the approach of the locator, which he was not permitted to pass, and which he was not at liberty to examine." In our case, the entry and survey of 1810, were made by the proper officer, professedly on real warrants, and with every mark of regularity. If the entry and survey in *Jackson* v. *Clark* fell within the protection of the proviso, how can ours be excluded? *Lindsey* v. *Miller*‡ comes next. In this case, indeed, it was held that

* 7 Wheaton, 23. † 1 Peters, 636. ‡ 6 Id., 666.

the proviso was not protection for a survey made under a State line warrant. But our entry and survey were not made under State line warrants, nor without semblance of authority; and Ross was guilty of no fraud and was in the lawful pursuit of a valid title. In *Galloway* v. *Finley*,* the next case, the court gave a larger operation to the proviso than had been stated in *Lindsay* v. *Miller*. Mr. Justice Catron, delivering the opinion, says: "It is insisted for the appellant that the section had reference to imperfect and not void titles. The legislature merely affirmed a principle not open to question, if this be the true construction. Had an effective patent been issued, the government would not have had any title remaining, and a second grant would have been void of course. Something more, undoubtedly, was intended than the protection of defective, yet valid, surveys and patents. This is not denied, but the argument insists only irregularities were intended to be covered. . . . . The statute is general, including by name all grants, not distinguishing between void and valid, and the plainest rules of propriety and justice require that the courts should not introduce an exception, the legislature having made none." The learned judge then refers to *Lindsay* v. *Miller*, and adds, in reference to that case: "But had the claimant been entitled to the satisfaction of his warrant in the military district, in common with others for whom the government held as trustees, the case might have been very different, even had the entry and survey been invalid." *McArthur* v. *Dun*† follows, and affixes the enlarged operation of the proviso as declared in *Galloway* v. *Finley*, and says, an entry and survey in the name of a deceased person, is within the scope of the proviso, notwithstanding such an entry and survey had been repeatedly held to be void.

It was in reference to these decisions that the Supreme Court of Ohio held, in *Stubblefield* v. *Boggs*,‡ "that by the proviso to the act of 1807, re-enacted from time to time, it has withheld from location all lands previously patented or sur-

* 12 Peters, 298. † 7 Howard, 264. ‡ 2 Ohio State Reports, 219.

veyed, whether the entries and surveys are valid or void, and has declared that any patent that may be obtained in virtue of a subsequent location of lands covered by a subsisting survey or patent, shall be null and void. Hence, it is of no consequence, whether the previous entry and survey have any validity or not. Admit that they are void, and that consequently the title both legal and equitable remains in the government, yet the subsequent location is a nullity, because Congress has so declared it."

Mr. Ewing, by brief, contra: The patent recites that the same warrants upon which Ross's entry of 1810 and survey were made, had been previously located in the District of Kentucky, and patented by the Commonwealth of Virginia to said Ross, in trust, &c., and lost by interference with a prior grant to Henderson, and withdrawn and relocated upon the lands in question. The fact, therefore, that the warrants under which the entry and survey were made, had been previously located, surveyed, and patented in Kentucky, is not open to controversy, and the question turns upon the legal effect of the fact. This we claim was to render the warrants *functi officio*, and the entry and survey in question made under color of them, a nullity. But it is a part of the recital of the patent that the entry in Kentucky was *withdrawn*. This recital is legally untrue, being legally impossible after the entry was carried into grant, in such way as to restore vitality to the warrants and admit of their being afterwards located and patented in the Virginia military district, in Ohio. The State of Virginia has ever retained and exercised her sovereignty over the subject of entry, survey, and patent of lands *south* of the Ohio, in satisfaction of warrants for military services, and the warrants in question, according to the laws of that State, were satisfied and withdrawn from the existing claims against her. Virginia has passed no law reviving and setting up warrants in cases where the land patented is lost by interference, or from any other cause. It has never been held, in the courts of that State, that the holder could withdraw and relocate them elsewhere *after sur-*

vey and *before patent.* No one would contend that in that State there could be a revival of the warrants *after patent*, and a consequent relocation. In Kentucky it has been held that there cannot be a withdrawal and relocation *after* survey, even *before* patent.* The language of Chief Justice Marshall in one case,† is striking. He says, "The military warrants to which these questions relate, originate in the land law of Virginia. The question whether a warrant completely executed *by survey* can be withdrawn and so revived by the withdrawal as to be located in another place, has never, so far as I know, been decided in the courts of that State. In Kentucky, where the same law governs, it has been determined that a warrant once carried into survey, with the consent of the owner, cannot be re-entered and surveyed in another place. In Ohio, it has not been understood that the question has been decided."

Do the subsequent acts of Congress confer such right as is claimed? The first that throws any light on this subject is the recital in the first section of the act of August 10, 1790,‡ which is as follows:

"And whereas, the agents for such of the troops of the State of Virginia, who served on the Continental establishment in the army of the United States during the late war, have reported to the executive of said State, that there is not a sufficiency of good land on the southeasterly side of the Ohio River, according to the act of cession from the said State to the United States, and within the limits assigned by the laws of said State, to satisfy the troops for the bounty lands due them in conformity to the said laws; to the intent, therefore, that the *difference* between what has already been *located* for said troops, on the southeasterly side of said river, *and the aggregate of what is due* to the whole of said troops, may be located on the northwesterly side of said river, and between the Scioto and Little Miami Rivers, and stipulated by the said State," &c.

* Taylor *v.* Myers, 7 Wheaton, 23; Withers *v.* Tyler, 2 Marshall, 173; Taylor *v.* Alexander, 3 Id., 501.

† Taylor *v.* Myers, 7 Wheaton, 24.

‡ 1 Stat. at Large, 183.

This recital shows the intent to provide for warrants which had *not* been *located*, not for warrants which had been *located*, *surveyed*, and *patented*. It excludes warrants which have been *located*, leaving the lands in Virginia and the laws of Virginia to provide for and take care of those warrants when lost by interference.

Next is the act of June 9, 1794,* which provides that the person entitled to bounty lands in Ohio, "shall, on *producing the warrant*, or a *certified copy thereof*, *and a certificate under the seal of the office where the said warrants are legally kept*, that the same, or a part thereof, remains *unsatisfied*, and on producing the survey, agreeably to the laws of Virginia, for the tract or tracts to which he or they may be entitled, as aforesaid, to the Secretary of the Department of War, such officer and soldier, his or their heirs or assigns, shall be entitled to and receive a patent for the same," &c. This act excludes all warrants which have been merged in patents.

This party did not produce the warrant. He could not have done it, for the warrants were merged in a patent. Neither did he produce a certified copy, and a certificate under the seal of the office where the warrants were legally kept, that the same, or a part thereof, remained *unsatisfied*. Nor could he have done it. These warrants were legally kept in the office of the Register of Lands in Virginia, and were filed, we know, as *satisfied warrants*.

Next comes an act of May 13, 1800,† the first section of which provides for the issuing of patents on surveys which have been made "*on warrants*" issued from military service; not *on patents* heretofore issued in Virginia on such warrants. The idea carried through the other acts cited is maintained in this. The patent of the United States issues on a survey made upon an *unsatisfied warrant*. The second section provides for interfering claims within the district:

"SEC. 2. That in every case of interfering claims, under military warrants, to lands within the territory *so reserved by the*

* 1 Stat. at Large, 394. † 2 Ib., 80.

State of Virginia, when either party to such claims shall lose, or be evicted from the land, every such party shall have a right, and hereby is authorized, to withdraw his, her, or their warrant, respectively, to the amount of said loss or eviction, and to enter, survey, and patent the same on any vacant land *within the bounds* aforesaid, and in the same manner as other warrants may be entered, surveyed, and patented."

It is limited in its terms to interfering claims under military warrants to "*lands within the territory so reserved;*" not to lands out of said territory. A conflict out of the territory did not fall within the cognizance of the United States; they had nothing to do with it; no jurisdiction over it; no means of ascertaining it. It was a matter for the States in which it occurred to settle in their own way. Consequently Congress has made no provision for it, but has provided for lands within the district for which they held the trust. The right to relocate where the land has been lost by interference is of statutory origin. This statute does not authorize the re-entry where the interference occurred *out of the district.* Such re-entry, therefore, is not *sustained*, but, on the contrary, is impliedly *forbidden* by this statute. You *may* re-enter it if your land is lost by interference *in the district.* You may *not* if lost out of it.

Is it not thus shown that the warrants upon which the Ross entry of 1810, and the subsequent survey and patent were founded were, at the time the entry was made, *functi officio;* satisfied in law and surrendered to the State of Virginia by a previous entry and survey fully carried into grant in the Kentucky district? In legal effect, were they not as effectually satisfied as they would have been if no interference with Henderson's Grant had ever happened, and the lands located in Kentucky remained in the possession and enjoyment of the assignees of Ross?

If this is so, the remaining question is: Was this survey of 1810, and the subsequent survey, predicated—as we assume it was—upon defunct and satisfied warrants, a survey within the meaning of the proviso of the act of 1807, and

one in virtue of which the lands included in it were withdrawn from the unappropriated residue, subject to entry in the district, and the entry and survey of the same lands in behalf of Saunders, rendered void? This question is so fully considered, on both principle and authority, in the opinion of the Supreme Court of the State of Ohio, in the present case, reported among the decisions of 1860, that we deem it unnecessary to do more than to request that reference be had to the Reports.

Mr. Justice CATRON delivered the opinion of the court; and after stating facts, and referring to Ross's entry of 1810, proceeded thus:

This entry was surveyed and the survey recorded in 1817. The entry and survey are regular, and free from objection on their face; they recite the warrants, and the boundaries of the survey are distinctly defined. It is not indicated on the records of the surveyor that the warrants had been merged in the first entry and the Virginia patents, nor that the warrants were absent when the entry and survey were made. In this condition Ross's title stood till 1837, when Samuel Saunders entered four hundred and twenty-eight acres of the land surveyed for Ross. Saunders's entry was surveyed on the same day it was made. On the 20th day of November, 1838, a patent was issued by the United States to Saunders, and on the same day a patent issued to Niswanger, the assignee of Ross's entry and survey. This patent recites the fact that a previous patent had been issued by the Commonwealth of Virginia, founded on warrants, in part, that were withdrawn because of the loss by the interference with Henderson's Grant in the Kentucky district.

A principal defence relied on by the respondents was, that the act of Congress of 1807 withheld the land surveyed for Ross from location by Saunders; that his entry was void, and that the bill should be dismissed for this reason. But the Supreme Court of Ohio held that the act of 1807 was no protection to Ross's survey, and decreed that the land should be conveyed to Saunders's heirs; and on this part of the case

an appeal was prosecuted to this court, under the twenty-fifth section of the Judiciary Act.

The record shows that the act of Congress was drawn in question and relied on as a defence, and that the defence was rejected by the State court.

The act of 1807, which we are called on to construe and apply to the facts coming within our cognizance, gives the further time of three years for making locations of lands in the military district of Ohio, and five years for the return of surveys and warrants to the office of the War Department; and then provides, "That no locations, as aforesaid, within the above-mentioned tract, shall, after the passage of this act, be made on tracts of land for which patents had previously issued, or which had been previously surveyed; and any patent which may, nevertheless, be obtained for land located contrary to the provisions of this section, shall be considered as null and void."

By subsequent acts of Congress, further time was given to return surveys, so that Ross's survey is not open to objection for not having been made and recorded in time, nor was any objection made in the court below on this ground; but the decree proceeded on the assumption that the warrants on which the entry and survey of Ross purported to be founded, were merged in the previous patent of one thousand acres; and that there were no valid warrants to sustain the survey, which was made without authority, and void; and therefore could claim no protection by virtue of the act of 1807.

Ross's entry and survey were made by the proper officer and in the proper office, purporting to be made on real warrants, and bearing on their face every mark of regularity.

When a survey is void for circumstances not appearing of record on its face, and which must be proved by extrinsic evidence from different sources, then a second enterer cannot be heard to adduce such proof, because he is met by the statute, and not allowed to obtrude on the existing survey by a second location. He can obtain no interest in the land to give him a standing in court. The government can justly say to him, "You are a stranger and must stand aside; this

land is withdrawn from location; you cannot be heard." If the grantee, Ross, lost part of his land by Henderson's grant, and his warrants were merged by this misfortune, equity required that Congress should declare his survey to be valid by a curative act. This is the principle governing the decisions in the cases of *Galloway* v. *Finley* (12 Peters, 294), and *McArthur* v. *Dun* (7 Howard, 264), where the entries, surveys, and patents had been made to dead men, and were void of course for want of a grantee; yet this court held that the act of 1807 applied, and that a second entry on the first survey was void. In the case of *Stubblefield* v. *Boggs* (2 Ohio State Reports, 216), the same doctrine is maintained.

We hold that the survey of Ross was protected, and that Saunders's entry, survey, and patent were void, and order that the judgment of the Supreme Court of Ohio be reversed, and that the cause be remanded to that court, to be proceeded with in conformity to this opinion.

REMANDED ACCORDINGLY.

UNITED STATES *v.* HALLECK ET AL.

1. Where a decree of the Board of Commissioners, created under the act of March 3d, 1851, to ascertain and settle private land claims in the State of California, confirming a claim to a tract of land under a Mexican grant, gives the boundaries of the tract to which the claim is confirmed, the survey of the tract made by the Surveyor-General of California must conform to the lines designated in the decree. There must be a reasonable conformity between them, or the survey cannot be sustained.
2. When such decree describes the tract of land, to which the claim is confirmed, with precision, by giving a river on one side and running the other boundaries by courses and distances, a reference at the close of the decree to the original title-papers for a more particular description will not control the description given. The documents to which reference is thus made, can only be resorted to in order to explain any ambiguity in the language of the descriptions given; they cannot be resorted to in order to change the natural import of the language used, when it is not affected by uncertainty.
3. When a decree gives the boundaries of the tract, to which the claim is confirmed, with precision, and has become final by stipulation of the

United States, and the withdrawal of their appeal therefrom, it is conclusive, not only on the question of title, but also as to the boundaries which it specifies.

Messrs. Justices CLIFFORD, MILLER, and SWAYNE, dissented in this case.

APPEAL by the United States from a decree of the District Court for the Northern District of California, approving the survey of a tract of land claimed under a Mexican grant, confirmed to Folsom, deceased. The case was thus:

In 1844, William A. Leidesdorff presented his petition to the then Governor of California, for the grant of a tract of land, the petition representing as follows:

That being owner of a great number of large cattle, and desirous of owning in fee a place to take care of them, he has found one vacant, bounded by the lands of Señor Sutter, *as shown by the annexed map, which he duly transmits.* Said place is on the bank of the American River, and consists of *four leagues in length towards the east, and two in breadth towards the south*

Accompanying this petition was a diseño or map of the land, and a certificate from Sutter, local magistrate, that the same was "then unoccupied, and was that represented *in the map.*" The map, in this, as in most of the California cases, was but a rude sketch, showing but the general position and outline of the land asked for; and herein, that is to say, in its want of full and exact delineation—as will be seen hereafter—was one of the difficulties of the case. The petition, map, and certificate having been presented, Jimeno, Secretary of State, made report, October 1, 1844, to the governor, as follows:

"The land solicited is vacant, as shown by the annexed certificate; and it appears *by the map, to be so well marked out,* and so near to the place of Señor Sutter, that I think there is no difficulty to your excellency's granting to the person interested, the land petitioned for."

The provisional concession of the governor, Micheltorena, dated October 8, 1844, was subsequently made. In this, the governor declares Leidesdorff "owner in fee of the land

THE UNITED STATES

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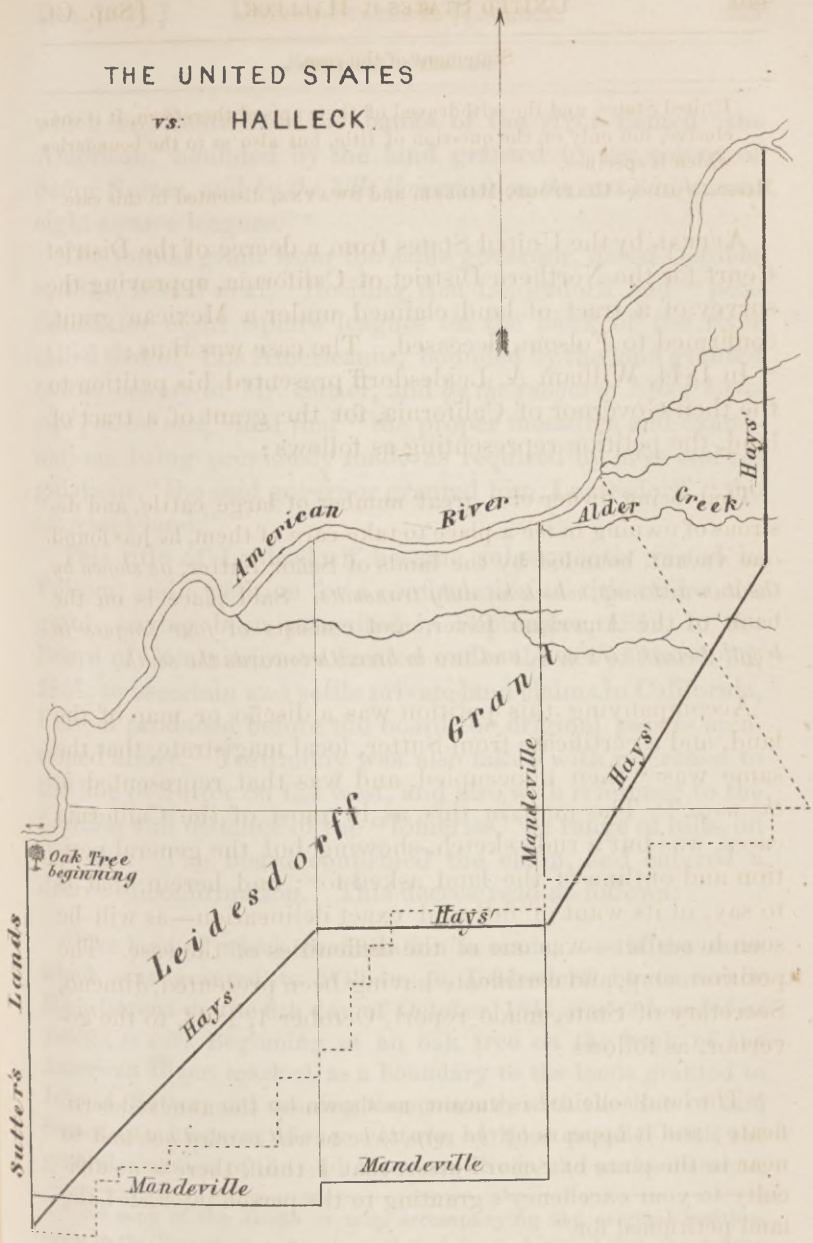


which is situated on the banks of the river named 'the American,' bounded by the land granted to the colony of Señor Sutter, and *by the hills* (*lomerias*) *on the east;* in extent eight square leagues."*

The formal grant from the same governor, dated October 8, 1844, issued next. Reciting that Leidesdorff had "petitioned for eight square leagues on the bank of the river called that of 'Los Americanos,' bounded by the land granted to the colony of Mr. Sutter, and *by the ranges of hills* ('*lomerias*') *on the east*," and that "the proper measures and examinations being previously made as required by laws and regulations," the said governor granted him, Leidesdorff, "the aforesaid land."

This title of Leidesdorff became subsequently vested in Folsom, and a petition for a confirmation of title under the grant, having been presented in September, 1852, to the Board of Commissioners created under the act of March 3d, 1851, to ascertain and settle private land claims in California, Folsom produced before the board the original papers mentioned above. Testimony was also taken with reference to the line of Sutter on the west, and also with reference to the position and distance of the "lomerias," or range of hills, on the east. The board confirmed the claim, and entered a decree of confirmation. This decree read as follows:

"The land of which confirmation is made, ... is the same which was granted to William A. Leidesdorff by Governor Micheltorena on the 8th day of October, 1844, *and is bounded as follows, to wit:* Beginning at an oak tree on the bank of the American River, marked as a boundary to the lands granted to John A. Sutter, and running thence south with the line of said Sutter two leagues; thence *easterly*, by lines parallel with the general direction of the said American River, and at the distance,

* No copy of the diseño or map accompanying the original petition, came to the Reporter's possession; though he understood that the "*lomerias*" on the east were not designated upon it. He *supposes*, that in fact, they lay somewhat in the direction of the *dotted* lines, indicating one survey of the tract as that line runs northwesterly and above the mouth of Alder Creek, towards the American River. On the diseño this river ran nearly west.

as near as may be, of two leagues therefrom, four leagues, or so far as may be necessary to include in the tract the quantity of eight square leagues; thence northerly, by a line parallel to the one above-described, to the American River; thence along the southern bank of said river, and bending thereon to the point of beginning. *For a more particular description, reference to be had to the original grant and to the petition and map contained in the espediente.*"

The case was removed by appeal to the District Court of the United States for the Northern District of California. In March, 1857, the attorney-general gave notice that no further appeal would be prosecuted by the United States, and upon stipulation of the district attorney, pursuant to such notice, the court, April 30th, 1857, "on motion of the district attorney, ordered, adjudged and decreed that the claimants have leave to proceed under the decree of the land commission heretofore rendered in their favor as under final decree."

Previous to the entry of this order, Folsom died, and his executors, Halleck and others, being substituted in his place, the subsequent proceedings were carried on in their names.

In May, 1857, a survey was made of the tract confirmed, by directions of the Surveyor-General of California, and was approved by him. From the name of the officer this survey is called in the argument of counsel "the Hays survey." This survey was forwarded to the Commissioner of the Land Office at Washington, in order that a patent might be issued upon it. The commissioner approved of it; but the Secretary of the Interior, to whom the case was taken, disapproved it; and in September, 1858, the case was sent back to the surveyor-general for a new survey. So far as the Reporter understood a case which he did not hear, the objections to the Hays survey in the secretary's mind was, that it ran on the east far beyond that point where the lomerias, fixed in the original grant by Governor Micheltorena, were supposed to be; this range having, on the diseño or map attached to Leidesdorff's original petition, been indicated as

being near a stream, not named, indeed, by Leidesdorff, but which was assumed by the secretary to be Alder Creek. The surveyor-general, accordingly, made and approved a new survey. From the name of the officer under whom this second survey was made it is distinguished as "the Mandeville survey." It was based apparently on instructions sent down from the Land Office on dissatisfaction with the former survey; these instructions saying, "that the decree of confirmation resting upon the *diseño and grant* must be satisfied by the survey; first, by adhering to Sutter's line on the west, the American River on the north, *and the foot-hills* near the junction on the east of a creek distinctly laid down on the diseño; that the said creek is held to be identical with Alder Creek*, . . . the said hills running near the junction of said creek, and in a southeasterly direction. That these are the *natural* features which must *control* the longitudinal extension of the grant. But," the instructions went on to say, "as quantity was petitioned for, granted, and confirmed, the said quantity may be taken by *increasing* the *depth* of the survey, so as to comprise the eight square leagues; thereby giving the location a more *compact* form." The differences of the survey and the difficulties of the case will be exhibited by reference to the map inserted in the report.

On the 22d of November, 1859, the District Court, acting upon the impression that it had jurisdiction to supervise all surveys of confirmed claims under Mexican grants, under the decision of the Supreme Court, in the *United States* v. *Fossatt*,† ordered the new survey made by Mandeville to be returned into court, and authorized the claimants to file exceptions to it. The survey was accordingly returned, and exceptions were filed by the claimants and purchasers under them.

After the passage of the act of June 14, 1860—by which new powers were given to the District Courts of California, with authority to order into court *any survey*, and to decide

* The secretary thus translated the word "lomerias;" assuming it apparently to mean smaller hills at the base of a higher range. REP.

† 21 Howard, 445; and see *ante*, 104.

on it—a monition was issued for notice to all parties, claiming any interest in the survey and location, to appear before the court, on or before September 26, 1860, for the protection of such interests, or their defaults would be taken. On the return of the monition, counsel appeared in behalf of the United States, and also counsel for the claimants, and also counsel for the Natoma Water Company, a corporation created under the laws of California. The default of all other parties not appearing was entered. Folsom subsequently filed exceptions to the survey. Among the exceptions filed to it in his behalf were these:

"1. Because it does not conform to the description of the land confirmed as contained in the decree of final confirmation.

"2. Because the grant calls for four leagues in length upon the American River, and two leagues in width from north to south, and the said survey gives the said tract less than two and one-half leagues in length on said river, and makes the same more than three leagues in width from north to south; thereby entirely changing the form of said tract from the form in which it was granted.

"3. Because the claim was regularly surveyed, and the survey thereof approved by United States Surveyor-General Hays, in May, 1857, which survey was in conformity with the final decree of confirmation.

"4. The survey of Mandeville ought to be rejected, and the survey heretofore made by Hays ought to be adopted, because the latter locates said eastern boundary in pursuance of the final decree, and the former ignores the said decree altogether, and professes to follow the arbitrary and illegal instructions of the Secretary of the Interior, said instructions being in conflict with said final decree, and with the evidence in the case filed before the land commissioners before whom the said eastern boundary was a question litigated by both parties hereto, and settled by the said final decree."

The United States also, by Mr. Williams, "acting in this case as United States District Attorney, at the request of Mr. Benham, who was once counsel for some of the claimants," filed several objections, embracing in substance the following:

1st. That the survey was not according to the final decree of confirmation entered in the above-entitled cause, or to the grant and other title-papers upon which that decree was founded, or to the evidence of the witnesses in the said cause, but in violation thereof is made to extend more than two leagues south of the American River, and thereby to embrace public lands of the United States not rightfully included within the limits of the said claim.

2d. That the survey wrongfully includes lands not at any time claimed by Folsom or his representatives, but, on the contrary expressly disclaimed.

3d. That it is erroneous, because the land granted and confirmed was a tract bounded on the west by Sutter's eastern line; on the north by the American River; on the east by Alder Creek and the neighboring low hills; and on the south by vacant lands; the southern line to be at a distance of two leagues from the river, as near as may be, and run on subdivision lines, so as to meet the meanderings of the river. Whereas the said survey does not regard these boundaries, but shows a southern line at right angles with the western line, disregards the meanderings of the river, and thereby includes within its lines a much larger quantity of land than was granted, and also includes many settlers under the United States, who have so settled and made improvements in good faith long before the said official survey was made.

Upon these exceptions, evidence was taken, and in November, 1861, the District Court set the survey aside, and ordered a new one to be made.* A rehearing being granted, the original survey made by Hays was approved and confirmed by the court. The decree of approval was entered August 2d, 1862. From this decree the present appeal was taken.

Messrs. Della Torre and Wills, for the appellants: The question strictly before the court is as to the correctness of the

* This new survey, of no practical interest in the case, is yet marked on the map inserted in the report as part of the history, and as showing the diverse forms that surveys of California lands, under the same grant, sometimes take. It is indicated by the dotted line without a name along it.

location of the land as shown by the Hays survey; although the record also contains sufficient matter to enable the court to direct the correct manner of survey and location, if the United States succeed in showing that the Hays location is incorrect. We insist that the survey and location of the land, as shown by the Hays plat, are incorrect, and must be set aside.

It is the duty of the one who comes here for confirmation of a land claim, not only to establish the validity of his title to some land, but also to point out the land, and identify it with the tract conceded him by the former government of California. It is enough for us to show that the land claimed is not that which was in contemplation of the granting power. It is not for the government to show how the land should be located; that is a matter for the claimant to demonstrate.

The Mandeville survey was made in general conformity with the directions, mentioned, *ante*, on page 443, and sent down by the Land Office to the Surveyor-General of California, when the Hays survey was disapproved, and a glance at that and the Hays survey will show the chief difference of opinion in this matter between claimants and the government.

When Leidesdorff applied for land, and the reports thereon had been made, Governor Micheltorena made his provisional concession of a tract "situated on the banks of the river named the American, bounded by the land granted to the colony of Señor Sutter, and by the hills on the east." The initial point and two lines are here fixed, and have never been disputed, to wit: the point on the river where the Hays survey begins, the river in its extension, and the line running north and south from the initial point, which has always been treated on all sides as coterminous with the lands of Sutter's colony. It is evident that the location cannot be extended beyond these assigned boundaries. There is also a terminus towards the east, beyond which the location cannot be extended, because the titles made by the granting power went no further. This is the line of the "lomerias." It would not matter even if Leidesdorff had

expressly asked for land beyond these bounds, for we are to seek not what he desired to get, but what the governor chose to give. In the documents of title which have been presented as emanating from that officer, the "lomerias" are laid down by him as the extreme limits of the land towards the east. They are laid down in the same instruments and with the same particularity as are the American River and the lands of the colony of Sutter. We therefore contend that the concession can no more be stretched across the "lomerias" than across any other of the particularized boundaries.

Then we have three of the inclosing lines of the granted tract,—the western, northern, and eastern. The fourth line is not fixed in the grant, and is dependent upon quantity for the place in which it shall run. It is therefore the discretionary line, all the others being fixed, and not to be moved, even if there should be difficulty in deciding upon the location of this southern line. By the express terms of the grant, then, it must be satisfied out of land lying southwardly on the American River, and between the lands of Sutter's colony and the "lomerias" on the west and east, respectively, extending southwardly to make up the quantity which may be held to have been granted. For the present we will presume that to have been eight leagues.

Having settled *what* are the fixed boundaries of this land, we next inquire *where* those boundaries are.

There is no dispute about the northern and western lines, but we have to ascertain where are the "lomerias" which are the eastern boundary, and here there is contention. We assert they are to be found in a row of hills arising a short distance from the mouth of Alder Creek, at its junction with the American River, and running thence in a southerly or southeasterly direction towards the Cosumnes River, the next stream which flows westward from the Sierra Nevada.

We shall be met with the objection that we have no right to look into this matter at all; that under the circumstances, we are confined to such *description* of the land as is given in the decree of the land commission, and that from its decree

the Hays survey may be constructed. Now, it will be said, that this description is conclusive and exhaustive of the description of the land; that in its location we can only seek for such land as is therein described; and as the board excluded the "lomerias" from contemplation in describing the tract, we are, in this proceeding, estopped from any examination as to *what* they are or *where* they are. This is a strange argument. We must presume, in the words of the judge below, when he rejected this survey, "that neither in this case nor in any other did the board mean to confirm the claim for any other tract than that described in the grant, and delineated in the diseño." Can we presume that the board deliberately excluded as one of the boundaries a natural landmark, called for by every one of the instruments of title produced by the claimants as issued to the original grantee? But in setting up this argument claimants have not quoted the whole of the decree, for immediately after the part above recited the decree goes on continuously to say, "*For a more particular description, reference to be had to the original grant, and to the petition and map contained in the espediente.*" This must be conclusive. Is not this latter quotation as much a part of the decree as the former? Has not the reference to the description in the grant and espediente, &c., the same effect as if the words had been set out in the decree? And are we now, when in search of the "more particular description," to be estopped from reading the documents to which the commission has referred us? This would suit the claimants, because by disregarding the "lomerias," as unnamed by the decree, they might stretch their claim *beyond* the limit assigned by the grant. But the reference to the grant makes the decree, in law, precisely the same as if the boundary "lomerias" was fully and particularly, and in words, inserted therein, for "*verba illata inesse videntur.*" In truth, the board intended in this case, as in all others, to give a general description of the land, leaving it for after-proceedings by the surveyors or other proper authority to compare and assimilate the land as it exists in nature with its description in the title-papers.

[The counsel here proceeded to comment upon the evidence in the case. They noted particularly the call in the decree of the board for an "easterly" course after the lines should leave Sutter's land; and argued that as this was to be "parallel with *the general* direction of the said American River," it was obvious that the exact course of that river was not well known to the board, for that the line could not run "east" and be parallel to the river at all. Undeniably, the line was to be an "easterly" one; and this being so, rendered necessary a change in the other lines east and west, so as to conform with the general intent of the board respecting the southern boundary. The counsel also argued from the evidence that the "lomerias"—hills on the east—were situated west of Alder Creek and the eastern line run by Hays; and that from the whole evidence, and especially from original title-papers and map, it was clear that the land granted to Leidesdorff, and described in the espediente, is contained within the bounds of the Mandeville survey. In reply to a question from the court, in what way they reconciled their apparent inconsistency in taking positions in support of the second or Mandeville survey in this argument, which were the reverse of the objections which had once been urged in the name of the United States in the court below, they answered, that the objections below were not those of the United States, but of individual claimants; that this form of proceeding was upheld by the district judge, who considered these proceedings upon surveys in the nature of proceedings *in rem*, and held that parties claiming interests in the subject-matter should be allowed to use the name of the United States to bring their claims to the notice of the court;* that the objections, accordingly, though put forward in the name of the United States, were, in point of fact, urged in behalf of settlers claiming part of the tract surveyed as public land and open to settlement.]

* See *post*, The United States *v.* Estudillo. REP.

Argument for the respondent.

A. P. Catlin and J. S. Black, for respondent:

1. The decree of the land commission in this case, by the dismissal of the appeal and the decree of the District Court of April 30, 1857, became final and conclusive as to all the questions decided by it. Under the act of 1860, the District Court did not acquire jurisdiction to open or reform the decree, but was confined to the duty of seeing that the surveyor ran the lines according to the decree.

2. The Hays survey is in conformity with the lines laid down in the decree. But the government contends that the said lines do not correspond with the original documentary title-papers; that the boundary lines laid down in the decree of confirmation, do not correspond with the boundaries named in the grant and other documentary title-papers, and consequently that a new decree, corresponding with such boundary, ought to be made.

I. If the descriptive portion of the decree can be disposed of upon such grounds, there would be nothing final in any branch of the case. The inquiry might be pushed still further, and the authority of the governor and all other vital questions upon which the commission passed, be laid bare for inspection and readjudication.

II. The court must construe the decree upon its face, when it is clear and plain, and the matters upon which a decree are founded are not resorted to for the purposes of construction, unless in the terms of the decree there is some want of clearness or some difficulty in understanding it. Understanding it is construing it, and if we understand it, there is no need of groping back into the darkness out of which the light of the decree was created. When the decree is understood, then it is construed. But the construction for which the appellant's counsel contend, is the power to construe the meaning of the original parties to the grant, in other words, to exercise the same power which the Land Commissioners exercised, and to review as upon appeal the judgment of that tribunal, and to make a new decree, in so far as it becomes necessary to illustrate the difference of opinion which may exist between the District Court under

the act of 1860, and the Land Commission under the act of 1851. There is no telling to what extent this mode of construction might be carried. It is equal to the power of making a new decree, and of reversing the judgment of a court, the meaning of which it pretends only to construe. It is said that the form of the tract produced by the lines of the decree show that the board, by the term "easterly," applied to the general course of the southern boundary, evidently intended that line should run more nearly east than it does in the Hays survey, and that the board must have supposed that the general course of the river was east, and that in order to carry out the meaning of the board we must change the course of the other lines on the east and west, in order to conform with the supposed intention of the board respecting the southern boundary. The assumption that the board did not understand the course of the river, is without foundation, and is contradicted by the terms of the decree itself. The peculiar manner in which the southern boundary lines are constructed, show that the board perfectly well understood that the course of the river was circuitous and irregular, and that its general course was not east. After first directing the starting-point to be the oak tree, and the first line to run from thence "south" two leagues, it says, "thence 'easterly,' by lines parallel with the general direction of the said American River, and at the distance, as near as may be, of two leagues therefrom." The course provided by this language is the course of the river by its bends and turns, and so the line is to be divided in parts to accommodate itself to these bends and turns, otherwise the board, if it had supposed the course of the river to be east or near east, would have said, thence "easterly in a line," instead of "easterly in lines." The term "easterly" is only necessary to indicate the way to turn when at the end of the first line, whether toward the west or toward the east. We understand the word easterly in its usual acceptation to mean to the east generally, in contradistinction to west, north, or south, and is correctly applied to any general direction to the east, as opposed to the west, which would not be better

indicated by using the terms northerly or southerly. In this decree the term easterly has qualifying words attached to it, showing that it meant the direction of the American River from the oak tree.

Mr. Justice FIELD delivered the opinion of the court:

This case comes before us on appeal from a decree of the District Court of the United States for the Northern District of California, approving the survey of the tract confirmed to Folsom, the testator of the respondents. The grant to Leidesdorff, from whom the respondents deraign their title, was issued in October, 1844, by Micheltorena, then Governor of the Department of California. In September, 1852, the claim for the land granted was presented to the Board of Commissioners created by the act of March 3d, 1851, and by a decree of that body, rendered in June, 1855, the claim was adjudged valid and confirmed. The case being removed by appeal to the District Court, the attorney-general gave notice that the appeal would not be prosecuted by the United States, and upon the stipulation of the district attorney in pursuance of such notice, the claimants had leave to proceed upon the decree of the board as upon a final decree.

The grant describes the land as consisting of eight square leagues, and as situated on the bank of the American River, and bounded by land previously granted to the colony of Sutter, and by a range of hills—"lomerias"—on the east. The provisional concession preceding the issue of the formal title, gives a similar description. The petition of Leidesdorff, which the grant recites, represents the land as being "four leagues in length towards the east, and two in breadth towards the south," and refers to a map transmitted with it. This map is a rough sketch indicating the general locality and outline of the land solicited.

The original papers give the locality, the form, and the dimensions of the tract granted. It is situated on the southern bank of the American River; it is four leagues in length by two leagues in width; it embraces eight square leagues;

and it is bounded by the land of Sutter on the west. From the data thus furnished, the boundaries, which are not designated, can be readily ascertained and declared. As a question was made before the board upon the location of some of the boundaries, and testimony was taken as to the line of the land of Sutter, and the position of the range of hills on the east, the case was a proper one for the board to fix with precision and declare the boundaries in its decree. As the appeal from the decree rendered was withdrawn by the United States, it is unnecessary to consider the character of the testimony produced or the weight to which it was entitled. The board acted upon it in connection with the title-papers, and in its decree, entered in April, 1857, declared the boundaries of the tract, running the same, except on the side of the river, by courses and distances.

In May following, a survey of the tract confirmed, was made under the directions of the Surveyor-General of California, and was approved and transmitted by him to the Commissioner of the General Land Office, at Washington, for examination and approval preliminary to the issue of a patent. In May, 1858, the commissioner appears to have approved the survey, and to have made preparations to carry the same into a patent, but was overruled by the Secretary of the Interior, who, in September following, disapproved of the survey, and sent the case back to the surveyor-general. At the subsequent December Term of this court, the decision of the case of the *United States* v. *Charles Fossat* (21 Howard, 445), was made, which was supposed by the District Court of California to recognize a jurisdiction in that court to supervise all surveys of confirmed claims under Mexican grants. Acting upon this view of the decision, the District Court, in November, 1859, ordered the new survey which had been made by the surveyor-general to be returned into court, and gave leave to the claimants to file exceptions to it. The new survey was accordingly returned, and exceptions to it were filed by the claimants and purchasers under them; and proceedings upon the exceptions were pending on the passage of the act of June 14th, 1860.

Whatever question might be raised as to the jurisdiction of the District Court to supervise the survey previous to that act, there can be none since its passage. That act applies not merely to surveys subsequently made, but also to such surveys as had been previously made and approved by the surveyor-general, and returned into the District Court upon objections to their correctness. Under the act, a monition was issued, and on its return counsel appeared on behalf of the United States, and for the claimants, and for the Natoma Water Company, a purchaser under the claimants. No other party appeared, and the court ordered "the default of all parties not appearing" to be entered. The United States subsequently filed their exceptions. All parties agreed in averring a want of conformity in the survey with the description of the land contained in the decree of final confirmation.

The District Court set the survey aside, and ordered a new one. Subsequently, upon a rehearing, it approved and confirmed the survey originally made. From its decree in this respect the United States appealed, and on the argument of the appeal took positions in support of the second survey, which are directly the reverse of the objections urged in their name in the court below. To the apparent inconsistency in their action in this respect the attention of counsel was called, and the explanation given was that objections in the District Court, though put forward in the name of the United States, were in fact urged on behalf of settlers claiming that part of the tract covered by the survey, was public land open to settlement. It is unnecessary to express any opinion upon the sufficiency of this explanation, or whether the United States are bound by objections on the record, which are advanced in their name, when presented for the protection of parties claiming interests under them by pre-emption, settlement, or other right or title. We refer to the matter, not because our judgment will be in any respect affected by it, but to indicate that it would be the better practice for the district attorney, when appearing for third parties in the name of the United States, to state the fact,

and give the names of the real contestants in the exceptions filed.

The material question for determination is, whether the survey approved conforms to the decree of confirmation. There must exist a reasonable conformity between them, or the survey cannot be sustained. And such reasonable conformity we at once perceive when we take up the survey and trace its lines under the directions of the decree. Indeed, we do not think that such conformity will be seriously controverted by the learned counsel of the appellants, if the survey be restricted to the description contained in the decree. Their position is, that this description is to be controlled by the original grant and by the petition and map contained in the espediente, to which reference is made at the close of the decree; in other words, that the question of boundary is open for adjudication precisely as it would be if no description had been given. The position of the learned counsel in this respect cannot be maintained. The documents to which reference is made can only be resorted to in order to explain an ambiguity in the language of the description given; they cannot be resorted to in order to change the natural import of the language used, if there be no uncertainty therein. If reference to original title-papers, where no doubt arises upon the terms of the decree, would authorize an inquiry into a matter of boundary, it would with equal propriety authorize an inquiry into any other matter upon which the commission had acted; and every question affecting the decree might be opened anew to consideration and contestation.

The decree in this case is plain, and admits of only one construction: the object of the appellants is to change the meaning of its language, by showing that the commissioners were ignorant of the true course and direction of the American River, and therefore intended different lines from those they specifically declared, and that they could not have intended the eastern line to run as directed, in disregard of what is asserted to be the true position of the "lomerias."

The answer to all efforts of this kind is, that the decree is

a finality, not only on the question of title, but as to the boundaries which it specifies. If erroneous in either particular, the remedy was by appeal; but the appeal having been withdrawn by the government, the question of its correctness is forever closed.

The decree of the District Court is

AFFIRMED.

Messrs. Justices CLIFFORD, MILLER, and SWAYNE, dissented.

THE INSURANCE COMPANIES *v.* WRIGHT.

1. Where a written contract is susceptible on its face of a construction that is "reasonable," resort cannot be had to evidence of custom or usage to explain its language. And this general rule of evidence applies to an instrument so loose as an open or running policy of assurance, and even to one on which the phrases relating to the matter in contest are scattered about the document in a very disorderly way. NELSON and FIELD, JJ., dissenting from the rule, or from its application in this case: in which there was a clause that, as they conceived, made the evidence of usage proper.
2. The expression "rate," or "rating" of vessels, as used in policies of assurance, means relative state in regard to insurable qualities. Hence, where a policy requires that a vessel shall not be below a certain "rate," as, *Ex gr.*, "not below A 2;" this rate is not, in the absence of agreement to that effect, to be established by the rating-register alone of the office making the insurance—certainly not unless the vessel was actually rated there,—nor by a standard of rating anywhere in the port merely where that office is. There being, as yet, no "American Lloyds," the party assured—if not actually rated on the books of the office insuring—may establish the rate by any kind of evidence which shows what the vessel's condition really was; and that, had she been rated at all at the port where the office was, she *would* have rated in the way required. He may even show how she would have rated in her port of departure, or in one where the company insuring had an agency through which the insurance in question was effected; this being shown, of course, not as conclusive on the matter of rate, but as bearing upon it, and so fit for consideration by the jury.
3. Evidence is not admissible of a general usage and understanding among shippers and insurers of the port in which the insuring office is, that in open policies the expression used, as *Ex gr.*, "not below A 2," refers to

the rate of vessels or the register of vessels making the insurance. SWAYNE and DAVIS, JJ., dissenting, on the facts of the case, as to this last point.

THESE were actions brought by Wright against two insurance companies in New York—"The Orient Mutual" and "The Sun"—on two policies of insurance, called open or running policies; a sort of policy which has been described in this court* as one enabling the merchant to insure his goods shipped at a distant port, when it is impossible for him to be advised of the particular ship upon which they are laden, and which, therefore, cannot be named in the instrument of assurance. The insurer upon this class of policies, of course, has no opportunity to inquire into the character or condition of the vessel, and agrees that the policy shall attach if she be seaworthy, however low may be her relative capacity to perform the voyage; and, for the additional risks he may thus incur, he finds his compensation in an increase of premium.†

The two suits brought on the two policies here, were tried together in the court below, and so argued and disposed of here; the principles in each case being confessedly, and so declared by the court, the same.

The policies professed to insure Wright against loss on one-fourth of five thousand bags of coffee, to be shipped on board of "good vessel or vessels" from Rio de Janeiro to any port in the United States. Thus far the case was plain. The difficulty arose from certain clauses relating to the *premium;* of which clauses there were several scattered about the instrument. One such, just after the declaration of insurance made, was thus: "*To add an additional premium if by vessels lower than A* 2, or by foreign vessels; to return $\frac{1}{4}$ of 1 per cent. if direct to an Atlantic port." The policies also contained this clause: "Having been paid the consideration for this insurance by the assured at the rate of $1\frac{1}{2}$ per cent., *the premiums on risks to be fixed at the time of the indorsement,*

* Per NELSON, J.; Orient Mutual Insurance Company *v.* Wright et al., 23 Howard, 495.

† Ibid.

and such clauses to apply as the company may insert, as the risks are successively reported."

The companies here sued, though New York companies, had an agent in Baltimore, through whom they effected insurances there; and it was through this agent that the present insurances were made. His testimony went to prove that when applications were made to enter risks on running policies, the application was indorsed at once by him, and a report made to the company in New York, which named the premium, and that this was made known to the assured; that the premiums specified in the body of the policies are nominal, and the true premiums to be charged are fixed by increasing or reducing the nominal premiums; and that the nominal premiums taken on the delivery of a running policy, are returned if no risks are reported.

On the back of one or both the policies here, were entries as follows, which, it was argued, explained this alleged custom:

1855. Aug. 13. Bark Maine Law, from Rio to New Orleans, $15,750, at 1½ per cent.
1855. Aug. 13. Brig Windward, from same place to Baltimore, $4750, at 1¼ per cent.
1855. Nov. 20. Brig T. Walters, from same place to Philadelphia, $2375, at 1¼ per cent.

In the present cases the plaintiff applied, in the latter part of August, 1856, to the agent in Baltimore, for an indorsement on the policy of the coffee in question, laden or to be laden on board a vessel called the "Mary W.," from Rio de Janeiro to New Orleans, which application was communicated to the company, in order that they might fix the premium. The company at first declined to acknowledge the vessel as coming within the description of a "good" vessel, on account of her alleged inferior character; but the plaintiff, insisting on her seaworthiness and his right to insure within the terms of the policy, the company replied to his application: "We shall charge the same rate as the Sun does, viz., 10 per cent., subject to average, or 2½ per cent. free of average." This the plaintiff refused to pay. The

company thereupon claimed to be released from the risk. The plaintiff asserted that there was still a subsisting contract.

The coffee had been shipped on the Mary W. at Rio, for New Orleans, 12th July, 1856, when she started on her voyage. The vessel was lost on the 29th of the month upon rocks; the master being some seventy miles out of his course.

The cases had been already before this court, in 1859 (23 Howard, 401, 412),* by writ of error from a former trial. *On that trial it was conceded that the vessel rated below A* 2: or that the testimony might lead the jury to this conclusion. And on review here, this court held, that if this were true, then, inasmuch as no rate of premium had been fixed by the agreement of the parties, and the plaintiff had refused to pay the additional premiums which the companies had demanded, there was in reality no contract of insurance consummated as to the goods on that vessel. As the instructions of the court below had assumed that the contract was complete, although the vessel might rate *below* A 2, and although no agreement had been made for the increased premium, the cases were reversed and a new trial ordered. On this second trial the plaintiff sought to establish, and contended that he had established, that the vessel was within the rate prescribed, and in fact was not a vessel lower than A 2.

On this second trial, the defendants having given testimony (much the same testimony as that above mentioned as given on the first), tending to establish a usage that the premium named in the policy was in all cases a nominal one, and that the insured had a right, when the risk was reported, to vary the rate of premium as he might wish—asked the court for eleven instructions; the material parts of the seventh, eighth, and ninth being as follows:

Seventh. That if they found from the testimony and course of dealing of the parties, that the premium specified in the body of the policy was a nominal premium only, to which no atten-

* See Orient Mutual Insurance Co. *v.* Wright, and Sun Mutual Insurance Co. *v.* Same Defendant.

tion was paid in fixing the true premium to be paid, then the company had the right to fix the premium at the time of indorsement, whether the vessel rated A 2 or not.

Eighth. That by the true interpretation of the policy, in the custom referred to in the preceding prayer, the insurer had the right, in good faith, to fix the real premium above or below the nominal premium, where the vessel rated A 2 or above it.

Ninth. That by the true interpretation of the policy, the real or actual premiums on risks were to be fixed by the companies at the time of return or indorsement of the risk, and that the premiums so fixed by them in the case of the "Mary W.," not having been assented to by the assured, the premiums in that case cannot now be fixed by the court or jury; and further, that by the true interpretation of the policies, the real premiums on risks are not fixed therein without action by the parties, whether the vessel rates A 2 or above or below that rate.

These instructions the court refused to give, and the only question submitted to the jury was, whether the vessel in which the loss occurred did or did not rate below A 2, within the meaning of the policy.

But another question here arose; the question, to wit, by what standard was this fact, whether the vessel did or did not rate below A 2, to be fixed? Was it by that of Rio, whence she sailed? Or by that of Baltimore, where the application for insurance was made? Or by that of New York, where the policy was issued? Or by the register of the company which made the insurance?—with a conclusion that if *that* were silent, the vessel was not A 2 within the meaning of the contract at all. It was proved that the standard of rating was different at Rio and Baltimore from what it was at New York, being higher in the last-named city than it is in either of the former ones; so much so, indeed, that a vessel might be rated A 2, at Rio and Baltimore, which would fall below that rate at New York. It was also proved that each of the marine companies of New York keeps constantly in its employment a salaried officer, whose business it is to examine and rate vessels, and that the rates of the vessels thus examined by him are reported to the company, and en-

tered upon a book kept for that purpose. Mr. Swan, of the house of Grinnell, Minturn & Co., large shipping merchants of New York, testified that "the business of rating is a special one; that the companies all have inspectors to ascertain the rating of vessels, and that when a policy speaks of the rate of vessels, it is the rate of the company, and refers to that standard." There was other testimony to the same effect. Testimony was given also, however, showing that this rating differs materially on the registers of different companies, and that we have not yet established in this country any institution similar to that of the British Lloyds; though there is one in New York calling itself the American Lloyds, and now attempting to establish for itself here the same position as the one in England, which has its inspectors in all ports of the United Kingdom, whose reports are forwarded to a board in London, which fixes the rate of all vessels which are known to it, and whose owners are willing to have them examined. In fact, with regard to this particular vessel, it appeared that in 1849, she had three different ratings out of five which it was proved had been made of her; that she left New York in the year last mentioned for California, and has never been in the port of that Atlantic metropolis since; that 1849 was the last year in which she was rated on the books of the "Sun Mutual" at all; while the "Orient Mutual" had not been established until 1854, and of course had her not upon any register of theirs; and shown finally that a rating seven years old is regarded by all insurers as no rating at all.*

* The position of the vessel in 1856, with the Sun Company, as to her "rating," as an insurable risk, was as follows: She was rated in 1847, on the books of the Sun Company, "A 2½," being then between one and two years old, and then first appearing on the company's books. In 1848 she was again examined by the inspector of the company, and her condition noted, the same *rate* being retained. In 1849, she having been remodelled, she was again examined by the inspector, and noted in the books of the company thus: "January, 1849, docked, caulked, and coppered; the centreboard taken out; the bottom planked, repaired. *California; let her go.*" The inspector explained the words, "California; let her go," thus: "I mean that she was bound to California; and by the words, 'let her go,' that

The plaintiffs were allowed to give evidence that at Baltimore and at Rio she was rated A 2; and particularly to give in evidence a memorandum in writing, signed by the counsel of the insurance companies, and which they had given in order to expedite a trial, that the vessel in question, at the time she left Rio, "was in a seaworthy condition, fit for any voyage, and especially for the transportation of coffee;" and by reason of thorough repairs at Rio, was "entitled to rate, and did in fact rate, at A 2 *there*." There was evidence also tending to prove that she so rated elsewhere, and ought to have so rated in New York; but much testimony also tending to prove the reverse.

The court below allowed the above-mentioned memorandum to go in along with other evidence, both evidence in favor of the plaintiff and evidence against him; including, in the former, evidence of this vessel having been newly and thoroughly repaired, and the testimony of seamen long engaged in the trade of this part of South America, and including the testimony of marine experts, and proof of the mode in which the vessel had been rated more than seven years before the policy issued. And disregarding the prayers of the defendants presented in some five or six different forms, and praying instructions that the standard of rate was to be determined by the books of the defendants and of other insurance companies in *New York*, charged them essentially as follows:

"If the jury should find that the rating of vessels on the registers of companies in New York, was always from personal examination by inspectors of the different companies, and should further find, that by the long absence of the said vessel from New York, she had, in the understanding and usage of underwriters in New York, no fixed rating on the registers of any of

she was not insurable for a sea-voyage; as a mark to indicate for the company *to let her alone; to let her slide;*" and said that the remodelling of the vessel, by taking out the centre-board, would degrade her rate from $2\frac{1}{2}$ to 3. He said that in 1855 and 1856, the vessel would have had no insurable rate in the Sun Company, that is, for a foreign voyage; she had a rate for coastwise voyages all the time; that rate was A $\frac{1}{2}$.

the insurance companies of that city in 1856 (the date of the contract); but would have been rated there not lower than A 2 —owing to her thorough repair, had she been there for examination—then the plaintiff is entitled to recover, although the jury may find that the said vessel was rated in 1848 or 1849, on the books of the defendant, below A 2; and that *it was the general usage and understanding of underwriters and commercial men in New York, that the words in their policies 'not rating below A 2,' refer to the rate of vessels on the register of the company making the insurance.*"

The rejection by the court of the defendant's seventh, eighth, and ninth prayers, given on pp. 459–60, and its refusal to submit, in interpretation of the contract, the practice and course of dealing between the insurance companies and its customers, as shown by the Baltimore agent, in regard to the nominal premiums, were the errors relied on in the first part of the case; as were the instructions as to the evidence of rating, and the admission of the memorandum and other evidence at Rio, those relied on in the second.

Messrs. Alexander Hamilton, Jr., Evarts, and Cutting, for the Insurance Companies, plaintiffs in error:

1. An open or running policy is issued when the shipments to be protected thereby, the time of making them, the vessel or vessels to carry them, the ports of destination, and the value or amount of the cargo, and other circumstances material to the risks to be borne by the underwriter, have no present existence, or are unknown to either of the parties. The contract is necessarily incomplete, though binding upon the underwriter, to the extent of the agreement. It contemplates that if the assured shall desire to avail himself of his right to be protected under it, he shall, when the risks to be insured are known to him, or within a reasonable time thereafter, make a declaration, return, or report of them to the underwriter, with all essential particulars, in order that the premium to be charged may be estimated by the insurer; and, if agreed to, may be entered with the particulars upon the policy, which is "open" to re-

ceive them.* The indorsements on these very policies furnish examples by way of illustration. The indorsements specify the successive cargoes insured, the different vessels by which each was to be carried, the port of departure, the several ports of destination, the value of each different shipment, and the rate of premium charged by the insurer, and agreed to by the assured, on each risk.

Until the return, by the merchant, of risks not known at the time of making the agreement to insure, no basis exists upon which the consideration or premium for assuming the hazards can be estimated or named by the underwriter. Consequently, an open or running contract to insure separate sums upon unascertained, future, successive, and distinct shipments, to be thereafter declared or reported by the merchant, is an agreement that the underwriter will assume the risk as to them, at and from the lading thereof, in consideration that the assured will pay *or agree to pay such premium as shall be in good faith named by the insurer* as an adequate compensation for the risks to be assumed by him.†

As the premium or consideration to be paid must, of course, vary according to the degree of hazard of each shipment, and as this cannot be ascertained until each shipment has been made or is known, and a declaration or return thereof has been reported by the merchant to the underwriter, it is the practice to specify in these agreements to insure, a nominal or average rate of premium, which is subject to such addition or deduction as shall make the premiums conform to the established rate at the time the return is made to the company; and, sometimes, as in the present case, a further stipulation is introduced, that if the shipments shall be made by foreign vessels, or by vessels rating lower than A 2, an additional premium shall be charged. In practice no attention is paid by either party to the nominal or average consideration, specified in the agreement to insure.

* 1 Phillips on Insurance, 3d ed., pp. 26, 273; Neville *v.* M. & M. Ins. Co. of Cincinnati, 17 Ohio, 192; S. C. on Reversal, 19 Id., 452; Douville *v.* Sun Insurance Co., 12 Annual, 259.

† Hazard *v.* New England Mar. Ins. Co., 8 Peters, 583.

The premium is calculated on each shipment, separately, each case being distinct, and the rate being dependent upon the character of the vessel, the port or ports of destination, the season of the year, and other circumstances calculated to increase or to diminish the hazards. A premium note for the nominal or average premiums upon the amount subscribed, is taken at the time the open policy is issued, and is returned to the merchant in case he should not avail himself of the protection of the contract, with the exception of one-half per cent., which the underwriters, in accordance with a very ancient custom, have the right to retain, although in practice this right is seldom enforced, it being now usual to return the whole amount.* The reason for this right to retain one-half per cent. is that, as the assured may never choose to avail himself of the contract, or may put a stop to any adventures under it whenever he may think proper, while, on the other hand, the insurer can never by his own act discharge himself from the agreement, it is but reasonable that the merchant should make some compensation to the insurer for his trouble and disappointment.

The rates of premium at which underwriters can afford to take hazards is the basis upon which the whole business of insurance rests. Great discrimination and accuracy of judgment is necessary in estimating the degrees of risks. In the practical conduct of his affairs, therefore, it is vital that the insurer should have the power to determine his rate of charge, leaving it, of course, optional with the merchant to accept or to reject it. Hence, under the agreement contained in the policy in controversy, as the risks to be insured at the time when it was effected, were not known, and did not exist, it was impossible to estimate the premiums to be paid, and therefore the agreement being necessarily incomplete, various reservations were made, and amongst others, the essential one, *the premiums to be fixed at the time of the indorsement, and such clauses to apply as the company may insert as the risks are successively reported.*

* 2 Arnould on Insurance, 1237.

In open or running policies, where the agreement is to insure cargo that is afterwards to be reported, and where the shipments are to be successive and independent, of distinct quantities, to be shipped at various and unforeseen times, by unknown vessels, of different classes, and of different nations, on different voyages, there must necessarily exist, as the risks are returned to the company, and the rates of premium are named by it and assented to by the assured, as many different contracts of insurance as there are different subjects to insure, and these contracts are as distinct as if each was made the subject of a separate policy. The rate of premium on each risk reported, must depend upon the particulars of each. When the company has in good faith estimated and determined the rate of premium which it deems to be commensurate with the risk reported to it, and the merchant considers it too high, and refuses to agree to it, the contract, as to that shipment, has not become complete. The merchant has the right to be protected by the policy, at and from the lading of the cargo, if he chooses to agree to pay the premium demanded by the company therefor. But if he prefers, he may decline to pay it, in which case, as the whole consideration fails, the company may refuse to enter the risk, or if an entry has been made, may strike it from their books.*

The court, therefore, erred in refusing to let the practice about these policies be shown. No instruments are so loosely drawn as policies of insurance. None depend so much, or are so frequently explained by usage, and without resort to it, it is sometimes impossible to interpret them at all.

2. The proofs admit of no dispute as to the "rating" of the policy, referring to the "rating" *on the books of the company issuing the policy*. The loosest interpretation of this word in the policy, under the evidence, cannot carry it beyond a reference to a "rating" upon the books of the marine insur-

* Douville *v.* The Sun Mut. Ins. Co., 12 Louisiana Annual, 259; Neville *v.* M. and M. Ins. Co., 17 Ohio, 192, 205, 213; 19 Id., Same Case, 452; reversing.

ance companies in the city of New York. There is no evidence that, in 1856, the vessel in question was *not* a vessel "rating lower than A 2" on the books of the Sun Mutual Insurance Company, the defendant below. Nor evidence that, in 1856, she was *not* one "rating lower than A 2" on the books of the marine insurance companies in the city of New York, or of any of them. There is evidence, that in that year, she *was* a vessel "rating lower than A 2" on the books of the defendant below, and of the other marine insurance companies of the city of New York; for, it is manifest that any evidence to the effect that she had, in 1856, come to be *disrated*, or *fallen below any insurable rate*, is emphatic evidence that she was a vessel "rating lower than A 2" on such books.

II. The instructions were erroneous in their whole scope and effect. Instead of submitting to the jury the question of fact as to what was the actual rate of the vessel on the register of the defendant or other insurance companies in New York, they instructed and authorized the jury, *as experts*, to determine what would be the rate in New York from the actual rating on the companies' registers, in connection with other elements submitted to them. They thus took away from the companies the determination of a technical and difficult question, which, under the policy as well as usage, *they* had a right to decide, and substituted the rude and necessarily imperfect conclusions of a jury in its place, and permitted the jury to ascertain and determine what *would* be her rate, in their opinion, as against her actual rating on the registers of the insurance companies in New York.

III. So, too, it was erroneous to submit to the jury the evidence that when the vessel left Rio she was *seaworthy*, and in good condition, and had just been thoroughly repaired, and was specially fit for the transportation of coffee, and *then rated there at A* 2. Such evidence was irrelative; for no question was raised as to the seaworthiness of the vessel. Moreover, it confounded two distinct questions, the questions, to wit, of seaworthiness and of rating; and probably misled the jury. Finally, it did not tend to show her rating in New

York (the only matter we assume important to be shown), as against the fact that she was actually rated there.

Messrs. Brent and May, contra:

Mr. Justice MILLER delivered the opinion of the court, and after stating principal facts, proceeded as follows:

The only question submitted to the jury on the second trial, the record of which is now before us, was whether the Mary W., the vessel in which the loss occurred, did or did not rate below A 2, within the meaning of the policy. Some of the instructions prayed by the defendants, and refused by the court, proposed to submit to them another question. Having given testimony which tended to establish a usage, that the premium named in the policy was in all cases a mere nominal one, and that the insurer had a right, when the risk was reported, to vary the rate of premium as he might wish, they asked the court to instruct the jury that if such a usage were proved, then the defendants had the right to demand, as they had done, an increased rate, which plaintiff had refused to give, without any regard to the rating of the vessel above or below A 2; and that plaintiff could not recover. This is the substance of the *seventh* and *eighth* instructions prayed by defendants.

Their *ninth* prayer, assumed that such was the construction of the policy, without any aid from usage to assist in its interpretation.

We do not think that the policy on its face can be so construed. It is signed by the defendant, and not by the plaintiff. All its promises are made by the defendant in its own language. All its exceptions and reservations are those of defendant. The rule is that when in such cases the language requires construction, it shall be taken most strongly against the party making the instrument.

The various phrases which relate to this matter of premium, are scattered through the policy "in most admired disorder." They may be brought together and stated thus: The plaintiff is insured on one-fourth of five thousand bags of coffee, from Rio de Janeiro to a port or ports of the United

States. The consideration of the insurance is acknowledged to be paid at the rate of 1½ per cent.; an additional premium if shipped by vessels lower than A 2, or by foreign vessels; a return of ¼ per cent., if shipped direct to an Atlantic port; the premium on risks to be fixed at the time of indorsement, and such clauses to apply as the company may insert, as the risks are successively reported. As it was not known that the coffee had been shipped, or on what vessels it had been or might be shipped, they were to be reported as soon as the owner received advices. Then the premium on the risks was to be fixed. But by whom and by what rule? The policy, we think, answers this, except in the case of a foreign vessel, or one rating below A 2. In either of these cases the premium was to be increased. If the shipment was direct to an Atlantic port, ¼ of 1 per cent. was to be deducted. But if the vessel was not a foreign vessel, nor one that rated below A 2, nor the shipment direct to an Atlantic port, then the premium was already fixed, and the money paid, and nothing more remained to be done in that respect.

This provision, that the premium shall be fixed at the time of the indorsement of the risk on the policy, has its full use and function in the three contingencies above-mentioned, wherein it is expressly stipulated that the rate shall differ from one and one-half per cent. The very fact that these three contingencies are expressly named, in which a different rate of premium may or shall be charged, excludes the idea that one of the parties may vary the rule in *all* cases, or in *any other case.*

Much weight is attached in the argument in this connection, to the phrase "such clauses to apply as the company may insert, as the risks are successively reported." It is not necessary to determine here what is the character of the clauses referred to, or what effect that phrase might have under certain circumstances. A war, a blockade, or some other change of affairs occurring after the policy was signed, might justify the company in inserting some clause for its protection, but we do not think it can be so construed as to authorize a clause changing the rate of premium in a case

where it is fixed by the other terms of the contract. No such clause was added, or proposed to be added to the policy by the company, and it is useless to speculate on what might or might not have been successfully claimed, in a case where no claim was made.

We have thus shown that the instrument has a well-defined meaning in reference to the rate of premium, and that it does not justify the ninth instruction asked by the defendants.

When we have satisfied ourselves that the policy is susceptible of a reasonable construction on its face, without the necessity of resorting to extrinsic aid, we have at the same time established that usage or custom cannot be resorted to for that purpose. In speaking of usages of trade, Greenleaf says:* "Their true office is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature of their contracts, arising not from express stipulation, but from mere implications and presumptions, and acts of doubtful and equivocal character, and to fix and explain the meaning of words and expressions of doubtful and various senses." Again, he says,† "But though usage may be admissible to explain what is doubtful, it is not admissible to contradict what is plain." In the case of the *Schooner Reeside*,‡ Mr. Justice Story, after using language strongly condemning the tendency to introduce and rely on usages in courts of justice, and defining their true office in the language just cited from Greenleaf, proceeds to say: "But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied or contradicted by a usage or custom, for that would not only be to admit parol evidence to control, vary, or contradict written contracts,

* On Evidence, vol. 2, § 251. † Id., § 292. ‡ 2 Sumner, 567.

but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties." These views, in addition to the high source whence they came, commend themselves to our judgment by their intrinsic soundness. "Not only is a custom inadmissible which the parties have expressly excluded, but it is equally so if the parties have excluded it by necessary implication. For a custom can no more be set up against the clear intention of the parties, than against their express agreement, and no usage can be incorporated into a contract which is inconsistent with the terms of the contract."*

Tested by these principles the usage attempted to be set up in the case at bar cannot be sustained. It contradicts directly the written contract. It proposes to set aside all that is said about the rate of premium, and substitute the discretion of one of the parties to the instrument. It goes upon the assumption that all that is written in the contract, which fixes, or ascertains, or limits the amount that may be claimed for premium of insurance by the company, is nugatory, and that the whole field is left open, and the power placed in the hands of one of the parties exclusively. No such usage can be admitted thus to contradict, vary, and control this contract.

The court below was right in refusing the prayers of the defendants which we have been considering, and in submitting as the only question for the jury to determine, the rating of the vessel in reference to A 2.

Upon this question the defendants below, in some five or six forms, prayed that the jury be instructed that it must be determined by the rating of the vessel on the books of the defendants, and other insurance companies in New York. The court refused the prayers, but told the jury, that "if

* 2 Parsons on Contracts, 59; Blivin et al. *v.* The N. E. Screw Co., 23 Howard, 431; Atkins *v.* Howe, 18 Pickering, 16; Bogert *v.* Cauman, Anthon N. Y. R., 70; Allegre *v.* The M. Ins. Co., 2 Gill & Johnson, 136.

they should find that the rating of vessels on the registers of the companies in New York was always from personal examination by inspectors of the different companies, and should further find that by the long absence of the said vessel from New York, she had, in the understanding and usage of underwriters in New York no fixed rating on the registers of any of the insurance companies in that city in 1856," (the date of the contract), "but would have been rated there not lower than A 2, owing to her thorough repair, had she been there for examination, then the plaintiff is entitled to recover, although the jury may find that the said vessel was rated in 1848 and 1849 on the books of defendant, below A 2; and that it was the general usage and understanding of underwriters and commercial men in New York, that the words in their policies, 'not rating below A 2,' refer to the rate of vessels on the register of the company making the insurance."

It is claimed by the plaintiffs in error, that the proposition submitted to the jury as to the rating of the vessel, must be determined exclusively by a reference to the books of the company making the policy. Although no such instruction was asked in the court below, it is urged upon this court that such is the true construction of the contract, and that the charge of the court was in conflict with this position.

There is nothing in the language of the policy itself to indicate the source to which we are to look for the determination of the rating of the vessel. The reasonable inference would seem to be, that, like any other question of value, or quantity, or quality, left open in a written contract, it should be decided by a reference to all the sources of information which enable the jury to fix the rate correctly. What is meant by the rating of vessels in insurance policies? *It means the determination of their relative state or condition in regard to their insurable qualities.* It is a matter which has excited much interest in the commercial world, although we are not aware that it has been often before the courts. In Great Britain there was established, in the year 1834, a department at the British Lloyds devoted to this very business. They

have their inspectors in all the ports of the three kingdoms, whose reports are forwarded to a board at London, and this board fixes the rate of all vessels which are known to it, and whose owners are willing to have them examined. The register thus kept, is the one used and referred to in all contracts of insurance in that country. They, however, have a mode of rating entirely different from any adopted here.* The testimony in this case shows that there is in New York an institution calling itself the American Lloyds, which is now attempting to establish the same position as the one referred to in England. But the proof is, that its rating is not generally adopted as yet, either by insurers or insured; and that each company in New York which does any considerable amount of business, has its own inspectors and its own register for rating vessels. The evidence shows that this rating differs very materially on the registers of the different companies. None of these registers have, or can have, any right to determine conclusively the rate of a vessel, when that question comes to be determined in a court of justice. It would seem that in a question of this kind, left open by one of these insurance companies, and the party whom it has professed to insure, equity would require the matter to be determined, if by the register of any company, by some other than that of the party interested. These registers are the private books of the companies. They are not for public use, and can only be seen by the courtesy of the companies' officers. Under these circumstances the justice of the principle which would refer the rating of the vessel exclusively to this register of a party to the suit, when no such provision is inserted in the policy, is not perceived. If they make their contracts, intending to assert such a claim, fair dealing requires that they insert it in their policy.

But testimony was introduced tending to show that, by the usage of underwriters and merchants in New York, the rating referred to was the rating on the register of the company which made the policy, and the court instructed the

* See McCulloch's Commercial Dictionary, p. 1169.

jury to disregard this usage if they should find that there was no rating of this vessel on the books of one of the defendants, and none since 1849 on the books of the other company.

The testimony shows that the Mary W. left New York in 1849, and has never been there since, and that was the date of the last rating on the books of the "Sun Mutual Insurance Company," one of the defendants, and that the "Orient Mutual," the other defendant, came into existence in 1854, and the Mary W. never had a rating on its register.

It was also proved by several witnesses, and is uncontradicted, that a rating seven years old is regarded by all insurance men as no rating at all. Here is a case, then, where a party is seeking to incorporate into his contract a usage, that the rating mentioned in his policy must have exclusive reference to his own register, when the vessel supposed to be insured is not on that register at any rating whatever. It must be remembered that we are now trying to arrive at the intent of the parties at the time the policy was made, and that this usage is introduced to assist us in that effort. Can it be believed that the contracting party, who paid his money at that time for insurance on coffee, to be shipped on any vessel that was seaworthy, whether below A 2 or above it, whether foreign or domestic, had any idea that he was limited in the selection of his vessel, to such as might be found on the register of the company he was dealing with? Or that the company, which professed to insure the coffee on home vessels or *foreign* vessels, on vessels rating above or below A 2, on shipments to Atlantic ports or Gulf ports from Brazil, intended to limit the plaintiff to the use of vessels whose names might be found on their register? And this, too, when one of the companies had no register reaching back more than two years. Yet we must believe this, if we hold the usage mentioned in the instrument as controlling the case.

It is not, however, necessary to go any further in this case than to decide, as we do, that such usage, if it were admissible at all, could only apply to the case of a vessel which

had an actual rating on the books of the company so recent as to be recognized by insurers as a valid rating. And that as the Mary W. had no such rating on the books of the defendants, the usage cannot apply to these contracts. Such was evidently the view of the court below, in which we think it was correct.

But the court was asked by the defendants below to instruct the jury, that in determining the rate of the Mary W., they must confine themselves to the registers of the defendant *and the other insurance companies of New York.*

The vessel had no rating on the books of any insurance company in New York, later than 1849, which was more than seven years before the risk was claimed to attach in these cases. It was, as we have already said, fully proved that such a rating was wholly disregarded by all insurance companies, as being of no value. The effect of the instruction would have been, to confine the jury to testimony which would give them no light on the subject they were directed to consider; indeed, to that which could not be called evidence at all. And the argument that plaintiff could not be supposed to have contracted with reference to any such rule as this, is quite as forcible as it is in regard to the claim to confine the evidence to defendants' own books. In this instance, there is no claim that the rule is supported by any usage. These registers differ among themselves, and those offered in evidence show that at the time the Mary W. left the Atlantic coast for California, in 1849, she had as many as three different ratings on the books of the five companies whose registers were offered in evidence. Which of these should prevail, even if they were recent enough to be admissible? Shall the jury be excluded from all other evidence to explain these differences, or to show the relative value or reliability of these different estimates? Can any sound reason be given for such exclusion? It is supposed that the few companies which may happen to have a vessel on their register have exhausted the means of information as to her character, and that no one else can throw any light on it? So far from restricting the jury in this manner, it seems to

us that as the true object of inquiry is to fix the insurable character or status of the vessel, they should be at liberty to hear any testimony which would tend to show her capacity for resisting the perils insured against. It is therefore our opinion, that when the court instructed the jury to base their verdict on the fact to be ascertained by them, whether the Mary W. would or would not have rated below A 2 *in New York, had she been there for examination*, the rule was stated quite as favorably to plaintiffs in error as sound principle will justify.

It is objected that the testimony of certain persons in Rio, and especially the agreed statement that she was entitled to rate as high as A 2, at that place, was not competent under the issue. We think this fact might well be submitted to the jury with many others, none of which were conclusive, but all bearing on the question before them. The fact that she had been newly and thoroughly repaired, had been surveyed before and after the repairs, and the results of these surveys, the results also of examinations made by seamen long engaged in the trade between Rio and the United States, were the best, perhaps the only evidence, of her then condition and insurable status. When the court, in addition to these facts, admitted on the part of plaintiffs in error, the opinion of New York experts on this testimony to go with it, and also the seven years' old rating of the plaintiffs in error, and other insurance companies, we cannot but conclude that the case went fairly to the jury on the testimony. None of it was held conclusive. No instruction was asked of the court or given as to its relative value, and as none of it was absolutely irrelevant, we see no error in its admission to the prejudice of the plaintiffs in error.

We have thus examined in detail, and with much caution, the points raised against the verdict below, and, as we find none of them tenable, the judgments are

AFFIRMED.

Mr. Justice NELSON:

The policy in this case underwent a very full examination

when it was formerly before the court.* The evidence in that case showed, and the argument of the counsel proceeded upon the assumption, that the vessel rated in New York, the place of the contract, below A 2; and, inasmuch as the policy provided, in case of that rating, for an additional premium, the principal question was, whether or not the company had a right to fix the additional premium, or, in case of dissent by the insured, it was a question to be determined by the court and jury. This court held, upon a true construction of the policy, that the right belonged to the company. The judgment of the court below was reversed, and the cause remanded for a new trial. On this second trial, which is now before us for review, the plaintiff placed his right to recover upon the ground that, at the time the Mary W. was reported to the company for indorsement on the policy, she, in point of fact, rated A 2, and hence came within the description of vessels in the policy that were to be insured for the premium paid when it was issued, which was $1\frac{1}{2}$ per cent. This ground was denied by the company, and, in addition, they also maintained that even if, as claimed, the vessel rated A 2 at the time of the report for indorsement, they had a right to add to the premium of the one and one-half per cent.; and inasmuch as the plaintiff had refused to pay this additional sum, no insurance of the coffee was effected. This latter position of the company assumed that, upon the true construction of this running policy, no binding contract of insurance existed in respect to a vessel reported for indorsement, whether she rated A 2 or not, until the company had fixed the rate of premium, and the insured had assented to it; and further, that whether the vessel rated A 2 or above that rate, they had a right to demand an additional premium to that mentioned in the policy.

We will reverse the order of the questions as stated, and inquire, first, whether or not the company are bound by the terms and conditions of the policy to insure a vessel for the

* *Vide* Report, 23 Howard, 401, 412.

premium mentioned on the report of her for indorsement, if at the time she rates at or above A 2?

The article insured, as specified in the policy, is coffee, to be shipped from Rio de Janeiro to a port or ports in the United States, the company to add an additional premium if by vessels lower than A 2, or by foreign vessels; ¼ per cent. to be returned if shipped direct to an Atlantic port. The premium paid as the consideration for the insurance, as recited in the policy, is at and after the rate of one and one-half per cent.

If there were no other provisions in this policy relating to the premium than those above stated, it would seem to be plain the coffee shipped in a vessel rating A 2, or above, would come within the description required by its terms as a condition of its binding effect, for the right of the company to add an additional premium is limited to the case of a vessel rating below A 2. If A 2, or above, no addition is to be made, and, if not, the moment the vessel is reported for indorsement the contract is complete. The whole of the premium that could be demanded had been already received by the company.

But there is another clause in this policy, which it is supposed qualifies the above construction, and which is as follows: "The premiums on risks to be fixed at the time of indorsement." The company rely upon this clause as securing to them the right in all cases to fix the premium at the time the risk is reported; and consequently, unless that rate is assented to by the insured, there is an end to the incipient contract, and, as we have already said, the company claims also under this clause to add to the premium in the policy even if the vessel rates A 2, or above, even if she should rate A 1.

In order to understand the force and effect of this clause, it will be useful to refer, for a moment, to the usage of the company in taking these risks on their running policies, as proved in this case. The premiums specified in the body of the policies are regarded as nominal, or rather as average premiums, and the true premiums to be charged are fixed

by *increasing* or *reducing* the average premiums when the risk is reported. This usage explains what is meant by the clause, "The premiums on risks to be fixed at the time of the indorsement,"—for, by recurring to the terms of the policy, it will be seen they provide for the case when an addition to the premium may be made, namely, when the vessel rates below A 2; and also, when the reduction is to be made, namely, in case the vessel rates A 2, or above, and the shipment of the coffee is to an Atlantic port, the reduction then is to be ¼ per cent. This usage has been carried out, practically, during the running of this policy. The following vessels are indorsed on it: "*August* 13, 1855, Bark Maine Law, from Rio de Janeiro to New Orleans, $15,750 at 1½ per cent.; Brig Windward, from same place to Baltimore, $4750 at 1¼ per cent. *Nov.* 20, Brig T. Walters, from same place to Philadelphia, $2375 at 1¼ per cent." This usage and the practice under it, furnishes a full explanation of the clause in question, and reconciles it with the previous parts of the policy, which were supposed to be in contradiction to it. It is true, the premiums are to be fixed at the time the risks are reported, but they are to be fixed in accordance with the stipulations in the policy, which, as we have seen, have specially provided for them. The company can make no additions to the premium except the vessel rates below A 2. If at or above this rate they are bound to deduct the ¼ per cent., when the risks are reported, if shipment be to an Atlantic port.

As to the other provision relied on, namely, "And such clauses to apply as the company may insert as the risks are successively reported." I agree that they have no reference to the questions involved in this case, and may be left for construction when a case arises under them.

The next point in the case, and the only difficult one in my judgment, arises out of the position taken by the plaintiff in the court below, that the vessel Mary W., in point of fact, rated as high as A 2 at the time she was reported to the company.

We lay out of view all questions, so fully discussed on the

argument, whether or not the rating of vessels referred to in the policy, related to the rating in the books of the company, or, if not, to the books of other companies in the city of New York; and whether resort must be had exclusively to these books for the purpose of ascertaining the rating of the vessels; for it appears from the evidence, and is not to be denied, that neither the books of the Orient, or of the Sun company, nor of any other of the insurance companies in the city, contained in contemplation of law a rating of the Mary W., at the time she was reported to the two companies, that could be of any controlling weight on the question. She was not rated in the books of the Orient at all, and had not been in those of the Sun for some seven years; and the same is true in respect to the other companies. There is not evidence in the case, therefore, to raise the questions as to the effect to be given to the rating of a vessel in the books of the company at the time of the insurance; and hence, it would be premature to express any opinion upon them, or upon the effect to be given to the like evidence in respect to the books of other companies at the place of the contract. These are important and interesting questions, and may well deserve the deliberate and careful consideration of the court when properly presented for decision.

The evidence, with a view to ascertain the rate of the Mary W. at the time she was reported for indorsement on the policy, 23d August, 1856, must of necessity be derived as well from other sources as from the books of insurance companies; and the questions are, in this posture and condition of the case, whether the court below admitted improper evidence against the objections of the defendants, and whether the charge of the court in submitting the case to the jury is subject to any of the exceptions taken to it.

As we have seen, there being no evidence in the record of this rating of the vessel on the books of the Orient company at all, nor upon those of the Sun at the time she was reported, within the period of some seven years, after the lapse of which time the rating bound neither the company nor the insured, the question whether the Mary W. rated at

the time reported not lower than A 2, of necessity depended upon general evidence of the character and condition of the vessel, and could not be restrained to the rating in the books; so in respect to the other insurance companies in the city of New York, as the rating in these books was made also some seven years prior to this insurance transaction. And, as it respects this general evidence, the appellate court can only look at such parts of it as were objected to and exceptions taken at the time offered at the trial.

The only exception we find taken is in respect to the competency of the testimony on a commission to Rio de Janeiro, or rather to the admission of evidence as the substitute for the commission, and which is, that the Mary W., at the time she left Rio on the voyage in which she was lost, was in a seaworthy condition, fit for any voyage, and especially for the transportation of coffee; and was, by reason of thorough repairs at Rio, entitled to rate, and did rate A 2 there. We agree that the rating of the vessel at Rio was not the criterion to determine the question before the court and jury. But it was competent testimony, tending to prove the quality and condition of the vessel at the time of her report to the company. The proof of the rating of a vessel consists, not only of testimony as to her construction, materials, age, &c., but also, of the opinion of experts, such as ship-builders and ship-masters, and others familiar with the subject. The record in this case is full of examples of this description of evidence, and the opinion of the witnesses as to the rating of a vessel is but the expression of the result of their examination of her. The rating by official inspectors, with a view to an entry in the books of a company, is evidence of the same character.

Then, as to the charge of the court. It is certainly very comprehensive and involved, and must have been difficult for a jury to understand; but we will endeavor to state the substance of it, which is this: that if the jury should be of opinion from the evidence, that the Mary W. at the time she left Rio was seaworthy and in good condition, and after her repairs was specially fit for the transportation of coffee, and

rated there A 2; and shall further find, that by the long absence of said vessel from the city of New York, there was no fixed rating on the registers of any of the insurance companies in that city in 1856; but that she would have been rated there not lower than A 2, owing to her thorough repairs, had she been there at the time, then the plaintiff was entitled to recover, notwithstanding she rated in the city of New York in 1848–9 on the books of defendants below A 2; and notwithstanding it was the usage and understanding of underwriters and commercial men in that city, that the phrase "not below A 2," referred to the rate of vessels on the books of the company making the insurance.

If this charge is examined with reference to the evidence in the case, we think it is unexceptionable. It must be remembered that there is no testimony found in the record of a rating in the books of the companies, defendants, or in other insurance companies in the city of New York, that could, in any aspect of the case, be controlling. It was necessary, therefore, to go outside of these companies, and resort to general evidence of the character and condition of the vessel, in order to find her rate at the time of the report for indorsement; and in this view of the case, and which we think the true one, the court instructed the jury, if upon this evidence they find that the Mary W. would have rated in the city of New York at the time of the report, the plaintiff was entitled to recover, otherwise not. We do not see how the case could, consistently with the evidence, have been put to the jury more favorably to the defendants. If these companies will undertake to insure vessels according to their rate, when no fixed rate is found in their books at the time, and no fixed standard exists, such as the British Lloyds, in England, by which to ascertain the rate, resort must necessarily be had to general evidence of the character and condition of them at the time of the insurance, with a view to the rate that would be assigned to her in the city of New York, the place of the contract.

For the reasons above given we think the judgment of the court below right, and should be affirmed.

Mr. Justice FIELD concurred in the opinion of Mr. Justice NELSON.

Mr. Justice SWAYNE, dissenting:

Finding myself unable to concur in the conclusions at which a majority of my brethren have arrived, I will state briefly the grounds of my dissent. My remarks will be confined to the case of the Orient company. The same objections apply in both cases.

[His honor here quoted the language of the policy, and stated the principal facts already set forth in the statement of the case, and proceeded]:

When the case was here, as reported in 23 Howard, 401, this court held that if the Mary W. were of a rate lower than A 2, "unless the assured paid or secured the additional premium fixed by the underwriters, the contract of insurance did not become complete and binding." The judgment of the court below was reversed and a *venire de novo* awarded. That adjudication is before us for our guidance, not for review. The reasoning of the court commands my assent.

Upon the retrial of the case in the court below, the main question necessarily was, whether the Mary W. was or was not below the rate of A 2. This proposition involved the further inquiry, By what standard the rate was to be determined? Was it by that of Rio de Janeiro whence she sailed? Was it by that of Baltimore, where the application for insurance was made? Was it by that of the city of New York, where the policy was issued? Or was the question whether she was A 2, to be answered only by the register of the company? and if that were silent, the consequence to follow, that she was not A 2 within the meaning of the contract? It was proved that the rules of rating at Rio and Baltimore were different from those of New York; that the standard at New York was the highest, and that a vessel might be rated A 2 at Rio and Baltimore, which would fall below that rate at New York. It was also proved that each of the marine companies of New York keeps constantly in its employment a salaried officer, whose business it is to examine

and rate vessels, and that the rates of the vessels thus examined by him, are reported to the company and entered upon a book kept for that purpose. Mr. Swan, of the house of Grinnell, Minturn & Co., of New York, a witness examined in behalf of the plaintiff, testified as follows: "The business of rating is a special one. The companies all have inspectors to ascertain the rating of vessels. When a policy speaks of the rate of vessels, it means the rate of the company and refers to that standard." Other testimony to the same effect was given.

Upon the last trial the court instructed the jury that if they should find (1), "That by the long absence of the said vessel from New York, she had, in the understanding and usage of underwriters in New York, no fixed rating on the registers of any of the insurance companies in that city in 1856, but would have been rated there not lower than A 2, owing to the thorough repairs, had she been there for examination, then the plaintiff is entitled to recover in this case . . (2), although the jury find that it was the general usage and understanding of underwriters and commercial men in New York, that the words in these open policies of insurance, 'not below A 2,' refer to the rate of vessels on the register of the company making the insurance."

For the present I pass by the second part of these instructions. A majority of my brethren hold both parts to be correct. Conceding the first to be so, then the testimony should have been *confined* to facts tending to show what the rate of the vessel would have been in New York, if she had been there for examination.

The plaintiff was permitted to prove that she was "A 2," according to the rating of Rio and Baltimore. The defendants objected and excepted. I think this testimony was incompetent and irrelevant. It was wholly immaterial what the rate of the vessel was according to the rules of rating at any other port than New York. The testimony must have tended strongly to mislead the jury. Having found that the vessel was "A 2" at Rio and Baltimore, according to the standard of those places, it was but one step further to the

conclusion, that she ought to have been and would have been rated A 2 at New York.

There are no cases in which it is more important to the right administration of justice that the rules of law should be carefully applied in trials by jury, than in those of the class to which this case belongs. The admission of this testimony, in my judgment, was an error. If such a usage existed as the second part of the instruction supposed, it entered into the contract. In that case it enlightens the ambiguity and ascertains the meaning of terms "A 2" as used in the policy. "It may also be laid down as clear law, that if a man deals in a particular market, he will be taken to act according to the *custom* of that market; and if he directs another to make a contract at a particular place, he will be presumed to intend that the contract shall be made according to the usage of that place."* "Witnesses conversant with the business, trade, or locality to which the document relates, are called to testify that according to the recognized practice and usage of such business, trade, or locality, certain expressions contained in the writing have in similar documents a particular conventional meaning."† "In resorting to evidence of usage for the meaning of particular words in a written instrument, no distinction exists between such words as are purely local or technical—that is, words which are not of universal use, but are familiarly known and employed, either in a particular district, or in a particular science, or by a particular class of persons,—and words which have two meanings, the one common and universal and the other technical or local. *In either case*, evidence of usage will be alike admissible to define and explain the technical, peculiar, or local meaning of the language employed. Though in the latter case, it will also be necessary to prove such additional circumstances as will raise a presumption that the parties intended to use the words, in what the logicians call the second intention, unless this fact can be inferred from reading the instrument itself."‡

* 1 Taylor on Evidence, 178, and authorities cited. † 2 Id., 984.
‡ 2 Id., 984–5.

The learned judge, instead of directing the jury to disregard the custom, should have instructed them that if established to their satisfaction, and especially if known to the assured, from his previous transactions with the company or otherwise, it determined the meaning of the terms A 2, and was fatal to the right of the plaintiff to recover.

The construction claimed by the underwriters involved no hardship to the defendant in error. When the parties failed to agree as to the premium, he was at liberty to insure elsewhere. He refused to pay the premium demanded, yet insisted they were bound. The company had a right to guard against the alternative of submitting the rate of the vessel to the judgment of a jury; I think they intended to do so. In any view which I can take of the subject, there was error in the second part of the instructions. For these reasons, in my opinion, the judgment should be reversed, and the cause remanded for further proceedings.

I am requested to say that Mr. Justice DAVIS concurs in this opinion.

HOMER *v.* THE COLLECTOR.

Under the Tariff Act of 1846, as amended by the Tariff Act of 1857, almonds are subject to a duty of 30 p. c. *ad valorem.*

ERROR to the Circuit Court for the District of Massachusetts, the case being thus:

The Tariff Act of 1857, which was an act reducing duties, provided by its first section, that in lieu of the duties then existing, there should be imposed upon the articles in schedule B of the Tariff Act of 1846, a duty of 30 p. c.; and upon those in schedules C, E, and G, of said act, the duties of 24, 15, and 8 p. c. respectively, "*with such exceptions as are hereinafter made.*"

The Tariff Act of 1846 had imposed a duty of 40 p. c. upon the articles enumerated in schedule B, among which were "*almonds*" (by name), "currants," "dates," "figs,"

"prunes," "raisins." It had imposed a duty of 30 p. c. upon those enumerated in schedule C, among which articles were "grapes," "*nuts*, not otherwise provided for," "plums;" and a duty of 20 p. c. upon those enumerated in schedule E, including "bananas," "cocoa-nuts," "*fruit*, green or ripe, not otherwise provided for," "oranges," "lemons and limes," "pineapples."

By this first section, therefore, of the Tariff Act of 1857, the duties on almonds, currants, dates, figs, prunes, and raisins, were reduced from 40 to 30 p. c.; grapes, plums, "nuts not otherwise provided for," to 24 p. c.; bananas, oranges, lemons, &c., and "fruit, green or ripe, not otherwise provided for," in the statute of 1846, to 15 p. c.; *unless* these articles or any of them should come under the "exceptions" afterwards made. The second section of the act of 1857 did make exceptions in favor of various articles, among them "*fruit*, green, ripe, or *dried*," which it enacted should be transferred to schedule G; thus making them liable to a duty of 8 p. c. No *particular* fruits were named in this section.

Tariff acts, prior to that of 1846—that is to say, the tariff acts of 1804, 1816, 1832, 1842—had all laid a duty on "almonds" by name.

In this state of the tariff acts the plaintiff had made an importation of almonds, on which the defendant, Collector of the Port of Boston, charged 30 p. c. *ad valorem*. The plaintiff, considering that almonds were within the exception of "dried fruit," and so chargeable with but 8 p. c. *ad valorem*, paid the larger duty under protest, and brought suit to recover the difference. In the course of the trial the following questions were raised:

1st. Whether by law almonds were subject to a duty of 30 p. c. or of 8 p. c. only.

2d. Whether evidence should be admitted to prove that before and at the time of the passing of the Tariff Act of 1857, almonds were fruit, green, ripe, or dried, *according to the commercial understanding of these terms in the markets of this country*.

3d. Whether it should be left to the jury to determine

whether almonds were fruit, green, ripe, or dried, *according to the commercial understanding of these terms in our own markets when the Tariff Act of* 1857 *was passed.*

A certificate of division of opinion in the judges as to these points brought the same questions here.

Mr. Welch, for the importer: Our position is, that an exception has been made on the article of almonds in the second section of the act of 1857; and that by this section it is transferred to schedule G, under the act of 1846, which imposed a duty of but 8 p. c.; and we ask to show this by evidence that "almonds" were "fruit," green, ripe, or dried, according to the commercial understanding of our markets, and so within that schedule.

The general rule, which will be admitted, is, that Congress uses language in the revenue laws "in its known and habitual commercial sense," "in that known in our own trade, foreign and domestic." There are two qualifications to this rule. The first is, where Congress has, by its legislation, made it *apparent* that it did not intend to include a particular article under a name which, among commercial men, would include it. But this qualification has no application here. [The counsel here cited and commented largely on prior tariff acts to support this position.] The *second* is, when there is a known popular sense in which a word or phrase, designating some common article, is used accordantly with the etymology of the language and with the common understanding of all but a particular class. In those cases Congress may be presumed to use the word in that sense, and not in any peculiar commercial one. *Maillard* v. *Lawrence*,* where it was decided that shawls were "wearing apparel" in the sense of the revenue laws, is an illustration. But this qualification applies no more than the first one, for the term dried fruits in popular meaning includes almonds. They are popularly classed among the dried fruits of the table with raisins, dates, &c.: they are bought as such at retail shops with the same articles

* 16 Howard, 251.

of dried fruit: they are defined in dictionaries as fruits, not in the general sense alone as fruits of the earth, but in the more limited sense as being the edible fruits of trees, shrubs, or vines: they are botanically treated as fruit in books of horticulture.*

It is not important that "almonds" are mentioned by name in the old tariff acts; for in legislation, previous to 1857, neither the terms "fruit, green, ripe, or dried," nor any similar terms were used; but "almonds," like the other dried fruits of commerce, were specifically enumerated, and were placed in companionship with those other dried fruits, and subjected to the same duty with all or most of them. Moreover, the general plan of statute of 1857 shows an intention to class them under the general term with the other dried fruits. And it may be added, that the same argument which would exclude almonds would exclude raisins, and all or most of the other dried fruits.

Mr. Bates, A. G., who submitted a brief of Mr. Woodbury, contra: The question really is, whether "almonds" are almonds; for if they are, there is an end of the question; "almonds" being by name charged 30 p. c. The *inference* from commercial nomenclature, that they have been transferred to a schedule providing for fruits, cannot operate in the face of a provision of a different kind for them by name.

The term "*dried* fruits" means such fruits as have required skill in preparation. Almonds may be "dry" when old, as hazel-nuts are, but they have gone through no process of preparation, and are not within the class.

* In "Downing on Fruit and Fruit Trees" (p. 150, &c.), the almond tree is treated of as one of the proper subjects of his book, the manner of cultivating it for fruit is pointed out, the localities in the United States where it will bear fruit are mentioned, and the various kinds are especially described. It is also stated that many naturalists, from the difficulty of distinguishing it by its leaves and wood from the peach, and from experiments in raising it from the seed, are of opinion that the peach tree and almond tree are the same, the difference between them having been produced by cultivation. See also "Loudon's Encyclopædia of Gardening," § 4542. Nut-trees in general are not treated of in works on fruit-trees.

The case is one of judicial construction of the revenue statutes. The proposition of leaving to the jury to determine, on evidence put before them, of a commercial understanding, whether an import, whose specific name is unquestioned, and is given specifically, bears also another name mentioned but generally, in the tariff, strikes at the roots of the judicial function of interpreting statutes. It places the construction of revenue laws at the mercy of commercial experts and unskilled juries, liable to vary in every district and at every term; and hence utterly incompetent to guide the Treasury in its obligation to require uniform duties.

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

The argument is, that almonds are dried fruit, and hence are provided for in the second section of the act of 1857; and evidence was offered on the trial to show that such was the commercial sense of the term. But this inquiry had nothing to do with the question, and, indeed, it is difficult to see how any such inquiry could take place except as matter of curiosity and speculation; for, certainly, such proof could not exist or be found in the sense of commercial usage under any of the tariff acts, as a duty has been imposed on almonds, *eo nomine*, almost immemorially, at least since the duty act of 1804, and continued in the duty act of 1816, 1832, 1842, 1846. The article, as we have seen, is charged specifically with a duty of 40 p. c. *ad valorem* in the act of 1846, and is not named in the changes in the act of 1857. Full effect can be given to the term "fruit," "dried," without the very forced construction to bring within it the article in question. Direction to the court below that almonds are subject to duty of 30 p. c. *ad valorem*. The other questions certified need not be answered.

DIRECTION ACCORDINGLY.

TURRILL *v.* THE MICHIGAN SOUTHERN, &c., RAILROAD COMPANY.

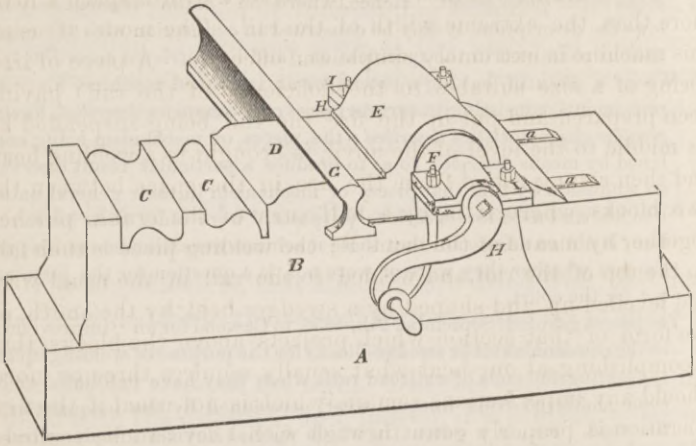
1. Patents for inventions are not to be treated as mere monopolies, and therefore as odious in the law, but are to receive a liberal construction, and under a fair application of the rule that they be construed *ut res magis valeat quam pereat.* Hence, where the "claim" immediately follows the description, it may be construed in connection with the explanations contained in the specification; and be restricted accordingly.
2. Where a plaintiff, having a patent for an improved machine, his "improvement" consisting in certain pieces of mechanism *described,* having *peculiar* characteristics *described;* the pieces of mechanism being combined by means *described,* so as to produce a particular result *described,* an admission by him that pieces of mechanism in their general nature like his, and used for "various purposes," were older than his invention, is not an admission that these machines were the same as his; and the fact whether they were or were not, is a question for the jury, and not for the court.
3. The patent granted, September 9th, 1856, to Cawood for an "improvement in the common anvil or swedge-block, for the purpose of welding up and re-forming the ends of railroad rails when they have exfoliated or become shattered from unequal wear, occasioned by the inequalities of the road," &c., is a patent in which special devices are described as combined and arranged in a particular manner, and as operating only in a special and peculiar way for a special purpose, and to effect a special result. It is not a claim for any kind of movable press-block, combined and operating in any way with any kind of fixed block to accomplish any purpose, or effect any kind of result.

THIS was a writ of error to the Circuit Court for the District of Michigan. The action was trespass on the case brought against the Michigan Southern and Northern Indiana Railroad to recover damages for the alleged infringement of a patent; the defence having been want of originality in the invention.

The patent, which was granted originally to one Cawood, dated September 9th, 1856, was for "*a new and useful improvement in the common anvil or swedge-block, for the purpose of welding up and re-forming the* ENDS *of railroad rails when they have exfoliated or become shattered from unequal wear, occasioned by the inequalities of the road;* six inches or so of the extreme end of the rail being frequently destroyed, while the remainder is perfectly sound."

The schedule ran as follows:

"I do hereby declare that the following is a full, clear, and exact description of the construction and operation of the same, reference being had to the annexed drawings, making a part in this specification and giving a perspective view of the machine:



A, representing the bed-sill on which the anvil is placed; B the anvil or swedge-block of cast iron; C C recesses, or dies across the face, the shape of the side of the rail; D solid block, making a part of anvil, with its side shaped to the side of the rail, while placed in its natural position; E a movable press-block held down to anvil by dovetail tongues on the anvil and grooves in the movable press-block, and operated by two eccentric cams, F, back and forth, in a longitudinal direction, to press the rail together while forming its end, and with sufficient travel to extricate the rail without altering its vertical position; G a rail of the T form, in its position, between the press-blocks.

"I usually make my improved anvil and swedge-block of cast iron, between four and five feet long and sixteen inches across the face, with two forms or recesses C C at one end, right and left, of a form corresponding with the side of the rail. Close to these is cast a raised block D, nearly as high as the rail, and with its farthest edge also shaped to fit the side of the rail when it lays across the anvil in its natural position. Next this I attach to the face of the anvil, by dovetail tongues and grooves, or any

other convenient manner, what I call a movable press-block E, with a similar but reverse-shaped edge, laying opposite the other so as to inclose the rail between the two, as in the jaws of a vice. This block I work by two eccentric cams F on a shaft, which is attached to the anvil by two standards H H, with bearings I I, either cast on or bolted to the edge of the same, so that half a turn of the crank will move the press-block over a space a little more than the extreme width of the rail. The mode of using this machine is extremely simple and effective. A piece of iron (being of a size suitable to the deficiency of the rail) having been prepared and put in the fire, the rail being suspended by its middle to the level of the anvil, is brought to a welding heat, and then swung round from the fire in the space between the two blocks, where it is, by a half turn of the crank, pinched together by means of the cams F; the welding-piece is then laid on the top of the rail and welded to the rail in the usual way, and levelled up and shaped by a swedge, held by the smith, of the form of that section which projects above the blocks, thus accomplishing at one heat what usually requires three or more. Should any imperfections remain, which is not usual if the first operation is properly gone through with, they can be removed by proper hand swedges after placing the rail in the recesses C C for that purpose."

The claim was thus:

"I do not claim the anvil-block nor its recesses; but what I do claim as my invention, and desire to secure by letters patent, is *the* movable press-block E, having its edge formed to the side of the rail G, in combination with another block D, with its edge of a similar but reversed form (the movable blocks to be operated by two cams, F, or in any other convenient manner), *for the purpose of pressing between them a T, or otherwise shaped rail;* thereby greatly facilitating the difficult operation of welding and renewing the ends of *such* rails after they have been damaged, in the *manner herein described and set forth.*"

Having put the patent in evidence, shown an assignment of it to the plaintiff, and otherwise made out a *primâ facie* case, the plaintiff rested. The defendants then introduced models of certain machines, for the purpose of showing that

the invention was not original. The models thus introduced were of the following machines: 1st. Of an angle-iron machine. 2d. Of an anchor machine. 3d. Of a bayonet machine. 4th. Of a machine patented in England to one Church.

On most or all of these, *movable and fixed blocks were used;* but it remained a question to be solved by inspection, whether the *forms* of these blocks and the *manner* in which they were combined, and the *means* by which they were moved and held, were or were not adapted to the welding up and re-forming the ends of railroad rails when exfoliated or shattered from unequal wear. The plaintiff, however, *admitted*, his admission being according to the bill of exceptions taken and sealed in the case, exactly in these words, "*that movable press-blocks, in combination with faces of various shapes*, and used for *various* purposes, were older than the alleged invention of Cawood, the patentee."

The evidence being closed, the plaintiff requested the court to charge the jury "that the invention patented consisted of the movable press-block and the block D, in combination with the anvil or swedge-block B, described in said specification." This instruction the court refused; and charged essentially as follows:

"In the view which the court takes of the case, *there will be no question of fact for you to decide.* According to the construction which the court has heretofore given to the patent, and which it now repeats, the patentee claims as his invention the movable press-block *E*, having its edge formed to the side of the rail G, in combination with another block D, the movable blocks to be operated by two cams, or in any other convenient manner. The specification shows that the block D is fixed and to be a part of the anvil or swedge-block, in combination with which, as well as with the fixed block, the movable block is to be used. Movable press-blocks in *such* combinations, with faces of various shapes, and used for various purposes, it is clearly proved and *frankly admitted*, are greatly older than the alleged invention of the patentee. The models exhibited in evidence of the 'angle-iron machine,' the 'anchor machine,' the 'bayonet ma-

chine,' and those made from the descriptions contained in the English patent of Church, are only some of the examples of their use and application. The patentee therefore claims that of which he is not the inventor. This fact is fatal to the patent, and entitles the defendant, *as matter of law, to your verdict.*

"If it be said that the claim is for the shape of the faces of the blocks, and the uses to which they are to be applied, the answers are:

"1st. A mere change of form is not a patentable subject.

"2d. The use of a machine or invention for a new purpose is also not patentable.

"3d. It was the duty of the patentee to describe clearly what he claims as his invention, so that it might be distinguished without doubt or difficulty from everything else to be used in connection with it. This has not been done. If the limited construction here under consideration be deemed the correct one, still this objection would be fatal, and your verdict the same. We are, however, satisfied that the true construction is the more comprehensive one, and that patentee claims the movable block in combination with the fixed one, and that the shape and proportions of the cheeks are only incidents and matters of detail."

The plaintiff took exceptions to the following among other parts of the charge:

First. To so much as stated that "the movable press-blocks in such combination, with faces of various shapes, and used for various purposes, being greatly older than the alleged invention of the patentee, was fatal to the patent, and entitled the defendant, as a matter of law, to the verdict of the jury."

Second. To so much as stated that, "in the view which the court takes of the case, there would be no question of fact for the jury to decide."

The chief question, therefore, in error was, whether the court had or had not decided a question of fact; and so withdrawn the case improperly from the jury; and this chief question involved, as a previous one, the question whether the court had or had not rightly construed the patent?

Argument for the plaintiff in error.

Mr. B. R. Curtis, for the plaintiff in error:

1. *As to the construction of the patent.* The claim is not one of *any kind* of movable press-block, combined and operating in *any* way, with *any* kind of fixed block, to accomplish *any* purpose. But it is a claim of *such* a movable press-block as is described, and *such* a movable fixed block as is described, arranged as described, and combined and operating in the particular way described, for the purpose of effecting the particular result indicated.

The patentee declares the sole *purpose* of the invention to be, "welding up and re-forming the ends of railroad rails, when they have become exfoliated or shattered;" and in describing the manner of constructing and using the machine, he shows it *to be designed for that purpose, and for that purpose only.* At the conclusion of the claim, he again declares the object of the machine to be "the difficult operation of welding and renewing the ends of *such* rails" (*i. e.* railroad rails), "after they have been damaged."

So far as respects *the result* to be effected, it is clearly shown to be, that single, special, and peculiar result of so placing and holding railroad rails, as greatly to facilitate the operation of renewing the ends of such rails by welding.

It is equally clear, that what the patentee intended to include in his claim was not *any* press-block or *any* fixed block, but *the* press-block and *the* fixed block which he has described.

I. Because the patentee, at the beginning of his specification, after stating that he has invented a new and useful improvement, says: "And I do hereby declare that *the following is a full, clear, and exact description of the construction and operation of the same.*" When he comes to make his claim, it is but just to the patentee to believe that he does not intend to claim as his own anything which is entirely outside of what he has described as his invention.

II. Because the language of the claim itself is not extended to *any* movable or *any* press-block, but is clearly limited to "*the* movable press-block E" "and *the* block D"—thus identifying the two elements of the combination, as being such a press-

block and such a raised fixed block as he had previously described, and had shown on the drawings by the designation of those letters.

Nor is the mode of arranging, combining, and operating these elements, which was intended to be claimed, left in any doubt. The patentee, in the specification, declares "that the following is a full, clear, and exact description of the *construction and operation* of the same." He gives also a clear description of his particular mode of arranging, combining, and operating the movable and the fixed block. And when he arrives at the claim, after saying he claims the movable block, in combination with the fixed block, he adds, "*in the manner herein described and set forth.*" Specifications are entitled to a liberal construction;* though there is no necessity for any special liberality here.

Then the blocks E and D, and the described mode of arranging, combining, and operating them, *have peculiar characteristics.* The specification says of block D that it is a "solid block, *making a part of the anvil*, with its side shaped to the side of the rail, while placed in its natural position." And again, "*Close to these* (*i. e.* close to the recesses C C in the 'improved anvil') IS CAST *a raised block* D, *nearly as high as the rail, and with its farthest edge also shaped to fit the side of the rail*, when it lays across the anvil in its natural position." It thus appears that this block D is a solid projecting part of the "improved anvil;" it is cast with it; as the specification declares, it is "a solid block, making a part of the anvil." Its outer face is shaped to correspond with one side of the rail when laid upon the anvil; and its office is, not merely to resist the pressure exerted on the rail by the movable block, *but to resist the force exerted upon the rail by the hammer in welding, and thus preserve the shape of the rail.* Three characteristics are here set forth, and each is essential to enable the block D to perform its appropriate functions in the combination.

The specification describes block E as a movable press-

* Winans *v.* Denmead, 15 Howard, 341, and cases there cited.

block, held down to the anvil by dovetail tongues on the anvil, and grooves on the movable press-block. Again. "Next this (*i. e.*, next the block D), *I attach to the face of the anvil*, by dovetail tongues and grooves, or in any other convenient manner, what I call a movable press-block E, with a similar but reverse-shaped edge, lying opposite the other, so as to inclose the rail between the two, as in the jaws of a vice." Here, too, are three characteristics, and each is also essential to enable the block E to enter usefully into the improved combination.

Then as respects the described mode of combining and working the blocks D and E. The specification declares that the block D is cast on and makes part of the anvil; and that the block E is held down to the anvil by dovetailed grooves and tongues. The two blocks are thus kept in certain relations to each other by and through the anvil, which thus forms one of the essential means of combining and operating them. They are connected with the anvil; and through that connection they are enabled to operate in combination, each performing its appropriate function, in harmony with the other, and their combined operation produces the specific desired result of holding and so supporting the rail on the anvil that it can be welded without destroying its peculiar form.

But, first, the block E must be moved on the anvil; and these means of motion must be such *that the entire face of the block* E *shall be kept parallel with the entire opposite face of the block* D, so as to exert the same pressure on every part of both faces of the rail. And second, the means of movement must be such, that when the block E has been advanced to its forward position, so as to grasp the rail and press it against the block D, *the machinery shall hold* E *rigidly in position*, not allowing it to be forced at all out of its position, otherwise the heavy blows necessary to weld the iron would destroy the shape of the rail. And a third result is, to produce the desired backward and forward movements and this rigidity, by simple and sufficient means, readily worked, either by hand or power.

Argument for the plaintiff in error.

All these necessities are met by means of the tongues and grooves, and the two eccentric cams, which cams, by a half revolution of a crank, advance the entire face of the block E parallel to the opposite face of the block D, until the rail is grasped, thus exerting the same pressure on every part of both faces of the rail, holding E rigidly in that position by the strength of the machine, so as perfectly to support every part of the rail against the force of the welding hammer, and by reversing the crank half a revolution, relieving the rail and placing the blocks E and D in position to receive another rail on the anvil.

What is the thing patented? The thing patented is described by *its title* to be "a new and useful improvement in the common anvil or swedge-block, for the purpose of welding up and re-forming the ends of railroad rails when they have exfoliated or have become shattered," &c. By the *description* which the patentee declares describes "*his improvement*," it appears to be *an improved anvil;* one of the parts of which is the block D, having the characteristics before described; another part of which is the block E, having the characteristics before described; and these two parts are combined and operated in the manner described to produce the effects indicated.

The result of the whole is, that the patentee claims to have taken the common *anvil* or swedge-block, and to have *improved* it by his new combination; and that the combination consists in this, viz.: That he has raised on the anvil a block D, making a part of the anvil, having a face upon it suited to receive the side of the rail, and press equally on it so as not only to grasp but support every part of that face of the rail, under the blows of the welding hammer; that he has combined with this projecting block D, which is part of the anvil, another block E, which is at the same time attached to the anvil and is movable thereon; that this block E is so attached to the anvil *as to be effectually a part of it when the anvil is used as an anvil, to resist the welding blows of the hammer, and to be movable when the objects to be accomplished require it to be moved;* that while this block E is thus an effectual part of

the anvil, it is also an effectual and sufficient support of the rail while undergoing the welding blows of the hammer; and in combination with the block D, not only grasps the rail and holds it on the anvil, but supports every part of the two faces of the rail, and keeps them from being forced out of shape by the blows upon the upper surface of the rail in welding its parts.

2. It is obvious that to compare any prior machine with this machine, it is necessary to see if any prior machine was adapted to accomplish the same, or an analogous result, by substantially the same means. Perhaps this is not the strictest possible abstract statement of the true inquiry. This is a patent *for means*, and viewed abstractly, the sole inquiry is, whether the *patented means* are substantially the same as previously existing means. But the application of the patent law rarely admits of such abstraction of means from ends. A new use of an existing machine is not patentable. A modification of an existing machine, whereby it is rendered capable of a new use, is patentable. One of these propositions is just as true as the other. Neither proposition can be safely applied, without careful regard to the facts of the case it is to govern. And, without going upon debatable ground, it is safe to assert, that if there was no prior machine which could accomplish *the same, or an analogous result, by the use of substantially the same means*, the machine is new, under our patent law. The practical results of inventions afford the reasons for the patent laws. They are designed to encourage progress in the useful arts; and therefore to disregard the practical results attained by a patentee would be to lose sight of the final cause of the system. And it is also true, and the more one is conversant with this peculiar subject the more impressed he will be with the truth, that means and ends are inseparably connected, and that it is not one of the cases ordinarily arising under the patent law *that a new and highly useful end has been attained by the application of means already well known and before applied to an analogous end.* It is a possible case; and therefore I stand on this proposition, *that if there was no machine, prior to that of the patentee,*

which could accomplish the same useful purpose, or one substantially analogous to it, by the use of substantially the same means, then his patent is valid. Now, in looking at the rulings excepted to, two well-settled rules are to be kept in mind:

I. The question whether any machine, proved, or admitted to have existed before the patentee's invention, was substantially the same as the thing patented, was *a question of fact for the jury.*

II. The patent is *primâ facie* valid, and the burden of proof is on the defendant. Consequently the defendant was required by law to satisfy the jury, not only that the machine he relies on did exist before the patentee's invention, but that some one of them could accomplish the same useful purpose, or one substantially analogous to it, by the use of substantially the same elements, combined and arranged in substantially the same manner as he described and claimed in his specification.

As to the admission of the plaintiff. Upon such an admission as was made, the patent cannot be declared void, as a conclusion of law, unless it is a conclusion of law that after movable press-blocks, in combination with faces of various shapes, had been used for various purposes, *there was no field of invention left unoccupied;* or if any such field was left, *that the claim of the patentee is not within that field.*

Now the first of these is manifestly not a conclusion of law. The law cannot determine it to be impossible to make a new combination to produce a new and useful effect because the principal elements have already been combined. A patent for a combination is for an entirety, formed out of the described elements, combined and arranged by the described means and operating in the described manner, to produce the described effect. Though all the elements had previously been combined in *some* way, to produce *some* effect, yet if the patentee modified one or more of the elements, to suit his new design, and combined the elements by different means, and so as to operate in a different way, to produce a new and useful result, it is a new combination and the subject of a patent.

It is manifestly possible there was a field of invention which could be occupied by a combination of the same elements used here, provided the patentee should modify those elements to adapt them to his new use, and should combine and operate them in a different way, so as to produce a new and useful result; *and it must be a question of fact and not of law whether he has so done.* If he has, he has made a patentable invention; and as a patent has been granted to him, after examination by the proper public officers, it is presumed he has made an invention, until the contrary is shown. Notwithstanding the admission, as there was a field of invention left, he is presumed to have occupied that field, *unless upon the fair construction of his claim it appears he has passed out of that field, and included something which, by his admission, appears to be old.* But it has already been shown that this claim cannot be so construed.

As to the models introduced by the defendant. Though on several of them movable and fixed blocks were used, we assert that on inspection it is obvious that the forms of those blocks, the manner in which they were combined, and the means by which they were moved and held, were not adapted to the new design of the patentee. But if all this should be denied, still *it is a question of fact whether he has done this.* How is the court to say, *as matter of law*, that a machine for holding and supporting rails, under a welding hammer, is substantially the same as a machine for making bayonets, or angle-irons, or anchors? The patent raises a presumption that they are not the same, and without the aid of the jury, how has this presumption been overcome? Yet, upon the introduction of these models, and upon the admission of the plaintiff, as given in the reporter's statement, the court did instruct the jury, *as matter of law, that the patent was void.* The instruction took the entire case from the jury, and no further instruction could be given to them, except the direction, which was given, that the defendant, as matter of law, was entitled to their verdict.

This instruction excepted to raises the question whether upon the introduction by the defendants of the models men-

tioned in the bill of exceptions, and the admission therein stated to be made by the plaintiff, it *was a conclusion of law* that the thing patented was substantially the same as was exhibited in either of the said models, or as was embraced in that admission; or whether there was still matter of fact to be passed on by the jury. If the claim is construed to be for *such* a press-block as is described, and *such* a fixed block as is described, combined and arranged in the manner described, to produce the effect described, no amount of evidence concerning *the existence* of prior machines could remove from the jury the question whether either of these machines *included this thing claimed by the patentee.* This is a distinct and substantive question, which could arise only after the prior existence of the other machines had been shown to and passed on by the jury.

Now upon this distinct and substantive question, as there does not appear to have been any evidence of experts, it was for the jury, upon an examination and comparison of the prior machines, to find whether either of them embraced the particular combination described and claimed by the patentee; and upon this question the burden of proof was upon the defendant.

The admission of the plaintiff "that movable press-blocks, in combination with faces of various shapes and used for various purposes, were older than the alleged invention," dispensed indeed with the production of evidence of the prior existence of those machines; but the question of fact still remained, *whether either of them included the particular combination described and claimed by the patentee.* It is true that if he had claimed a machine not distinguishable from *any other* having a press-block, in combination with a face of some shape, and used for some purpose, then his admission would have conclusively proved, not only the prior existence of such machines, *but their identity with the thing claimed;* and therefore, though it is not very clearly expressed in any part of the bill of exceptions, it would seem that the court *did give this broad construction to the claim*,—holding it in effect to be a claim of a movable and a fixed block, without regard to any

modification made by the patentee of those elements to fit them for his special use, and without regard to the particular manner in which the patentee had combined them so as from the whole to produce a new result, and without regard to the degree of utility of that result. But it has been shown that this is not the true construction.

The rule laid down by the court, that "it was the duty of the patentee to describe clearly what he claims as his invention, so that it might be distinguished *without doubt or difficulty* from everything else," seems hardly consistent with that liberality in the construction of claims, which has been often announced by this court, as due to the nature of the subject, and just to inventors, and which has been so constantly applied by the Circuit Courts in administering the patent laws.* It is a rule which would destroy a very considerable proportion of meritorious patents. But still it might be applied to this specification and leave it valid. For, when it is borne in mind that each of the blocks is carefully described, both in words and by references to the drawings; that the manner of combining and operating them is also carefully and distinctly shown; that the new and useful result is also clearly described, and that the manner in which each part operates in the production of that result is pointed out and exhibited, and that the claim is for "the press-block E, having its edge formed to the side of the rail G, in combination with another block D, with its edge of a similar but reversed form (the movable blocks to be operated by two cams, or in any other convenient manner), for the purpose of pressing between them a T or otherwise shaped rail, thereby greatly facilitating the difficult operation of welding and renewing the ends of such rails, after they have been damaged, *in the manner herein described and set forth*;" it would be doing violence to the clearly expressed intention of the patentee to hold that he has made a broad claim of press-blocks, and faces however formed, combined in any way, for any use.

* Corning *v.* Burden, 15 Howard, 269; Winans *v.* Denmead, 15 Id., 341, and cases there cited.

Argument for the defendant in error.

Mr. Keller, contra:

1. The construction of the claim given by the court below is the true construction of the patent. The prayer to charge, when taken in connection with the charge, leaves no doubt as to the construction which was given to the claim of the patent by the court below. The court was requested to charge that "the invention patented consisted of the movable press-block, and the block D, in combination with the anvil or swedge-block B, described in said specification." The court refused so to charge, but did charge that the patentee claimed as his invention the combination of the fixed with the movable block or jaw, operated by two cams, or in any other convenient manner. And although the court, in the charge, did say that the specification shows that the stationary block or jaw is to be a part of the anvil or swedge-block, and to be used in that combination, nevertheless it is clear that the court refused to consider the anvil as one of the elements of the combination claimed by the patentee. The court below also clearly excludes, from the invention claimed, the shape and proportions of the jaws, holding that these were merely incidental to the use to which the machine was applied.

Now this construction is the true construction, because:

1. The Patent Act of 1836 (§ 6) requires the patentee to give not only a full, clear, and exact description of the manner of making, constructing, and using his invention, but that he shall also "particularly specify and point out the part, improvement, or combination which he claims as his invention."

This provision is based on the presumption that in giving a full, clear, and exact description of the manner of making and constructing a machine, the applicant, unavoidably, will be required to describe many things well known in the arts prior to his invention; hence the necessity for the other provision of the same section, which requires that out of all which he has thus described he shall specify and point out the part, improvement, or combination which he claims as

his invention. In view of this provision the court could not include in the claim of a combination any element not named in the claim, however clearly such part may be presented in that portion of the specification which describes the manner of making, constructing, and using the machine.

II. The elements, which constitute the combination claimed by the patentee, are not only in terms the movable press-block, with its edge formed to the side of the rail, and the stationary block, with its edge of a similar but reversed form; but the better to exclude all other things from the combination intended to be claimed, the patentee has stated that the things so claimed, in combination are "for the purpose of pressing between them a T or otherwise-shaped rail." And although the machine, as an entirety, is stated to be for the general purpose of welding up and re-forming the ends of railroad rails, such general purpose will not justify the introduction of the anvil as one of the elements in the combination claimed, in the absence of all mention of the anvil in the claim, because the purpose specified in the claim, and the office assigned to the combination claimed, is that of pressing or griping the rail, and the anvil performs no office —subserves no duty—in pressing the rail, and it is the duty specified in the claim, and not the use for which the entire machine is designed, which is to control in the construction of the claim.

III. That the patentee did not intend to include the anvil as one of the elements of the combination claimed, appears in the fact that, in the descriptive part of the specification, he designates the several parts by letters of reference to the drawings,—the anvil by the letter B, the stationary press-block by the letter D, and the movable press-block by the letter E—and that in specifying the combination which he claims as his invention, he designates the parts by the same letters, and the letter B does not appear in the claim.

IV. As the movable and the stationary press-blocks are specified in the claim in terms indicated by letters of reference, and perform the whole duty for which the combination is claimed, and as the anvil is not specified in terms in

the claim, nor indicated by letter of reference, and can perform no duty in the purpose for which the combination is claimed, by no rule of construction can the anvil be introduced as one of the elements of the combination claimed.

v. The anvil or swedge-block, described and represented in the patent, could not be claimed in combination with the press-blocks, because it has no mechanical relation to, or dependence upon them. The anvil or swedge-block is indicated in the drawings by the letter B. It has recesses or dies formed in its upper face, in shape the reverse of the sides of the rail, so that when a rail is out of shape it can be laid in either of these recesses or dies, and hammered into shape. Now, in the specification, after describing the manner in which the ends of a rail are to be re-formed when griped between the stationary and the movable press-blocks, the patentee says: "Should any imperfections remain, which is not usual if the first operation is properly gone through with, they" (the imperfections) "can be removed by proper hand swedges, after placing the rail in the recesses C C for that purpose." From this it will be seen that the anvil or swedge-block B, with its recesses C C, has no mechanical combination with, or relation to the press-blocks. It makes no part of an organized mechanism. It is simply a swedge-block or anvil of the usual construction, placed in convenient proximity to the press-blocks, so that if it should become necessary to swedge the sides of the rail it can be done conveniently. One might as well say that an improvement on an ordinary vice could be claimed in combination with an ordinary blacksmith's anvil, if used in the same shop and placed at a convenient distance, so that a piece of iron, after being forged, could be conveniently put in the vice to be filed.

2. The court below said rightly that, in the view which it took of the case, "there could be no question of fact for the jury to decide."

No exception was taken to that part of the charge in which the court below stated that "movable press-blocks in such combinations, with faces of various shapes, and used for

various purposes, it is *clearly proved and frankly admitted*, are greatly older than the alleged invention of the patentee."

In view of the ruling of the court on the questions of law, there was but one material question of fact in the case, and that was whether, prior to the alleged invention by the patentee, similar combinations of press-blocks with faces of the required shapes were known and used in the United States, or patented or described in any printed publication in this or any foreign country. And that fact having been conceded by the plaintiffs, the case was left to stand alone on questions of law. It was, therefore, the duty of the court to direct the jury to render a verdict for the defendant.*

Mr. Justice CLIFFORD delivered the opinion of the Court.

I. Patentee describes his invention as a new and useful improvement in the common anvil or swedge-block, for the purpose of welding up and re-forming the ends of railroad rails, when they have exfoliated or become shattered from unequal wear, occasioned by the inequalities of the road. Having made out a *primâ facie* case, the plaintiffs rested, and the defendants then introduced certain models of machines, for the purpose of showing that the patentee was not the original and first inventor of his improvement. Models of machines so introduced were the following, to wit: *First*, a model of an angle-iron machine. *Secondly*, a model of an anchor machine. *Thirdly*, a model of a bayonet machine. *Fourthly*, they also introduced a copy of an English patent granted to one Church, with the specifications and drawings annexed, and the statement in the bill of exceptions, in regard to all those machines, is that they were known prior to the invention of the patentee in this case. Bill of exceptions also states, and it is important to observe the fact, that in addition thereto the defendants also adduced evidence to show, and that it was admitted by the plaintiffs,

* Parks *v.* Ross, 11 Howard, 373; Morgan *v.* Seaward, Webster's Patent Cases, 170.

that movable press-blocks, in combination with faces of various shapes and used for various purposes, were older than the alleged invention of patentee. Other evidence, it is stated in the bill of exceptions, was also introduced by the defendants, for the purpose of showing that the patentee was not the original and first inventor of the machine for which he obtained the patent; but the evidence is not given, and it is not perceived that the statement is of any importance at the present time.

II. Charge of the court is given entire in the record; but in the view taken of the case, it will only be necessary to refer to so much of it as relates to the construction of the patent, and the effect of the admission made by the plaintiffs. Construction of the patent, as given by the court, was that the patentee claimed as his invention the movable press-block, having its edge formed to the side of the rail in combination with the block D, the movable blocks to be operated by two cams, or in any other convenient manner. "Specification shows," said the court, "that the block D is fixed and is a part of the anvil or swedge-block, in combination with which, as well as with the fixed block, the movable block is to be used." Such is the substance of the charge so far as respects the construction of the patent; but the court added, in the same connection, that "movable press-blocks in such combination, with faces of various shapes and used for various purposes, it is clearly proved and frankly admitted, are greatly older than the alleged invention of the patentee;" and in support of that proposition of fact, the presiding justice referred to the several models given in evidence by the defendants, and to the description contained in the English patent, as examples of their use and application. Following those references, and in connection therewith, the court told the jury that "the patentee, therefore, claims that of which he is not the inventor, and this fact is fatal to the patent, and entitles the defendants, as matter of law, to your verdict." Exceptions were seasonably and duly taken to all that portion of the charge of the court. Principal complaint against the charge is that the court decided a

question of fact which belonged to the jury, and which should have been submitted to their determination under proper instructions.

III. Whether that complaint is well founded or not depends very much, if not entirely, upon the construction to be given to the patent. Patents for inventions are not to be treated as mere monopolies, and, therefore, odious in the eyes of the law; but they are to receive a liberal construction, and under the fair application of the rule, *ut res magis valeat quam pereat*, are, if practicable, to be so interpreted as to uphold and not to destroy the right of the inventor. (*Ryan* v. *Goodwin*, 3 Sum. C. C. R., 520.)

Claim of the patentee in this case is not for the anvil-block nor its recesses, as is expressly stated by him in his specification. On the contrary, what he claims as his invention is the movable press-block, having its edge formed to the rail, in combination with another block, which is described as a fixed block, and whose edge is of a similar but reversed form, for the purpose of pressing between them the railroad rail. Shape of the rail is immaterial, except that the inner face or edge of the respective blocks must be so made and formed as to fit the respective sides of the rail to be repaired. Statement of the claim is, that the movable blocks may be operated by two cams, or in any other convenient manner, and the representation is that the machine will greatly facilitate the operation of welding and renewing the ends of such rails, after they have been damaged in the manner herein described and set forth. Taking the description of the machine as set forth in the specification, it consists of the following elements: *First*, a bed-sill, on which the anvil is placed. *Secondly*, the anvil or swedge-block of cast iron, usually four or five feet long, and sixteen inches across the face. *Thirdly*, a solid block cast with and making a part of the anvil, nearly as high as the rail when it is laid across the anvil in its usual position. *Fourthly*, a movable press-block, attached to the face of the anvil by dovetailed tongues and grooves, having an inner edge or face shaped to fit the opposite side of the rail so as to inclose the rail between

the two, as in the jaws of a vice. Press-block, as before remarked, is worked by two eccentric cams, which serve to advance the press-block upon its dovetailed tongues and grooves parallel to the opposite face of the fixed block. When the press-block has been thus advanced so far as to bring its face in contact with one side of the rail, the cams and the tongues and grooves hold the press-block in position, and the rail is firmly grasped between the inner faces of the two blocks. Inventor then goes on to describe the mode of using the machine, which he says is extremely simple and effective, and sufficient has already been remarked to show that his representation is correct, without reproducing the description. Immediately following that description, is the claim of the patent, as heretofore given, which need not be repeated.

IV. Evidently, the claim must be construed in connection with the explanations contained in the specification, and when viewed in that light, it is quite clear that it should receive a more restricted construction than was given to it in the charge of the court. Special devices are described as combined and arranged in a particular manner, and operate only in a special and peculiar way for a special purpose, and to effect a special result. Obviously, it is not a claim for any kind of movable press-block, combined and operating in any way with any kind of fixed block, to accomplish any purpose or effect any kind of result. Giving that construction to the claim, then indeed it would be true that the plaintiffs, when they admitted that movable press-blocks, in combination with faces of various shapes and used for various purposes, were older than the invention of the patentee, did admit away their whole case, and, if viewed in that light, would be equally true that there was no question of fact to be submitted to the jury. But such is not the true construction of the patent, as is obvious from every one of the explanations of the specification. Invention was of such a movable press-block as is described, having its edge formed to the side of the rail in combination with such other block as is described, with its edge of similar but reversed form arranged

as described, and combined and operating in the particular way described, for the special purpose of effecting the described result.

When viewed in that light, it is equally clear that the charge of the court was erroneous, because there was an important question of fact which should have been left to the jury, whether the machines introduced by the defendants or any of them, or any of the prior movable press-blocks, as is shown in the admission, were substantially the same as the machine of the patentee. American authorities, at least, hold that every such question is one for the jury, and upon that ground alone we have come to the conclusion that the judgment in this case must be reversed.

Judgment of the Circuit Court is accordingly reversed, with costs, and the cause remanded with direction to issue a

NEW VENIRE.

ROOSEVELT *v.* MEYER.

Where a certificate, coming up with the record from the highest court of law or equity of a State, certifies only that on the "*hearing*" of the case a party "*relied upon*" such and such provisions of the Constitution of the United States, "*insisting*" that the effect was to render an act of Congress void, as unconstitutional, which said claim, the record went on to say, "was overruled and disallowed by this court," and the record itself shows nothing except that the statute which it was argued contravened these provisions, was drawn in question, and that the decision was in *favor* of the statute, and of the rights set up by the party relying on it; no writ of error lies from this court to such highest State court under the twenty-fifth section of the Judiciary Act of 1789.

MR. ROELKER, of counsel for the defendant in error in this case, moved the court to dismiss the writ of error for want of jurisdiction: the case being thus:

The Judiciary Act of 1789 (§ 25) provides that this court may review the judgment of the highest court of a State in cases "where is drawn in question the construction of *any clause of the Constitution*, or of a . . *statute* of . . the United

States, and the decision is *against* the title, right, privilege, or exemption specially set up or claimed by either party under such clause of the said Constitution, statute," &c. And the Constitution aforesaid, by Article I, section 8, clause 5, gives power to Congress to establish "uniform laws on the subject of bankruptcies." By Articles 5, 9, and 10, of certain amendments to the same, it declares that "no person shall be deprived of life, liberty, or *property*, without *due* process of law; nor shall private property be taken for public use without just compensation;" and makes some other provisions not specially important to be mentioned.* With these constitutional provisions in force, Congress, on the 25th of February, 1862, passed an act authorizing the issue of United States notes, which notes the act declared should be "*lawful money and a legal tender in payment of all debts, public and private*," except duties on imports, and interest on the Federal debt.

In this state of things, as appeared from a case stated for the Supreme Court of New York, Meyer, plaintiff in that case, desiring to pay a bond and mortgage which he had assumed to pay, and which were held by Roosevelt, defendant in it, as original mortgagee, tendered to the latter the sum of $8171, being the full amount of principal and interest, in notes of the United States, issued under the act of Congress, aforesaid. Roosevelt refused to receive the same as legal tender, and claimed that the repayment should be made in gold coin of the United States. The case stated for the Supreme Court of New York went on as follows:

"It was thereupon agreed by and between the said parties that the defendant should receive, and he accordingly did receive, the said sum of $8170 in said notes of the United States, conditionally, and that the question whether the said notes of the

* They run thus:

Art. 9. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Art. 10. The powers not delegated to the United States by this Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

United States are and were a legal tender in payment of said mortgage debt and interest should be submitted to a court having jurisdiction.

"The question submitted to the Supreme Court of New York upon this case is:

"*Were the said notes of the United States a legal tender on the part of the plaintiff?*

"If the court shall decide this question in the affirmative, then judgment is to be rendered for plaintiff, ordering the defendant to deliver up said bond and mortgage to be cancelled, and to acknowledge satisfaction thereof, and discharge the same of record.

"If, on the other hand, the court shall decide the said question in the negative, then judgment is to be rendered in favor of defendant, ordering the plaintiff to pay the additional sum of three hundred and twenty-six $\frac{78}{100}$ dollars,* with interest from the 11th day of June, 1862; and that upon the payment of this sum, with interest, the defendant acknowledge satisfaction of said bond and mortgage, and discharge the same of record, and deliver up the said bond and mortgage to be cancelled."

The Supreme Court of the State decided the question in the negative, and judgment was rendered for the defendant. The plaintiff appealed to the Court of Appeals of the State of New York, the highest court of the State, and that court reversed the decision of the court below, and rendered judgment in his favor, and in their order for judgment add the following:

"And it is hereby certified and stated by this court that the defendant and respondent on the *hearing* of this case, *relied* upon certain provisions in the Constitution of the United States, namely Article I, section 8, clause 5, of the said Constitution, and Articles 5, 9, and 10 of the amendments thereof, the effect of which, as the said respondent *insisted*, was, that the debt, owing to the said respondent upon and by virtue of the bond

* This was admitted to be the difference at 4 per cent. between the market value of the notes, on the day of tender, and gold coin of the United States

and mortgage mentioned in the submission of the case, could not be paid against the will of the said creditor in anything but gold or silver coin, and that the said *claim* of the respondent was *overruled* and *disallowed* by this court."

Roosevelt, the defendant, and now plaintiff in error, thereupon brought a writ of error under the twenty-fifth section of the Judiciary Act of 1789, which writ the defendant in error now moved to dismiss, on the ground that this court has no jurisdiction, inasmuch as the highest court of law and equity of the State, in which a decision in the suit could be had, decided *in favor* of the validity of the act of Congress of 25th of February, 1862, which was the only statute of the United States drawn in question in the case.

Mr. Roelker, in support of his motion: The certificate does not state, that the points referred to were especially set up by the plaintiff, but only that on the *hearing*, *i. e.* on argument of the case, the plaintiff *relied upon* the sections of the Constitution referred to. It is evident that the plaintiff in error, *by way of argument* against the constitutional validity of the act of 1862, relied upon the sections of the Constitution to demonstrate that the act is unconstitutional and invalid. This is insufficient. The *record* should show, by just inference at least, that these questions were made, and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the decision of those questions, as indispensable to that judgment.* The question regarding the validity of any act of Congress will always involve the construction of one or more sections of the Constitution. The validity of an act depends upon the power of Congress to pass it, and this power depends upon the Constitution, as the source of all its powers. Either party in any suit, where such a question arises, must claim under some section of the Constitution, for or against the validity of the act. If the decision is in favor of the validity,

* Willson *v.* Blackbird Creek Marsh Co., 2 Peters, 245, 250; Harris *v.* Dennie, 3 Id., 292, 302; Williams *v.* Norris, 12 Wheaton, 117.

it may, in one sense, be said that what the other party claimed was disallowed, but not in the sense of the Judiciary Act.

Messrs. Scharff and Henry, contra: The record in this cause, we think, does show that there was drawn in question in the court below the true construction of certain clauses of the Constitution, to wit, Article I, clause 5, section 8, and Articles 5, 9, and 10 of the amendments; and it shows further, that the decision of the court below was against the right claimed by Roosevelt thereunder. By such adverse decision he is entitled to an appeal. The Court of Appeals, in fact, took special care to insure justice as far as it lay in their power to both parties, by so framing the judgment that no doubt could exist as to its appealable character, and evidently with this intent they made the particular certificate which they did. That certificate comes here as part of the record.

Under the several clauses of the Constitution mentioned in it, but particularly under Article 5 of the amendments, Roosevelt claimed as a *right of property*, sacred under the fundamental law of the Union, that he could not, by the operation of the act of February, 1862, directly or *indirectly* be deprived of his property without due process of good constitutional law, and that therefore he could not be made against his will to accept *as full* payment and discharge of a debt of $8171 due to him from Meyer, certain paper securities of the United States, called Legal Tender Notes, the market value of which at the time of their tender to him was only $7844.22, or about $326.78 less than the debt, and the effect of which tender would be, if enforced, to confiscate to the use of the debtor Meyer a portion, to wit, $326.78 of said debt.

The clause of the twenty-fifth section of the Judiciary Act, relied on, which gives an appeal to the citizen where the decision of the State court is against a right claimed under and depending upon the construction of any clause of the Constitution is, in fact, coextensive with the provision of the Constitution which extends the judicial power of the

Supreme Court to "all cases in law and equity *arising* under this Constitution;" and no construction of the Judiciary Act can be made to deprive the citizen of the United States of the protection guaranteed to him by that article.

A case is said to "arise" under the Constitution or laws of the United States whenever its correct decision depends on the construction of either.*

Mr. Justice WAYNE delivered the opinion of the court.

The suit was commenced in the Supreme Court of the State of New York, in which the validity of the act of Congress, of the 25th February, 1862, to authorize the issue of United States notes, and for the redemption and funding thereof, and for funding the floating debt of the United States, was drawn in question, and the legal right and title of the defendant, who was plaintiff in the court below, depended upon that statute. [His honor here stated the facts.] The Supreme Court ruled the question in the negative, and judgment was rendered for the plaintiff in error. The defendant in error then carried the case to the Court of Appeals of the State of New York, and that court reversed the decision of the Supreme Court, by rendering its judgment in favor of the defendant in error, giving to him the right which he claimed by the statute to pay the bond and mortgage in the notes issued under it. From that judgment the plaintiff in error has brought the case to this court. I have been instructed by the court to announce it to be our conclusion, upon the examination of the record, that as the validity of the act of the 25th February, 1862, was drawn in question, and the decision was in favor of it and of the rights set up by the defendant, that this court has no jurisdiction to revise that judgment. We direct accordingly the dismission of the case.†

Mr. Justice NELSON dissents.

DISMISSAL ACCORDINGLY.

* Cohens *v.* Virginia, 6 Wheaton, 379.

† Gordon *v.* Caldcleugh, 3 Cranch, 268; Fulton *v.* McAffee, 16 Peters, 149; Strader *v.* Baldwin, 9 Howard, 261; Linton *v.* Stanton, 12 Id., 423.

WHEELER *v.* SAGE.

Where a firm, whose business was "a general produce business," owned a mortgage on real estate, which real estate itself the firm was desirous to purchase under the mortgage, and intrusted the subject generally to one of the firm,—*held*, that the legal obligation of the partner intrusted being only to get payment of the mortgage, he might make an arrangement for his own benefit with a third person, without the knowledge of his partners, by which such third person should buy the mortgaged estate, giving him, the intrusted partner, an interest in it; and if the mortgage debt was fully paid by such partner into the firm account, that there was no breach of partnership or other fiduciary relation in the transaction; *or, at least*, that no other partner could recover from him a share of profits made by a sale of the real estate; all parties alike having been originally engaged in a scheme to get the real estate by depreciating its value through a process of entering a judgment for a large nominal amount, and by deceiving or "bluffing off" other creditors.

THIS was an appeal from the District Court of the United States for the District of Wisconsin; the case in that court having been one of a bill in equity, by which the appellant Wheeler sought to charge Sage as his trustee. The material facts, as set forth in the bill, were these:

On the 12th day of September, 1851, Wheeler, Sage, and Slocum entered into an equal copartnership, to carry on "a *general produce business*" in Troy, New York. The firm became the owner of a large debt against Alanson Sweet, of Milwaukee, which was secured by mortgage on valuable real estate. Proceedings to foreclose were commenced in October, 1854, and a decree passed in November, 1855. Sweet was insolvent, with heavy judgments against him. The parties were desirous of getting a perfect title to the mortgaged premises, their value being, when the mortgage was given, $50,000. In order to do this, it was thought necessary that certain judgments should be purchased and other arrangements perfected, which Sage informed Wheeler and Slocum could be done through a certain Alexander Mitchell, for $10,000. Sage was authorized to perfect the agreement, and to charge Wheeler and Slocum their proportionate amount on the books of the firm. This agreement, or a

similar one, was made by Sage with Mitchell, and judgments purchased under it. Without the knowledge of Wheeler, Sage, however, abandoned this agreement, and made one with Mitchell for his own benefit. The mortgaged property was sold, and Mitchell became the purchaser, letting Sage have one-third interest on certain conditions; this being done, as alleged, in violation of the rights and without the knowledge of Wheeler and Slocum. The mortgage debt was fixed at $24,000, two-thirds of which amount was paid over by Sage to Wheeler and Slocum, being, as he said, the best that could be done, and which was accepted by Wheeler and Slocum on that hypothesis. Enough of the mortgaged property, the bill alleged, had been sold to produce $105,000, leaving unsold what was worth $27,000. The prayer of the bill was, that Sage might be declared to be trustee for Wheeler for one-third of the mortgaged property still held and unsold by Mitchell, and for one-third of the proceeds of what had been sold; and be decreed to account.

Sage, in his answer, admitted that the firm was desirous of becoming the owner in fee of the premises mortgaged, and that it was thought by an expenditure of $10,000 that the object could be attained; and that an arrangement to this effect was contemplated with Mitchell, but became impracticable, and was abandoned: that Mitchell controlled the defence, which was serious and complicated, and it was feared by Wheeler that it might so far prevail as to lessen the amount of the mortgage debt. After considerable negotiation, a basis of settlement was agreed to by the partners and Mitchell, which fixed the amount due on the mortgage at $24,000. The defence was withdrawn, and a decree entered (at the instance of Mitchell) for $33,000, which was to be discharged on the payment of $24,000 by Mitchell, or at his election the decree was to be assigned to him. Mitchell preferred a sale to cut off an intervening claim. Sage admitted that, after the sale, he became interested in one-third of the property, but denied that Wheeler and Slocum have ever had, or were ever entitled to any interest whatever therein, and averred that when the sale was made there was

no subsisting agreement or understanding other than that said Mitchell should pay the amount agreed upon at the time of sale. The answer also denied that the mortgaged premises were of the value stated in the bill, and insisted that enough had not been realized from their sale to pay Sage the sum of $24,000.

A general replication was filed, and proofs were taken. In regard to the plan of getting a "perfect title" to the premises, it appeared by these that Sweet had about *thirty different judgment creditors* (Mitchell holding a judgment for $18,556.04, and the remaining creditors, exclusive of the Troy firm, for $59,597.73); that the principal item of the mortgaged premises was a *warehouse*, valued, when the mortgage was given, at $50,000, but of which the rise in value had been so great, that when the bill was filed it had come to be valued by some persons at twice that sum. The firm, accordingly, did not want to receive their money and interest under the proceeding to foreclose, but wanted to get the warehouse itself; of which, indeed, they had been for some time in possession, and which they were now actually occupying, with apparent exercise of ownership. But there were difficulties in the case. Sweet thought that with the rise of this property, which would occur by a railroad about to be made near it,—the Lake Shore Railroad,—he would be able to reinstate his affairs, and his judgment creditors looked to the same possibility as the means of at least getting the amount of their debts. Sweet accordingly threatened to redeem; and the creditors were watching the course of events. The object of Wheeler, Sage, and Slocum was, therefore, to get the warehouse itself under their mortgage, and for no more, or for little more, than its principal and interest. The operation was to be performed, in part, by buying in certain judgments at a discount, and in part by securing Sweet's acquiescence, in virtue of a consideration, to their getting a decree as speedily as possible, and an arranged sort of sale on foreclosure. The following extracts, or parts or copies of letters, selected from a large number in the record, give an idea of the process. The firm, it ap-

peared, was represented in Troy by Messrs. Sage (M. C.) & Slocum, as R. Sage & Co.; and in Milwaukee by Mr. Wheeler, as Wheeler & Co.

[WHEELER TO SAGE.]

MILWAUKEE, October 11, 1853.

MESSRS. R. SAGE & CO.

GENTLEMEN: Had conversation this morning with Mr. Sweet; says he shall try and have some one redeem, and knows where he can get the money; that the property was worth $90,000, as other property was selling, and wanted $10,000 for his aid in perfecting title, which he says he can do. I remarked to him that it would be no object to him to redeem, as his judgment-creditors would take it all from him again. He said he knew it, but in all human probability he should defend. I remarked that his services might be worth something to you in perfecting title, but no such sum as he named. . . . I think if you can secure his quietness, that you would be safe from any creditors. I am of the opinion that if terms could be made with him for $3000, payable when title is perfected, it would be a good thing to do. Let us hear from you what you think.

Yours, truly,
WHEELER & CO.

On the 26th November, 1853, Wheeler writes to Sage: "Mr. Sweet is *defending* the suit of foreclosure of warehouse property; can't imagine what he does it for, unless it is to make you pay him for keeping still, or to stave it off until the property should rise more in value. *Sweet is willfull.*" Wheeler says subsequently, at different dates: "I think there is a game, an intrigue in the defence, against the warehouse property. There may be a collision of parties that we little expect. . . *Sweet is ugly*, and is determined to make you all the trouble he can;" "is trying to make some defence in your chancery suit of warehouse property; is around amongst the warehouse men making inquiries what it is worth." "These chancery suits are long-winded." "There is no earthly doubt but that the warehouse property is worth $50,000; nor but that it would sell for that now." "The property is variously estimated from $50,000 to $100,000."

"I think I have found a responsible man who will take it at $4000 rent."

[WHEELER TO SAGE.]

MILWAUKEE, September 11, 1854.

HON. R. SAGE.

DEAR SIR: Mr. Sweet says that he has figured up, and finds he can cancel all obligations (and that there is about $100,000), for $12,000, and that if you were disposed to take hold and give paper to that amount, on three, six, nine, and twelve months, he could clear the property in twenty days. Also, there is parties here who have proposed to him to raise what money is necessary to pay your mortgage, and buy up the other obligations, and divide with him what they could make out of it. I am of the opinion, and I say it to you in confidence, that your attorney did not crowd the suit at the last term with sufficient energy. If he had, he could have got the decree. I say it to you, as the fraternity say, "on the square," and there is no mistake about it. There has been some collusion for others' benefit somewhere. If I could see you, I could tell you, so you would see through the whole arrangement better than I can on paper. But you now have enough to put you on the alert.

Very truly, yours,

WHEELER & Co.

[SAGE TO WHEELER.]

TROY, April 24, 1855.

MESSRS. WHEELER & Co.

Mr. Slocum returned yesterday; says he saw Sweet, and had a long talk with him; thinks Sweet has a friend that is going to bid in the property; but thinks an *arrangement could be made to avoid this by giving a certain sum to Sweet, conditioned that we should get a decree for the amount, and sell the property, and perfect our title.* I think he and I may come out there next week, and look into the matter, and see if something of the kind may not be best. Of course, you must keep all quiet, and treat Sweet kindly.

Very truly,

RUSSELL SAGE.

[WHEELER TO SAGE.]

MILWAUKEE, May 5, 1855.

HON. R. SAGE.

DEAR SIR: I have seen F. in regard to you and Mr. Slocum

coming here; he thinks favorable of it; but said you made a mistake in not buying up those old judgments. However, he now thinks if you can buy Sweet's peace, *that the creditors of Sweet could be bluffed off by getting a large decree, and taking a proper time to sue it, and the price of Sweet's peace to be contingent to the final adjustment of title.* Sweet is now at Grand Haven. . . . So you had better come out next week, or at farthest week after next, and you will almost be sure to see him.

Yours, truly,

WHEELER & Co.

[SAGE TO WHEELER.]

TROY, May 19, 1855.

C. H. WHEELER, ESQ.

DEAR SIR: I saw Mr. Mitchell a few minutes last night, on his way to New York; and agreed with him to have the suit put over. . . . Mr. Mitchell repeated what he said to you, as you state in your letter of the 15th, and said you offered to pay $10,000 for a clear title. I told him I thought we would do this. I have talked with Mr. Slocum, and he is in favor of it. . . . In the meantime everything must be kept quiet, as I will advise further after seeing him in New York on Monday next. I am satisfied we can't do anything without some such course of action as this. This must be kept still, however, until all is accomplished. Now I have some fears about the renting of the warehouse until we get through. I will consider it, and advise you hereafter.

Yours, truly,

RUSSELL SAGE.

[WHEELER TO SAGE.]

MILWAUKEE, May 18, 1854.

HON. R. SAGE.

DEAR SIR: We have telegraphed you to-day as follows: "See Mitchell; come to Milwaukee, court setting; Sweet here; adjust title now or never." I have had long conversation with Finch in regard to our suit with Sweet. I have ordered him to buy what judgments that he represented, some $5000, at twenty-five to thirty cents on the dollar, if he could. If we do not make some arrangements with S. to stop defence, and let us have a decree this term, we will, in the ultimation, have to take the money on the mortgage, as the property has risen more than 100 p. c. within the last two years, and we came to the conclu-

sion that you and Mr. Slocum should come out at once and try to perfect something. Yours, truly,

WHEELER & Co.

[SAME TO SAME.]

MILWAUKEE, May 9, 1855.

HON. R. SAGE.

DEAR SIR: I dislike this delay in our warehouse suit, as the property is increasing in value so fast, and now the Lake Shore Railroad is done, it will give a fresh impetus, and if we do not get a decree pretty soon, there will be hordes of speculators that will run the property, on sale, to $50,000, if not more.

Yours, truly,

WHEELER & Co.

[SAGE TO WHEELER.]

TROY, May 23, 1855.

C. H. WHEELER, ESQ.

DEAR SIR: Yours of 18th and 19th are before me. As to the warehouse suit, would say we cannot hurry it. I think my arrangement with Mitchell will succeed. . . . You can readily see that with this arrangement, we shall be quite sure to succeed with Mitchell at home. *At any rate, we shall get a large and full decree, which we could not get without this, and with the judgments in our own hands, it is almost a certainty that we shall get through just as we expect to.* As to the renting of the warehouse, would say I think it would have been better to have kept along as we are, until we get a decree and sale, and should prefer it now, if you can arrange with your man. If you cannot, then you must do the best thing you can, and keep as quiet as you possibly can. I think the least said the better. Mitchell will put all right with Sweet. Yours, truly,

RUSSELL SAGE.

[SAME TO SAME.]

TROY, June 4, 1855.

MESSRS. WHEELER & Co.

GENTLEMEN: As to the renting of the warehouse, would say I consider it risky to do so, and should favor keeping along in its full possession until we get a decree and sale. *You can readily see what the effect of a* $4000 *rent would have with a court or jury compared with one of* $2000. I think you had better say to

Mr. Butten that I own the house, and will not consent to rent it until my suit is ended, which I supposed would have been done at the present term; that he should have the preference of it so soon as this can be accomplished, &c. This, it strikes me, is clearly the most wise and politic course to take; certainly it is, if we expect to get the property, and keep down competition. . . . It may be a little embarrassing to you, but thrice it me.

Yours, truly,

RUSSELL SAGE.

At a subsequent date, Sage went to Milwaukee, and took the negotiation largely into his own hands; the issue of it being as already stated.

The court below dismissed the bill, which dismissal was the matter now complained of on appeal.

Mr. Emmons, for the appellant, Wheeler:

1. It may be mentioned as a preliminary objection that the complainant has never offered to refund the money received from Sage. If Wheeler would take advantage of Sage's contract with Mitchell, he must take it in whole, and exactly as Sage made it. He should not be permitted to hold us in a lawsuit, and to speculate upon the chances of prospective value of what Sage received from Mitchell.*

2. The bill of complaint itself states in the outset that the partners were engaged in "a general produce business." Admit that the mortgage debt was treated as a partnership adventure. What then? The partnership gained thereby no interest in the mortgaged *premises*. The complainant assumes that with the ownership of the *debt* the firm acquired a vested interest in the real estate by which it was secured, and a right to "secure a perfect title;" but this is not so. When Sage had collected the debt, and accounted for it, there all agency ceased. He might, during the existence of the copartnership, have acquired in his own right the equity

* 1 Leading Cases Equity, by Hare & Wallace, 157, note; Ibid., 167, note; Wilson *v.* Poulter, 2 Strange, 859; Reid et al. *v.* Hibbard, 6 Wisconsin, 175; Clark *v.* Baker, 5 Metcalf, 452.

of redemption, without violating any legal duty or trust springing from his relation as a copartner. His contract, therefore, with Mitchell for an interest in the premises —whether before or after the foreclosure sale—was no breach of his obligation as a partner. He could in his own right have become a purchaser at the sale, paying down, of course, the mortgage-moneys.

3. If the complainant has established any theory by his bill and proofs, it is that the firm of Wheeler & Co. aimed at purchasing title to the mortgaged premises, not by paying the value of them, or what they would bring by fair competition at public sale, but by combination tending to outvie or deceive other creditors, and to repress rivalry and competition. That courts will refuse relief in such a case is undeniable. *Randall* v. *Howard*,* in this court, is in point, and the authorities show that the refusal will be made under almost any variation of circumstances that can be conceived.†

Mr. Carpenter, contra:

1. The objection that in his bill the complainant did not offer to pay back the sum which Sage paid him at the time of the sale, as his proportion of the money secured by the mortgage, is a technical objection only; one to the frame of the bill; and can be taken advantage of only by demurrer.‡ The bill states that Sage has received under said contract with Mitchell much more than the amount paid by him to Wheeler, and it is for his proportion of that surplus that Wheeler brings this suit.

2. We may admit that the proper business of the partnership was dealing in produce, and not in purchasing real estate. Still a purchase of real estate which had been mort-

* 2 Black, 585.

† Phippen *v.* Stickney, 3 Metcalf, 384; Bexwell *v.* Christie, 1 Cowper, 395; Howard *v.* Castle, 6 Term, 642; Veazie *v.* Williams, 8 Howard, 134; Hawley *v.* Cramer, 4 Cowen, 717; Fuller *v.* Abrahams, 3 Broderip & Bingham, 116; Jones *v.* Caswell, 3 Johnson's Cases, 29; Doolin *v.* Ward, 6 Johnson, 194; Wilbur *v.* Howe, 8 Id., 444; Thompson *v.* Davies, 13 Id., 114.

‡ Story, Equity Pleading, § 453, 528.

gaged to the firm, for a produce debt, or of which the mortgage came into the firm as cash assets, was quite within its sphere. The purchase was by way of protection; and the estate was to come into the firm, *incidentally* only. The question then is, whether in such a case, *i. e.* where one partner has been *intrusted* by his copartners as agent of the firm to purchase on joint account, and on joint account has undertaken so to buy, he can, in good conscience, carry on a long operation, corresponding with his confiding partners in a most confidential way, and then, when he sees the path clear to a profitable operation, dismiss those copartners—copartners, in this special operation, independently of all general relations—and put the profits into his own pocket? We submit that he cannot. As the agent of his copartners, Sage's relation was a highly fiduciary one, and he must not abuse it to his own benefit.

3. We admit, too, the general rule of law, that where a bill seeks to enforce a contract which rests in illegality, or which was entered into to defraud others, the court will not hear the parties, and thus give effect to an illegal agreement. Such was the case of *Randall* v. *Howard*, in this court, cited on the other side. But when a defendant is called to an accounting in a court of equity *for breach of trust*, he is never permitted to set up that the fund was created in some illegal way. In *Barney* v. *Saunders*,* this court compelled a trustee to account for usurious interest, illegally taken by him on the trust fund. This, then, is not a case where the Hon. Mr. Sage can make infamy his shield, and by setting up this defence, sacrifice his character for a money "equivalent."

Mr. Justice DAVIS delivered the opinion of the court.

The right to recover is placed mainly on two grounds.

First. That Sage, in the absence of any agreement, could not by private treaty become interested in the mortgaged property, to the exclusion of the other partners.

Second. That there was an agreement that Sage should act

* 16 Howard, 535; see also McBlair *v.* Gibbes, 17 Id. 232.

as the agent of his copartners in perfecting the title to the mortgaged premises; and having violated his agreement and made a private bargain with Mitchell for his individual benefit, he is chargeable as trustee.

Each partner is the agent of his copartners in all transactions relating to partnership business, and is forbidden to traffic therein for his own advantage, and if he does, will be held accountable for all profits. But beyond the line of the trade or business in which the firm is engaged, there is no restraint on his right to traffic. As one partner has no authority to bind the firm outside of their ordinary business, he cannot of course be held liable to account, should he make a profitable adventure in a matter not legitimately connected with the business of the firm. The difficulty generally is, to ascertain what acts are within the scope of the particular trade or business. But in this case there is no embarrassment whatever in the application of the principle. This was a partnership to do a general produce business. It contemplated no dealings in real estate, and each partner was at liberty to buy and sell real estate, and was under no legal liability to account to his copartners. The debt due from Sweet belonged to the partnership, and not the premises mortgaged. To the extent of their debt the partners had an interest in the mortgaged property, and no further. They were interested to have the debt paid, not to procure title to the mortgaged property. It can readily be seen that it would be profitable to get a real estate worth $50,000 for $34,000; but *how* an engagement to do a general produce business could embrace that speculation is not so apparent. Sage's legal relations to his copartners extended to the procurement of the money due from Sweet. They were neither more nor less. But it is said that the copartners were desirous, if possible, of obtaining the title to the mortgaged premises, and that Sage undertook the negotiation for them, and made an effective arrangement with Mitchell, which he afterwards relinquished, and secured clandestinely an advantage to himself, to the injury of the other partners, and should, therefore, be held to account for profits.

The evidence in this case, consisting mainly of letters interchanged between Wheeler and Sage, shows clearly enough that a scheme was initiated to get the title to the property, and that Sage was the active agent to perfect it, but for some unexplained reason it failed. The evidence does not prove that Sage made a contract with his copartners to perfect the title, but his engagement was to consummate a contract with Mitchell, if it could be done, by which the object could be accomplished. All parties rested in the belief that the negotiations with Mitchell would be successful; but from some motive not disclosed in the record, Sage abandoned the idea of buying the property on joint account, and bargained with Mitchell in his own behalf.

Generally, when a party obtains an advantage by fraud, he is to be regarded as the trustee of the party defrauded, and compelled to account. But if a party seeks relief in equity, he must be able to show that on his part there has been honesty and fair dealing. If he has been engaged in an illegal business and been cheated, equity will not help him. "The Warehouse Case," as it is somewhere called in the record, is anything but creditable to the parties concerned, and it is surprising that they should have been willing to give publicity to it through a legal proceeding. Sweet was an insolvent debtor, owing Sage, Wheeler & Slocum $24,000, secured on real estate in Milwaukee, which was worth, when the security was given, $50,000, and over $100,000 when the bill in this case was filed. In 1854 and 1855, when the scheme to perfect the title was in full progress, the property was appreciating in value. Judgments had been entered against Sweet in favor of Mitchell to the amount of $18,556.04, and in favor of various other creditors for the sum of $59,597.73. Suit to foreclose was commenced, and a vigorous defence interposed. Sweet denied that there was as much due on the mortgage as was set forth in the bill, and he claimed a share of the general business, and that he was entitled to a credit of $12,000 for the rent of the warehouse for three years, during which time it had been occupied by Wheeler & Co. If this defence was successful, they

could not hope to "perfect the title." The property was too valuable and the venture too great to lie idle and wait the ordinary progress of a suit in chancery. The property must be saved at all events and Sweet's peace bought. Wheeler writes to Sage, May 5, 1855: "F. thinks if you can buy Sweet's peace, that the creditors of Sweet could be bluffed off, by getting a large decree and taking a proper time to sue it, and the price of Sweet's peace to be contingent to the final adjustment of title." Again, under date of May 18, he writes to Sage, "that if we do not make some arrangement with S. to stop the defence and let us have the decree at this term, we will have to take the money on the mortgage, as the property has risen in value more than 100 per cent. within the last two years, and we want you and Mr. Slocum to come out at once and do something."

"To perfect the title" and grasp the coveted prize, the defence must be stopped, Sweet bought off, and the decree enlarged beyond the just sum, so as to "bluff creditors." The nearer the decree was to the actual value of the property, the less was the chance of being outbid. To pay value for the property was not embraced in the scheme, but if Sweet was silenced, there would be no difficulty of fixing the decree at a sum which would tend to repress competition, and the decree was actually made for the sum of $33,000, when the amount due was only $24,000. It is true that Sage, in his answer, says that Mitchell had this done from motives of his own. But the correspondence between Wheeler and Sage abundantly proves, that to get a decree for the nominal instead of the real amount due on the mortgage, was one of the main parts of their project.

The court was imposed on, and a combination formed, the object and direct tendency of which was to secure the title to the valuable real estate of an insolvent debtor, at the expense and sacrifice of his creditors.

A proceeding like this is against good conscience and good morals, and cannot receive the sanction of a court of equity. The principle is too plain to need a citation of authorities to confirm it. It is against the policy of the law to help either

party in such controversies. The maxim, "*in pari delicto potior est conditio defendentis*," must prevail.

DECREE AFFIRMED WITH COSTS.

BURR *v.* DURYEE.

1. The practice of surrendering valid patents, and of granting reissues thereon in cases where the original patent was neither inoperative nor invalid, and where the specification was neither defective nor insufficient—the purpose being only to insert in the reissue expanded or equivocal claims—is declared by the court to be a great abuse of the privileges granted by the thirteenth section of the Patent Act of 1836, authorizing a surrender and reissue in certain cases, and is pointedly condemned.
2. As the Patent Act grants a monopoly to any one who may have discovered or invented "any new and useful art, *machine*, manufacture, or composition of matter," and as a machine is a concrete thing, consisting of parts or of certain devices and combinations of devices, a patent must be granted, in cases where the invention comes within the category of a machine, for *it*, and not for a "mode of operation," nor for a "principle," nor for an "idea," nor for any abstraction whatsoever: and this rule of law is not affected by the fact that the statute requires the patentee to *explain* "the mode of operation" of his peculiar machine which distinguishes it from all others.
3. The machine patented to Seth Boyden, January 10, 1860, for an improvement in machinery for forming hat-bodies, is no infringement of any of the patents granted to Henry A. Wells for the same thing. The patents to Wells, so far as they related to an improvement in the *process* of making hat-bodies, were void; William Ponsford having invented and patented the thing before him, and Wells having seen Ponsford's invention.

APPEAL from the Circuit Court for the District of New Jersey.

The complainant, Burr, as assignee of a patent granted to Henry A. Wells for "an improvement in the *machinery* for making hat-bodies, and in the *process* of their manufacture," filed a bill in the court below against Duryee and others for infringement. The patent to Wells was granted originally April 25, 1846. It was surrendered in 1856, and reissued in two separate patents; one for the improved *ma-*

chine, the other for the *process*. In the spring of 1860 these patents were extended, and afterwards, December 3, of that year, they were surrendered and reissued with what were alleged to be *amended* specifications; the bill being filed on these reissues of 1860, numbered respectively No. 1086 and No. 1087; the former for process, and the latter for machinery. The court below dismissed the bill, and the case came here by appeal.

The chief questions in this court were in effect,—

1. Whether a certain machine, patented to one Seth Boyden, infringed in terms the machine part of the patent originally granted to Wells?

2. If it did not, whether, under the right given by the Patent Act of 1836 (§ 13), to surrender and have a reissue in certain cases provided for by the act, the owner of the original patent could, by such surrender and reissue of a patent, enlarge its operation in a way which the present complainant sought to do, and which is stated farther on?

3. Whether Wells was the original inventor of the *process* part of his patent?

In their more general aspect, however, the first two questions involved some of the fundamental principles in the law of the issue and reissue of patents; and they were argued elaborately and with great ability on both sides.

The learned Justice, GRIER, J., who delivered the opinion in one of the cases here reported (see *postea*), refers to the "large museum of exhibits in the shape of machines and models" which had "been presented to the court," and which, he states, were "absolutely necessary to give the court a *proper* understanding of the merits of the controversy." Most of them were introduced by the defendant, and they were arranged and explained with admirable clearness by one of his counsel, Mr. George Harding.* Drawings—of

* The whole business of making hats, from the disintegrating of the fur to the production of a hat-body, was actually carried on and exhibited in the court-room; and the printed *argument* of Mr. Harding contained, as "exhibits," the skin of the beaver as it comes from the animal, with specimens of fur as thus exhibited, and also as exhibited in various conditions

which but three can here be given—supply imperfectly originals thus advantageously presented. Without them, however, no idea *at all* can be had of the case; and the reporter trusts that while, from the special difficulty above referred to of understanding the case perfectly, without an inspection of actual machines, he will be pardoned for a statement of it which may be not intelligible to all; he will, on the other hand, be excused for incumbering a book of law reports with drawings, which, in the eyes of a casual observer, will give to it the aspect of a treatise on physical science, more than the aspect of one on the science of jurisprudence.

Any complete understanding of the principles which the case embraces and settles requires some preliminary explanation of the particular art which happened to be the one in which the questions were presented to this court; the art, to wit, of the *hatter*.

EXPLANATION OF THE ART.

Hat-bodies are manufactured out of fibres of fur or wool felted together. The fact that when the fibres of wool or fur are moistened and rubbed together, they would interweave spontaneously and form the fabric called felt, has been known from a remote antiquity. The process of felting is believed to have been anterior to the art of weaving.

In Asia felted wool was used at a very early day for making tents, cushions, and carpets. It was known to the Greeks as early as the age of Homer, and is mentioned by him, and also by Xenophon and Herodotus. Its use was introduced into Rome from the Greeks, and it is mentioned by Pliny. Felt hat-makers appeared in France, in Nuremberg, and in Bavaria, early in the fourteenth century. It had been con-

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and processes, down to the very surface of the "brush" and "napped" hats. No similar argument, perhaps, was ever made in any court of law; nor could a case be explained in a manner more satisfactory. This "clinical" style of argument illustrated perfectly the poet's truth:

> "Segnius irritant animos demissa per aurem,
> Quam quæ sunt *oculis* subjecta fidelibus et quæ
> *Ipse sibi tradit spectator.*"

jectured by Monge, a French *savant*, in 1790, that felting was probably due to small scales on the fibres of fur or wool; but, as nothing of the kind was found by the aid of the microscope, the idea was set aside by Dr. Young and other philosophers. Mr. Youatt, an intelligent English naturalist, in 1835, in investigating the subject of felting, carefully re-examined the fibres of wool, and the fur of rabbits and other animals, under a powerful achromatic microscope, and found that each fibre of fur or wool has its surface covered with serrations or saw-like projections, and that all these serrations pointed in a direction from the root towards the point of the hair. The appearance of a short piece of a fibre of wool under the microscope is shown in figure 1, and the wool or fur of the rabbit in figure 2.* The fur of the rabbit does not exceed in diameter the one-thousandth part of an inch; and in an inch of length of each fibre there are found to be 2880 of these serrations.

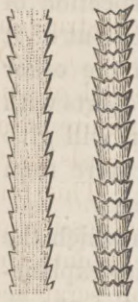


Fig. 1. Fig. 2.

In order that the fibres of fur or wool should felt, it is necessary that the relative position which they occupy in nature should be changed, and the direction of the serrations on the fibres shall be reversed to each other, as shown in figure 3, instead of being pointed in the same direction as in nature. The thorough separation of the individual fibres of fur from each other is one of the first essentials in manufacturing fine felted fabrics; not only for the purpose just mentioned, but also to prevent the formation of lumps. The well-known instruments for separating or disintegrating

Fig. 3.

* The great majority of hat-bodies are made of the fur of the Russian hare, the English or the American rabbit, the coney (a small species of rabbit), the nutria and the beaver.

fibrous material are the carding engine, the picker, and the bowstring.

The carding engine is the most complete and generally used instrument for separating all fibrous material, as wool, cotton, fur, and silk. It is shown on the *body* of the instrument, drawn in figure 6 (page 538); that part of the instrument on the left of the dotted line, and marked F, 2, *c*, *e*, *b*, D, being left off. The carding machine is composed of one central main cylinder, covered with an almost infinite number of fine wire teeth. On the finer qualities of cards there are 79,000 teeth in every square foot of surface. This fine wire-pointed surface turns in contact with a succession of fine wire-teethed surfaces, and between these points the fibrous material is thoroughly disintegrated or scratched apart and separated. When operating on fur a fan (F)—in this plate a rotary fan-wheel—is attached to it, to throw the fur after it has been so separated.

Another mechanism ordinarily used for disintegrating fibrous substances in the arts is the "picker" or "devil," which is shown in figure 10 (page 549), and consists of a series of very short, stiff, metallic teeth or studs, arranged at intervals on the periphery of a cylinder, and which is revolved with great rapidity. It acts by striking or whipping the fibrous material into or against the air with great velocity, and thus scatters it into distinct fibres.

Fig. 4

The bowstring is a vibrating cord, which also acts on the fur in a similar manner to the picker. By being twanged it vibrates, and it whips

or strikes the fibres of the fur or wool a sharp and rapid blow against the air. Felt was merely used as the foundation or body for the hat, which body was first stiffened and then shaped into the figure of the ordinary stiff cylindrical hat; and finally, its exterior surface was made to have the appearance of a glossy fur.

A finished hat was formerly made in the following manner: The "body" or foundation was first made of beaver, or rabbit, or coney fur; *first*, by the fibres being deposited in the form of two triangular pieces by means of the hatter's bow, as shown in figure 4, and then felted by rubbing by hand. In forming the body the skill of the workman directed the fur towards the brim or tip, as was required; it being generally necessary to make the *brim* thick. The bodies were then taken to the kettle, or battery, containing boiling water, where, by the workman's repeatedly immersing the body in hot water, and rubbing it on the shelf with

Fig. 5.

his hands for about the space of an hour, the fibres of fur were forced to interlock or felt. The operation is seen in figure 5. Under this process of "*sizing*," as it is called, the

body shrinks to nearly one-third of its original superficial size, and greatly increases in thickness, compactness, and toughness. The body was then stiffened, either by immersion in a hot solution of glue, or in a solution of gum shellac in alcohol. It was next blocked by being drawn over a cylindrical block and tied at the band, and then felted or stretched so as to make the brim straight. Lastly, the body was dried, and a silk plush covering was stuck on the exterior of it by a hot iron, which melted the glue or shellac.*

THE INVENTION IN MACHINERY AND PROCESS OF MAKING HAT-BODIES.

Prior to 1833 no *machine* had been devised for depositing the fur in a proper manner to form hat-bodies; and the process was effected solely by the use of a bowstring worked by hand, as shown in figure 4.

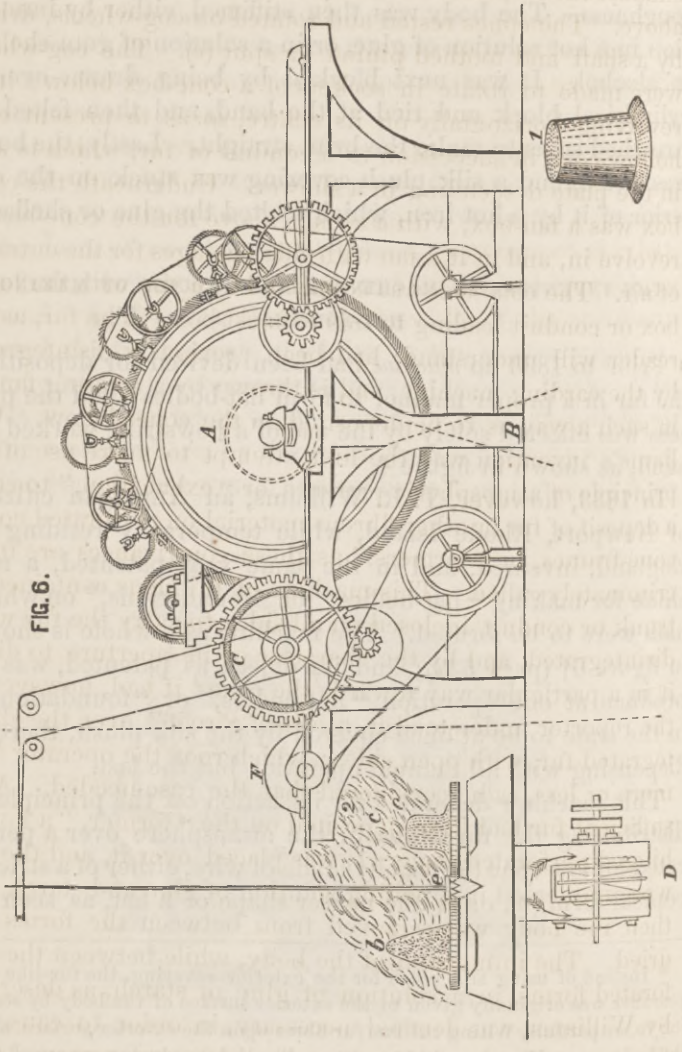
In 1833, however, T. R. Williams, an American citizen, of Newport, Rhode Island, while temporarily residing in England, invented, and in the same year patented, a machine for making "hat-bodies," or "foundations," on which hats were to be formed. The machine as a whole is shown in figure 6† (page 538); and its object, as patented, was to produce at one operation "hat-bodies," or "foundations," in the state to be at once covered by the silk plush, thereby dispensing with all manual operation but the last.

This machine depended for its action on the principle of distributing the fur fibres in the atmosphere over a perforated hollow cone (*b*), usually made of wire, either of a strictly conical form (*b*), or of the nearer shape of a hat, as seen in

* Instead of using silk plush for the exterior covering, the fur-like appearance was originally given to the exterior surface of the body by scalding in, or partially felting the fine fur fibres upon the exterior surface, after the body was stiffened, and before it was blocked, producing a napped surface, and the hat was called a napped hat. At other times the workman, while engaged in sizing the body, by continually brushing the body with a hand-brush, would brush a nap out of its surface. Hats so finished were called brush hats.

† This plate is a copy of one annexed to Williams's patent.

FIG. 6.



the other figure *c*, of the plate; having an apparatus (D) to exhaust the air, and so to attract the fibres of fur to the cone above. The cones rested and rotated on cog-wheels, driven by a shaft and toothed pinion or spur (*e*). The cog-wheels were made to rotate in sockets of a cone-box below; itself revolving horizontally on its centre, so as to present each hollow cone in succession to a conduit of fur, which is seen in the plate descending in a shower. Underneath the cone-box was a fan-box, with a socket above for the cone-box to revolve in, and in it a fan with side passages for the entrance of air. The cone-box was connected by a rim with the lower box or conduit leading to this exhaust-box. The fur, as the reader will understand, had been previously disintegrated by the carding machine, and is thrown by a rotating fan (F) in such a way as to be deposited on the cones below. Williams's invention was the first attempt to make use of the principle of atmospheric pressure, or "exhaustion," to cause a deposit of fur or other fibrous material on perforated cones, cone-frames, or "formers," as these contrivances are indiscriminately called. This machine of Williams contained no trunk or conduit inclosed on all sides to carry the fur when disintegrated, and by the character of its aperture to direct it in a particular way towards the cone; it had, however, as the reporter understood it, a sort of "roof" over the disintegrated fur, with open sides; which roof the operator bent more or less, as he considered that the case needed. After sufficient fur had been deposited on the "former," a hollow hinged perforated cover (1) was placed over it, and the two were immersed in a boiling solution of glue and starch, and then the body was removed from between the forms and dried. The immersion of the body, while between the perforated forms, in a solution of glue or starch, as described by Williams, was deemed necessary, in order to cause the fibres to adhere together after the body was removed from the influence of the exhausting apparatus. The fur fibres, by Williams's process, were so glued or stuck together that they could not be felted afterwards.

In 1839—this date must be observed—a certain *William*

Ponsford discovered, that when a mass of fur or fibrous material capable of felting is disintegrated, and deposited in a condition proper for felting, and is immersed for an instant in very hot water, that the hot water will, of itself, cause an incipient felting of the fibres, so that a continuous fabric of fur of the shape of the "former" can be then removed from the "former" and finished by the hand of the workman; and he further discovered, that if the bat* be surrounded carefully with a soft cloth, its texture will not be disturbed during the operation of immersion, by reason of the water percolating or passing through it. The mode of applying this discovery was described in the English patent of Ponsford in 1839 as follows:

"The hair as it passes from the blowing machine is to be tossed or thrown into the air, from which it is to be sucked or drawn down upon hollow perforated cones or moulds of metal or wood, with an exhausting cylinder beneath; when the hair has been received on one of those perforated cones or moulds to a sufficient thickness, a cowl of linen or flannel is to be drawn gently over it, and then a hollow perforated cover, of copper or any other suitable metal, is to be dropped over the cowl; the cone or mould is then to be immersed in a vat or tub of boiling-hot water, and there allowed to remain for about a minute, after which it is to be taken out, and the metal cover and flannel or linen cowl removed, when the bat or layer of hair will be found felted to a degree that it may be readily finished off by the workman in the usual manner at the oven."

As illustrating the history of the art, and fixing the true relations to it of subsequent discoveries, rather than as directly bearing on the case in issue, it may be mentioned that in 1842 a certain Fosket began experiments in this same branch of business, and obtained a patent January 23, 1846, three months before Wells obtained his original patent.† Fosket's machine consisted of a combination of a vibrating

* A "bat" is a hat-body in the process of formation.

† Wells's reissue, No. 1087, referred in its preamble to this patent of Fosket, reciting it as a prior patent.

bowstring disintegrating apparatus, worked by a wheel, as in figure 7; a hollow perforated revolving vacuum cone and a

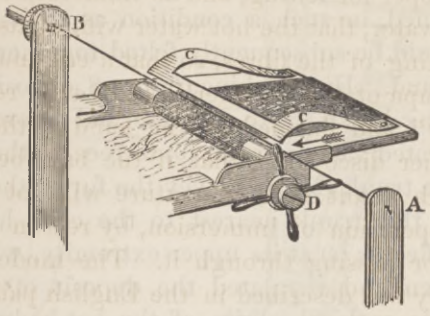


Fig. 7.

trunk or conductor, partially surrounding the disintegrater at one end, and extending to the cone, for the purpose of guiding and directing the fur between the disintegrating mechanism and the cone. The patent of Fosket was reissued March 23, 1858, two years anterior to the Wells reissues of 1860. A person named Robertson, and Hezekiah Miller, a Philadelphian, had previously made certain improvements, not necessary to be specially presented; the former in 1838, the latter in 1839.

The present controversy related to the formation of the "hat-body," or foundation of the hat on the perforated cone, and the removal of it when formed from the cone without injury to the texture; the former matter being the principal question.

A fur hat-body is required to be made of uniform thickness in the direction of its circumference, and of varying thickness from brim to tip, thin at the tip and along the crown, and thick at the band and brim; but thickest at the junction of the brim with the crown, termed the band. To secure lightness with the requisite strength calls for such a distribution of the material as will concentrate most of it where strength is most required.

Wells, from whom, as already mentioned, the complainant

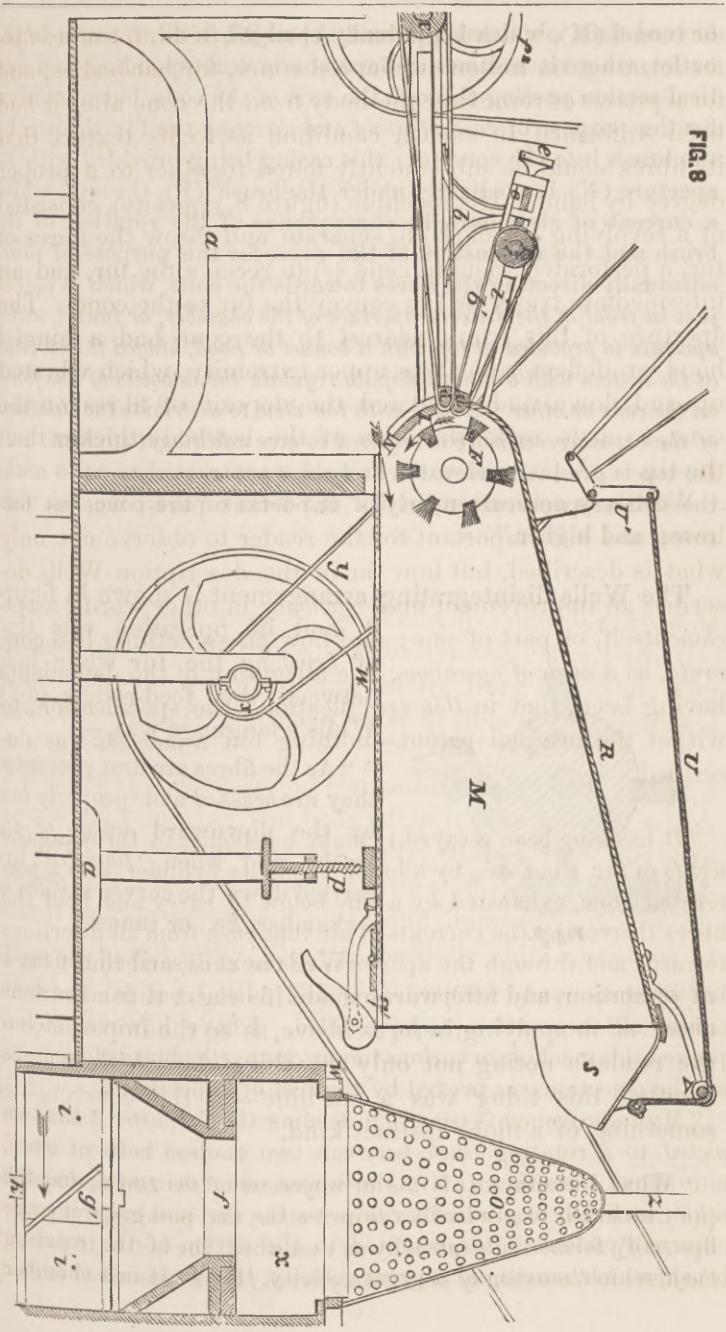
derived title, obtained a patent, April 25, 1846, for a *machine* for forming, on hollow perforated cones, fur hat-bodies, and for a *process* of removing the body from the cone after it had been so formed, in such a condition as to its texture that its fibres could be subsequently felted together to a proper degree by hand. His machine (figure 8, opposite), consisted of a revolving brush (F) to separate and throw the fibres of fur, a perforated vacuum cone (*o*) to receive the fur, and an intermediate trunk (M) to convey the fur to the cone. The aperture of this trunk nearest to the cone had a hinged hood or deflector (*s*) at its upper extremity, which vibrated up and down and regulated the deposit of fibres on the cone, so as to make the brim of the hat-body thicker than the tip.

Wells's specification, in its important parts, was as follows; and it is important for the reader to observe not only what is described, but how far in the description Wells describes an improvement on *a machine;* in other words, a *machine* itself, or part of one; and how far something less concrete, as a *mode of operation;* the allegation of the defendants having been, that in *this* specification—the specification, to wit, of the original patent—nothing but a *machine* was described.

"It has long been essayed to make hat-bodies by throwing the fibres of fur, wool, &c., by a brush or picker cylinder, into a perforated cone, exhausted by a fan below to carry and hold the fibres thereon by the currents of air that rush from all directions towards and through the apertures of the cone, and thus form a bat of fibres ready for hardening and felting, but from various causes all these attempts have failed. I have, however, so improved this machine in various important particulars as to remove all the objections, as proved by the test of experiment.

"My improvements consist in feeding the fur, *after it has been picked*, to a rotating *brush*, between two endless belts of cloth, one above the other (*b b'*); the lower one horizontal, and the upper inclined, to gradually compress the fur, and gripe it more effectually where it is presented to the action of the rotating brush, which, moving at a great velocity, throws it in a chamber

Statement of the case.



or tunnel (M), which is gradually changed in form, towards the outlet, where it assumes a shape nearly corresponding to a vertical section passing through the axis of the cone, but narrower, for the purpose of *concentrating* and *directing* the fur thrown by the brush into the cone (*o*); this casing being provided with an aperture (N) immediately under the brush (F), through which a current of air enters, in consequence of the rotation of the brush and the exhaustion of the cone, for the purpose of more effectually directing the fibres towards the cone, which is placed just in *front of the delivery aperture of the chamber, or tunnel, which aperture is provided at top with a bonnet or hood, hinged thereto, and at the bottom with a hinged flap, to regulate the deposits of the fibres on the cone or other 'former,' with the view to distribute the thickness of the bat wherever more is required to give additional strength. . . .* Its top is gradually elevated and sides contracted so as to make the delivery aperture nearly of the form of the cone, but narrower and higher."

The Wells disintegrating arrangement is shown in figure 9, and its operation was that of *brushing* the fur while held between the feed-rollers (*d d'*). Wells's language was,—

Fig. 9.

"As the fibres are first presented they are *brushed* and 'properly *laid* by the downward *action of the brush*,' and when '*liberated*' are carried down the curved surface of a chamber, &c., or tunnel."

Wells next described the mode of operation, and afterwards made his claim thus: the same observation applying here, as above, as to the importance of the reader's noting not only the thing described, but also whether this thing was a machine—in the concrete—or something of a more abstract kind.

"What I claim, &c., is *the arrangement of the two feeding-belts (b b'), with their planes inclined to each other*, and passing around the lips (*d d'*) formed substantially as described, the better to present *the fibres to the action of the rotating brush* (F), as described in com-

bination with the rotating brush and tunnel or chamber (M) which *conducts* the fibres to the perforated cone or other former placed in front of *the aperture or mouth thereof*, substantially as herein described. I claim the *chamber* (M) into which the fibres are thrown by the brush, in combination with the perforated cone or other 'former' (*o*) *placed in front of the delivery aperture thereof*, for the purpose and in the manner substantially as herein described, the said chamber being provided with an aperture (N), below and back of the brush, for the admission of a current of air to aid in throwing and directing the fibres on to the cone or other former, as described. I also claim the employment of the *hinged hood* (*s*) *to regulate the distribution of the fibres on the perforated cone or other former, as described.* And I also claim providing the *lower part or delivery aperture of the tunnel or chamber with a hinged flap* (*q*), *for the purpose of regulating the delivery of the fibres to increase the thickness of the bat where more strength is required, as herein described, in combination with the hood, as herein described.*"

In the original machine of Wells, the movable hood, it seemed, did not distribute the fur on the cones perfectly, and it was subsequently improved by Burr & Taylor, who made the trunk of copper or other flexible metal, regulated by a movable top.

Wells also described and claimed in his original patent a process of removing the body after it was formed, which consisted in surrounding the body, while yet on the cone upon which it had been formed, with cloths, and then placing over it another perforated cover, and immersing the whole, together, in hot water, so as to partially unite the fibres of fur into a loose texture,—a part of the patent not important here to be dwelt upon. This original patent, as stated in the beginning of the case, was surrendered, for an alleged defective specification, and *two* reissued patents were granted; one being for *the machine*, and the other for the *process* of removing the body from the cone by immersion in hot water.

On the 10th of January, 1860, Seth Boyden—the person mentioned in the beginning of the case as the person whose

patent came into competition with the *machine* reissues (No. 1087) of Wells—obtained letters for a machine for forming hat-bodies, and the defendants used several machines under this Boyden patent. On the 3d of December, 1860, after the Boyden machine had been put in operation at the defendant's factory, where the complainant was invited to inspect, and saw it, the complainant, who now owned the reissues of 1856 of the original Wells patent, again surrendered them for a defective specification, and obtained two new reissues, to wit, the issues No. 1086 and 1087,—the former for the *process;* the latter, on which, as already said, the principal question in the present suit turned, for the machine. The reissues for both were obtained under the thirteenth section of the Patent Act of 1836, which permits a patentee to surrender a defective patent, and to have it renewed in proper form "whenever it shall be inoperative or invalid by reason of a *defective* or *insufficient* description or specification, or by reason of the patentee claiming in his specification as his own invention *more than he had a right to claim as new*, if the error has arisen by inadvertency, accident, or mistake," &c. The complainant, in his application for these reissues, stating that he was the assignee of Wells, set forth, as the ground for the application, "that the aforesaid patent is *not fully available to him as assignee;* that said error has arisen from inadvertence, accident, or mistake."

In the latter of the two reissues of 1860—that is to say, in No. 1087, the *machine* patent, and the patent on which the chief questions in this suit arose—the invention of Wells is thus described; and as the reader's attention was directed (*ante*, p. 542), in reading the specification and claim in the *original* patent, to observe how far they described or claimed *machines* in a concrete form, and how far *modes of operation* abstractly, so it must be directed to the same point in reading the description and claim in the reissue; for it was upon the different character of the claim in the two that the case largely rested.

"*The mode of operation of the said invention* of the said Henry

A. Wells is such that the fur fibres are directed and controlled so as to travel from the picking and disintegrating brush (F) towards the surface of the pervious cone or other 'former' (*o*), that they may be deposited thereon to the thickness required to make a bat of uniform thickness all around, and of the required varying thickness from brim to tip; and this *mode of operation* results from combining with a rotary picking and disintegrating brush, and a pervious cone or equivalent former, connected with an exhausting apparatus, *suitable means* for directing and controlling the fur-bearing currents.

"*The said mode of operation, invented by the said Henry A. Wells, is embodied in the following description of the mode of application*, reference being had to the accompanying drawings, in which *a* is a frame properly adapted to the operative parts of the machine, and *b* the lower feed-apron, on which the stock or fur is spread by the attendant, in separate parcels, each sufficient for the formation of a hat, according to its intended weight."

Then followed a description of the machine, as in the original patent, with these exceptions: 1. The word "hood" which occurred in the original patent is omitted, and the word "upper deflector" substituted for it. 2. The word "hinged flap" is omitted, and "lower deflector" substituted throughout. 3. A clause near the end of the original patent of 1846 is altered by leaving off the part in italics:

Passage in Original Patent of 1846.	*Corresponding Passage in Reissue of* 1860.
It will be obvious, from the foregoing, that the hood may be operated by hand instead of machinery, thus substituting the attention, skill, and cost of an operative for the positive regularity and cheapness of mechanical movements, &c.; *but such a change, whilst it gives less perfect and advantageous results, still involves one of the essential parts of my invention.*	It will be obvious, from the foregoing, that the hood may be operated by hand instead of machinery, thus substituting the attention, skill, and cost of an operative for the positive regularity and cheapness of mechanical movements.

After describing the machine as shown in the drawing, and described in the original patent, the specification resumes thus:

"Having thus described the mode of application of the said

invention of the said Henry A. Wells, as the same was successfully reduced to practice by him, I do not wish to be understood as limiting the claim of my invention to *such* mode of application; as other modes may be devised, having the same *mode of operation*, or *principle*, and only differing from it in form, or in the substitution of *equivalent* means.

"Nor do I wish to be understood as making claim therein to the combined process of forming and hardening hat-bodies on pervious cones or other analogous 'formers,' preparatory to taking them off in a suitable condition for the after-process of sizing by felting, as this is the subject of another patent.

"What I claim *as the invention* of the said Henry A. Wells, in machinery for forming bats of fur fibres, in the manufacture of fur hat-bodies, *is the mode of operation substantially as herein described*, of forming bats of fur fibres of the required varying thickness, from brim to tip, which *mode of operation* results from the combination of the rotating picking mechanism, or the *equivalent* thereof, the pervious 'former' and its exhausting mechanism, or the *equivalent* thereof, and the *means* for directing the fur-bearing current, or the equivalent thereof, as set forth."

The Boyden machine—or rather the important and peculiar part of it—as used by the defendants, is shown in figure 10 (opposite). It consisted of a revolving *picker*, or *devil* (the instrument described, *ante*, p. 535), to separate the fibres; a perforated vacuum cone to receive the fur, and *an intermediate plate to so guide the fur as to cause more to be deposited on the base than the top of the cone.* Boyden thus described his invention; this being the invention which it was alleged by the complainant infringed the right granted by the *machine* patent, or reissue No. 1087, of Wells, whose specification and claim have just been set forth (*ante*, p. 547–8).

"This invention relates to *an improved mode of directing or guiding the fur to the cone*, as hereinafter fully shown and described, *whereby trunks and all other comparatively complicated appliances hitherto used for the purpose are dispensed with*, and *an exceedingly simple and efficient device substituted therefor.* The invention consists in placing directly in front of the picker D a plate (F), so bent or curved that its surface will have a certain

Statement of the case.

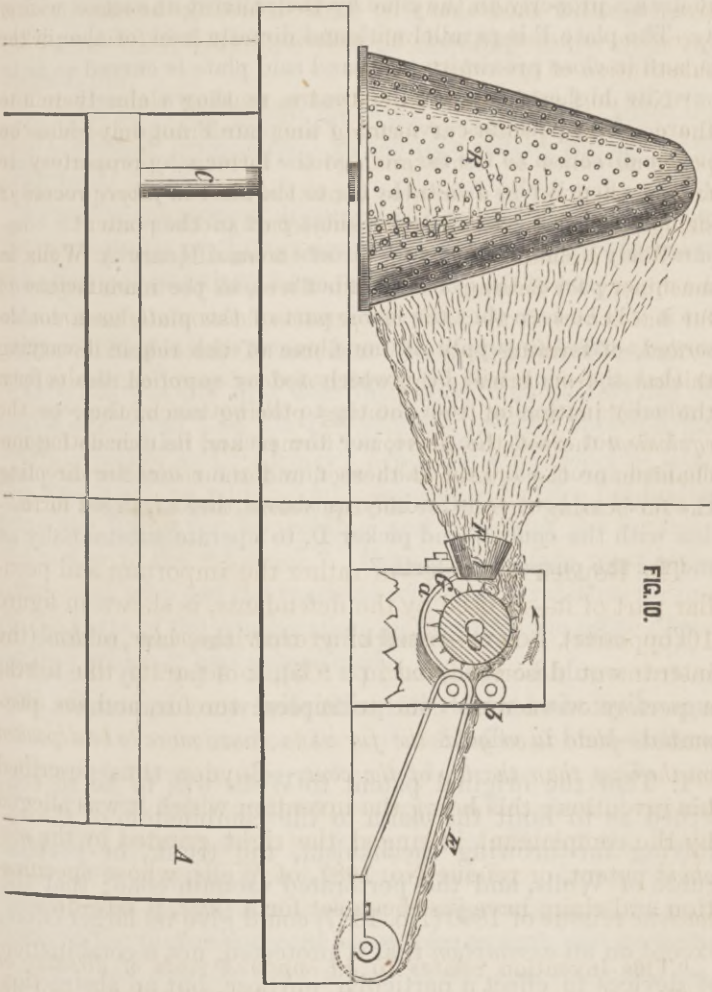


FIG. 10.

relative position with the axis of the picker and the surface of the cone (B), and give such a direction to the fur as the latter is thrown on it by the rapid motion of the picker, that the fur will be drawn properly on the cone by the exhaust or suction within it. The plate F is parallel with and directly back of the picker D, and in close proximity to it, and said plate is curved so as to have its highest point at the centre, as shown clearly in the figure. This peculiar curvature of the plate F not only gives the proper direction to the fur, so that the latter may properly *cover* the cone, but it also *directs* the fur to the cone in *proper quantity;* for instance, the central and highest part of the plate F is comparatively a short curve, and directs a small quantity of fur to the upper part of the cone where but a small portion is required; but it will be seen that the lower part of the plate has a double curved surface to supply the cone, one at each side of its centre, so that the cone will be properly fed or supplied, the supply gradually increasing from the top to the bottom of the cone.

"I do not claim the cone, nor the picker, neither do I claim the feed-apron, but I do claim as new the fur director or plate F, curved or bent substantially as shown, and arranged in relation with the cone B and picker D, to operate substantially as and for the purpose set forth."

The court below—remarking that the law relating to patents would be obscured in a "bank of fog" by the subtle ingenuity with which its principles were sometimes presented—held in effect:

1. That the original patent to Wells was to be so construed as to limit the claim to the combination of the revolving fur-throwing mechanism, the trunk, or peculiar guide of Wells, and the perforated vacuum cone; that the *machine* reissue of 1860 (No. 1087) could give no larger effect, except on an *assumption* that it protected, not a combination of devices to effect a particular purpose, but an abstraction or generalization broad enough to include all combinations whatsoever of devices to produce the same effect; "a transcendental abstraction magnified into a monopoly, not of a machine (which is a concrete thing), but of a principle, effect, or result." And that if this was assumed, an assumption

was made that the patent protected that which it is no purpose of a patent to protect, and that which made it void.

2. That Boyden's machine was no infringement of the *reissued* patent of Wells; and, if it was such infringement, the *reissue* itself would be void as claiming more than the original did.

3. That as to the patent for process (reissue No. 1086) the claim wanted originality; Ponsford's patent having been prior to it.

From the consequent dismissal of the bill the appeal came; the correctness of these views on the case as stated being the principal questions here.

Messrs. Stoughton, Gifford, and Keller, for the complainant:

I. Wells was the first who introduced *any guiding and directing mechanism*, and his introduction of that between the rotating picker and "former" produced a *new machine*, viz., the first machine which could successfully make hat-bodies from the flying fur, by guiding and directing the fur from the picker to the "former." He may therefore treat as infringers all who use the machine with only a *substitute* for one of the parts of the combination, performing the office of the part for which it was substituted.

II. The machine reissue (No. 1087) should not be so construed as to be limited to the particular form of mechanism interposed between the picker and former to guide and direct the fur, but it ought to cover *any device* placed between the picker and the cone, performing the office of the Wells mechanism in guiding and directing the fur. It is not important what the particular shape or construction of the part between the picker and cone is, so long as such part *performs the office and does the work* which Wells conceived the importance of having *there* done, and which he there did, and which characterize the operation of his machine.

In *Winans* v. *Denmead*,* the majority of this court, in-

* 15 Howard, 341.

cluding three of its present justices, recognized and applied the following principles:

1. That the *mode of operation* constitutes the *essence* of a machine.

2. That the "mode of operation is, in view of the patent law, the *thing* entitled to protection."

3. That a description by the patentee of *one structure or device*, embodying his new mode of operation, is sufficient to entitle him to be protected against the use of *other structures or devices*, to carry on substantially the same mode of operation.

4. That copying the *mode of operation* described is an infringement.

5. That a patentee *may* and *should* so form his specification and claim as to cover his *new mode of operation.*

6. That where the patentee has described his invention and shown its principle, and claimed it in that form which most perfectly embodies it, he is deemed to cover by his claim *every form* embodying *his mode of operation.*

7. That to form an infringement, the defendants need not have produced the same degree of result as the patentee, but that it is sufficient to constitute infringement if the result "be the *same in kind*, and effected by the employment of his *mode of operation* in substance."

To apply this doctrine to the Wells patent, let us ask:

What is the structure or device described in the Wells patent as embodying his inventions? It consists, essentially, of a rotating picker, a pervious, exhausted, conical "former," a device intermediate to the picker and former, to guide and shape the current of fur, to present a section of it to the cone nearly in the form of a vertical section of the cone.

What mode of operation is introduced and employed by this structure or device, that is, by the Wells machines?

The answer is, that operation is upon the fur; that its peculiar treatment of the fur identifies its mode of operation; that its mode of operation must be found in the relation between it and the thing acted upon, to wit, the fur; and that the adaptation and capacity of the machine to produce

and sustain that relation constitutes its principle; that is, its *mode of operation.* Its treatment of the fur is to *disintegrate* it, *throw* it into a current of air which it produces, forming a mixed current of fur and air, and thus suspend it, propelling it toward the cone, and while on its way guiding and directing it, so that when it reaches the cone a section of the current will nearly correspond with a vertical section of the cone, and *depositing* it thence upon the cone in proper thickness for a hat-body.

"*What result* is obtained by means of this mode of operation," that is, by means of the operation of the Wells machine upon fur?

The result, which is matter of common knowledge and is proved, is, that bodies are formed with such rapidity, and of such quality, and out of such variety of stock, that the manufacture of hats has been revolutionized; that fur is now used for hats which could not before be used; that one machine forms from three hundred and fifty to four hundred hat-bodies per day, while twenty was a large day's work for a good workman by the old process of hand-bowing; that fur hats are made better and out of less material by the operation of a machine than they were by hand-bowing; that hats are greatly cheapened to the consumer by the operation of this machine; and that hand-bowing, once the most difficult part of the hatter's trade, has now ceased to be any part of it.

"*Does the specification of claim cover the described mode of operation by which the result is attained?*"

The Wells specification does directly and expressly cover the mode of operation. In *Winans* v. *Denmead* there was some doubt as to whether or not the claim was sufficient to cover the invention—that is, the mode of operation; but in this case there can be no uncertainty. In view of the opinion of the court in that and other cases holding the same doctrine, the claim of the reissued patent was made so as to expressly cover the mode of operation of the Wells machine. This claim is for "the mode of operation" resulting from the "combination" of the mechanism.

It is obvious that, where the invention is in machinery, the *mode of operation* embodied in such machinery must constitute the essence of the *means* of producing the result. If any one think otherwise, let him test it by supposing the mode of operation to be taken away from the machine, and see what will remain. To enforce this truth, imagine, if possible, a machine without any mode of operation, and what is it? Clearly nothing but the wood and metal composing it. This shows that the mode of operation is the characterizing feature.*

III. The claim of the reissued machine patent (No. 1087) is not void as being for an unpatentable subject-matter. It will be insisted on the part of the appellees, that because the claim *expressly* covers the "mode of operation" of the combination, it covers an abstraction or a result; and that such a result as is not patentable. To this two answers may suffice:

1. That the "mode of operation" of a combination in machinery is neither an abstraction nor an unpatentable result.

2. The phraseology having been recommended by this court, and adopted by the owners of the patent pursuant to such recommendation, the court will sustain it.

It will be further insisted on the part of the appellees, that because the claim specifies that the "mode of operation" claimed *results* from the combination of mechanism, therefore, the claim must cover an unpatentable result.

It is submitted that neither such reasoning nor such conclusion is sound:

1. There cannot be a mode of operation of a combination without the existence of the combination.

2. Creating or bringing into existence the combination, of course, produces the mode of operation.

* McCormick *v.* Seymour, 2 Blatchford, 246; Tatham et al. *v.* Le Roy, 1 Id., 485; O'Reilly *v.* Morse, 15 Howard, 62; McClurg *v.* Kingsland, 1 Id., 202; Curtis on Patents, § 223; Morgan *v.* Seaward, Webster's Patent Cases, 170; Haworth *v.* Hardcastle, Id., 484; Nelson *v.* Harford, Id., 295; Walton *v.* Potter, 587; Huddart *v.* Grimshaw, Id., 95; Russell *v.* Conley, Id., 463.

3. It follows, therefore, that the mode of operation of a combination of parts in machinery *does result* from that combination.

The mode of operation is a property of the combination and cannot exist without it. The phrase, "the mode of operation of a combination," has the same meaning as the phrase, the mode of operation resulting from the combination.

As to infringement: The defendants infringe by using the combination patented, varied only by the substitution of a mechanical equivalent for one of the elements of the combination. The question respecting infringement is not whether the defendant's machine is like the patentee's or is different from the patentee's, because it may be greatly different, and the differences may also be patentable and patented; but the question is, whether or not the defendant's machine contains the invention of the patentee.* The fact that an alteration in a machine is patentable and patented as an improvement, does not prevent its being a mechanical equivalent, and the use of the machine an infringement.†

As to the reissued patent: The *original* patent of Wells sets forth the invention which is claimed in the machine reissue (No. 1087), and justifies and sustains that reissue.

The specification of that original patent consists of five divisions:

1. A statement of what was needed.

2. A statement that he (Wells) had succeeded in accomplishing what others had tried in vain to do.

3. A general statement of the means by which he had succeeded.

4. A description of such means and its mode of operation; and,

5. A specification of items claimed.

Both a machine for forming the bats (or fabric of the body), and the process of removing them from the "former,"

* Curtis on Patents, 2d ed., § 224.

† McCormick *v.* Talcott, 20 Howard, 405; Crehoe & Brooks *v.* Norton. *Coram* Nelson, J., Southern District of New York, A. D. 1853.

are described in this original specification. The machine consists of three classes of mechanism. One to receive, disintegrate, and throw the fur; another to act upon, guide, and direct the fur; and the other to receive and hold the fur. A *trunk* was the means which he adopted to put in operation that idea; and it is acknowledged that that was the best form of means which has yet ever been known for such purpose. In his original specification he says, that this trunk "is gradually changed in form toward the outlet, where it assumes a shape nearly corresponding to a vertical section passing through the axis of the cone, but narrower." After giving this direction he states the object, and says it is "for the purpose of concentrating and directing the fur." Again, in this specification, he says, in describing the trunk: "Its top is gradually elevated, and sides contracted, to make the delivery aperture nearly of the form of a cone, but narrower and higher."

By this original patent three things are claimed in combination, irrespective of other parts:

1. The trunk or chamber.
2. The perforated cone or "former."
3. The picker or brush.

This shows that he regarded this combination of leading and essential parts as constituting the *substance* and *essence* of his invention of the machinery; and it is submitted that *any* reissue from this patent covering the *mode of operation* of *this* combination is sustained by the original, and is good and valid against the use of *any equivalent* of any of these three parts.

A combination of the *trunk*, "*former*" *and picker* being claimed in the original patent of Wells, irrespective of other parts, was, perhaps, sufficient to cover the "mode of operation" of that combination, and the use of any "equivalents" for either of those parts. But after the direction given by this court in *Winans* v. *Denmead*, it became not only prudent and proper for the owners of the patent, but their duty, to have it so reissued as to expressly cover the mode of operation of the combination. It was pursuant to the directions

of this court in the case just named that the reissued machine patent was obtained.

A patent may be valid and may have been so held to be by a court, without being broad enough to cover the whole invention. In such cases the act of Congress tenders the patentee relief by reissuing to make his claim broader.* It is no objection to a patent that it has been more than once reissued.† If the last reissued patent claimed under be adapted to the invention made by the patentee, and described in his original patent, it is valid as a reissue, and it is immaterial how many prior reissues there may have been, or what may have been the proceedings or mistakes in applications for or in the granting of such prior reissues.‡

The action of the Commissioner of Patents in accepting a surrender of a patent and granting a reissue, is conclusive that the prerequisites to the surrender did exist, unless fraud be shown.§

4. As to the reissued patent No. 1086,—the process patent. Ponsford's patent, it is true, did exhibit a process of removing the body from the cone on which it had been formed, similar to the process of Wells. But the invention was defective in not presenting or forming the body prior to its removal. It was, therefore, an incomplete invention and substantially different.

Messrs. George Harding and Courtland Parker, for defendants:

As to the originality of Wells's machine patent.

In view of the prior inventions of Williams, the extent of Wells's invention in the machine patent (No. 1087) may be thus analyzed:

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* Batten *v.* Taggart, 17 Howard, 83.

† O'Reilly *v.* Morse, 15 Id., 112.

‡ Goodyear *v.* Day, 2 Wallace, Jr., 283; Woodworth *v.* Stone, 3 Story, 749, 753; Allen *v.* Blunt, 3 Id., 742–3; Carver *v.* Braintree Manufacturing Co., 2 Id., 432–8.

§ Stimson *v.* The Westchester R. R. Co., 4 Howard, 380, 404; Same *v.* The Philadelphia and Trenton R. R. Co., 14 Peters, 448.

I. In the machine patent, Wells substituted as a disintegrating agent for the carding machine, shown in figure 6, page 538, the revolving brush, shown in figure 9, page 544.

II. Wells adopted from Williams's machine the following:

1. The hollow perforated removable formers, as shown in figures 11 and 12, resting on horizontal wheels:

Fig. 11.

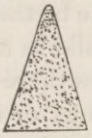


Fig. 12.

2. Two revolving perforated removable wheels, having rims projecting below to turn on, and secure the joint, and cogs on their circumference to be driven by; as shown in figure 13.

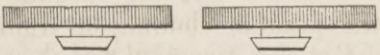


Fig. 13.

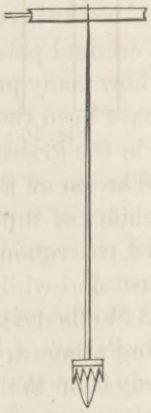


Fig. 14.

3. A central pinion, or an upright shaft, for driving these wheels. (See figure 14.)

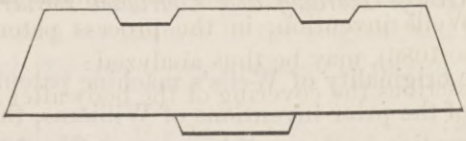


Fig. 15.

4. A cone-box capable of revolving, connected by a rim with a lower box or conduit leading to the exhaust-box (as shown in figure 15), having two sockets above for the cone-wheels.

5. A conduit from the cone-box to the fan-box, with a socket above for the cone-box to revolve in, as in figure 16.

6. A fan-box and fan with side passages for entrance of air, as in figure 17.

Fig. 16.

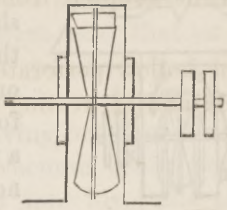


Fig. 17.

7. The use of a hollow perforated cover, to place over the fur while on the former, after the material had been deposited, to retain it in position when removed from the exhaust, and while subsequently treated.

III. Wells devised and introduced between his peculiar disintegrating apparatus or brush and the vacuum cone apparatus of Williams, the peculiar conduit, or trunk, or tunnel, as it is called, with its hood and its flap, shown in figure 20, page 560, and thus produced the complete machine shown in figure 8, *ante*, p. 543.

As to the originality of the process patent of Wells.

In view of the prior inventions of Williams and of Ponsford, the Wells invention, in the process patent of Wells (reissue No. 1086), may be thus analyzed:

Wells describes the covering of the body after it is formed on the cone:

First, with a cloth, which was the invention of Ponsford.

Second, with a perforated metallic conical case, which was the invention of Ponsford and Williams.

Third, the immersion of the whole in a vessel of boiling-hot water, which was the invention of Ponsford.

It is, therefore, only necessary to say, that in view of Ponsford's English patent, Wells's reissue, No. 1086, claiming exactly the same invention, should be declared to be void.

As to Boyden's machine: Williams, Wells, and Boyden all used the Williams' vacuum cone apparatus, see fig. 18. Williams having employed a carding machine and fan, F, as shown in fig. 19, to disintegrate and throw the fur on to the cones; Wells, on the one hand, substituted therefor a revolving brush, F, inclosed in a tunnel or trunk, M, with a vibrating nood or cap, *s*, as shown in figure 20.

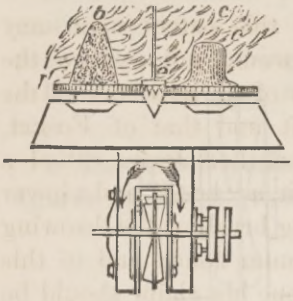
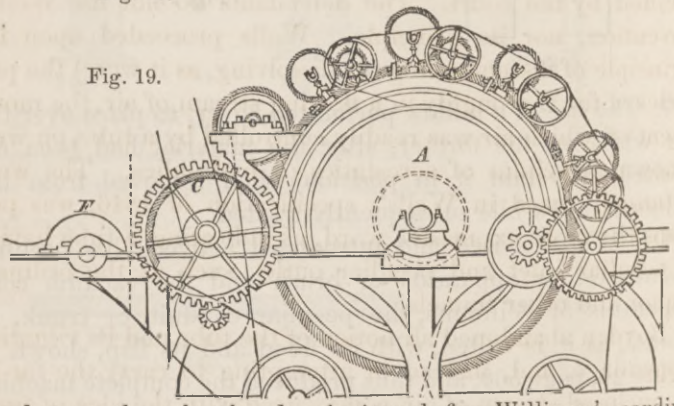


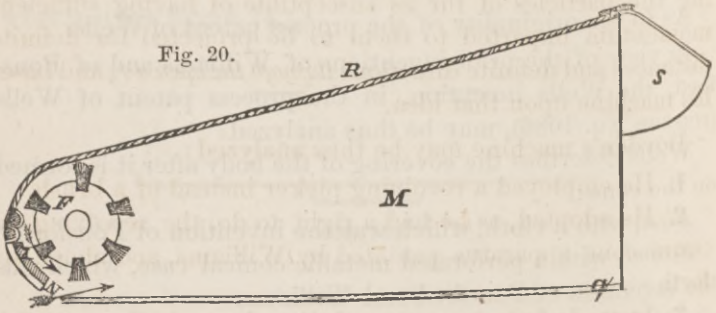
Fig. 18.

Fig. 19.



Boyden, on the other hand, substituted for Williams' carding machine and fan an open picker, D, with a curved guide plate, F, in front of it, as shown in figure 21.

Fig. 20.



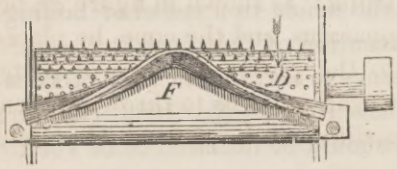


Fig. 21.

As to the infringement of the machine patent:

The defendants do not infringe this patent upon any construction of its claims which would not require the patent to be declared void. In view of the new state of the art, as shown by Williams's patent and that of Fosket, Wells invented nothing but the peculiar device called a "trunk," with two appendages, to wit, a "hood" and a lower "flap" placed between the revolving brush or fur-throwing mechanism and the perforated vacuum cone; and to this combination of brush, trunk and cone his claim should be limited by the court. The defendants do not use Wells's invention, nor its principle. Wells proceeded upon the principle of disseminating (or dissolving, as it were) the particles of fur thoroughly in a flowing stream of air, the movement of which air was readily controlled by a tube, on well-known principles of aerostatics or hydraulics. The word "tunnel," used in Wells's specification of 1846, was perhaps the most expressive word, as indicating a tube having a peculiar inlet and peculiar outlet, such as the ordinary liquor and other tunnels.

Boyden abandoned all notion of the tube and its vibrating appendage, and, instead of attempting to carry the fur by an inclosed stream of air, commenced with the idea of treating the particles of fur as susceptible of having sufficient momentum imparted to them to be projected for definite distances and definite directions *through the open air*, and bases his machine upon that idea.

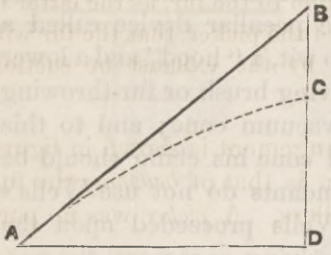
Boyden's machine may be thus analyzed:

1. He employed a revolving picker instead of a brush.

2. He adopted, as he had a right to do, the revolving vacuum cone apparatus patented by Williams, and above set forth.

3. Instead of placing a "trunk," as shown in figure 20, between the disintegrating apparatus and the cone, he placed in front of and opposite to the picker a series of plates having different angles of elevation, so as to throw different portions of fibres of fur to different heights on the cone.

Experience soon showed him that it could be so reduced to a system that the fur could, by a proper combination of inclined planes, of varied surface and inclination to the picker, be made to deposit itself in any manner desired.



In fixing the angles of the planes there must be a reference had to the influence which gravity exerts on all projectile bodies. Thus, if a body be projected from A in the direction of the line A B, instead of pursuing the course of the line A B, gravity will cause it to constantly fall from it, and to travel in the path indicated by the dotted line A C. Allowance is always made for this in gunnery, and a similar allowance has to be made for the influence of gravity in adjusting the Boyden planes.

The width of the planes is determined by the relative amount of fur that is required at the part of the cone intersected by each plane respectively. Thus the zone, at the base of the cone, one inch wide, as compared with a zone one inch wide at the top, would require very different amounts of fur; first, because of the much greater area of depositing surface presented at the base of the cone; and, second, because of the greater depth of deposit required at the base. Hence, the width of the plane which points towards the base of the cone is very many times wider than that which points towards the top.

As the one set of planes, when adjusted for a particular cone, will answer for any number of bodies to be formed on that cone, the machine is automatic, requiring only new planes when the cone is changed. The invention is thus described in Boyden's patent:

"This invention relates to *an improved mode of directing or guiding the fur to the cone*, as hereinafter fully shown and described, *whereby trunks and all other comparatively complicated*

appliances hitherto used for the purpose are dispensed with, and *an exceedingly simple and efficient device substituted therefor.*

"The invention consists in placing directly in front of the *picker* a plate, so bent or curved that its surface will have a certain relative position with the axis of the picker and the surface of the cone, and give such a direction to the fur, as the latter is thrown on it by the rapid motion of the picker, that the fur will be drawn properly on the cone by the exhaust or suction within it."

The Wells disintegrating arrangement is shown in figure 9 (*ante*, p. 544), and its operation is that of *brushing* the fur while held between the feed-rollers. A *picker* was no part of his device.

II. Subject to what the court may decide on what precedes, we contend that the claim of the Wells reissued patent is void, as being for a function, principle, or result; that the term "mode of operation" was used in the claim and throughout the Wells reissued specification, No. 1087—the machine patent—to characterize the function or result produced by the machinery, and not the manner or mode in which the physical parts comprising the Wells machine are combined and co-operate to produce that result.

In the reissue—No. 1087—obtained with a view to stop the Boyden machine, after a full inspection of it, the invention of Wells is thus described:

"*The mode of operation* of the said invention of the said Henry A. Wells is such that the fur fibres are directed and controlled so as to travel from the picking and disintegrating brush towards the surface of the pervious cone or other former, that they may be deposited thereon to the thickness required to make a bat of uniform thickness all around, and of the required varying thickness from brim to tip, and this mode of operation results from combining with a rotary picking and disintegrating brush, and a pervious cone or equivalent former, connected with an exhausting apparatus, *suitable* means for directing and controlling the fur-bearing currents.

"*The said mode of operation*, invented by the said Henry A. Wells, is embodied in the following description of the mode of

application, reference being had to the accompanying drawings."

Then follows a description of the machine as in the original patent, with these exceptions: 1. The word "hood" which occurred in the original patent is omitted, and the word "upper deflector" substituted for it. 2. The word "hinged flap" is omitted, and "lower deflector" substituted throughout. 3. A clause near the end of the original patent of 1846 is altered obviously with the intention of changing an important feature of his invention. See *ante*, p. 547, in the statement of the case, to which the reader can turn.

After describing the machine as shown in the drawing, and described in the original patent, the specification of No. 1087 resumes thus:

"Having thus described the mode of application of the said invention of the said Henry A. Wells, as the same was successfully reduced to practice by him, I do not wish to be understood as limiting the claim of my invention to *such* mode of application; as *other* modes may be devised having the same *mode of operation, or principle,* and only differing from it in form, or in the substitution of *equivalent* means.

"Nor do I wish to be understood as making claim therein to the combined process of forming and hardening hat-bodies on pervious cones or other analogous formers, preparatory to taking them off in a suitable condition for the after-process of sizing by felting, as this is the subject of another patent.

"1. What I claim as the invention of the said Henry A. Wells, in machinery for forming bats of fur fibres, in the manufacture of fur hat-bodies, is the *mode of operation substantially as herein described,* of forming bats of fur fibres of the required varying thickness from brim to tip, which *mode of operation* results from the combination of the rotating picking mechanism, or the *equivalent* thereof, the pervious former and its exhausting mechanism, or the *equivalent* thereof, and the means for directing the fur-bearing current, or the *equivalent* thereof, as set forth."

A striking feature about this claim, and indeed about the whole reissued specification, is that while professing boldly

to describe and claim a mode of operation, it neither describes what that mode of operation is, nor does it state in what parts, or combination of parts, of machinery that mode of operation is to be found.

Thus, in the first clause of the former of the passages above quoted, if the question be asked, What is the mode of operation which Wells invented? the answer would be "*such*," that the fur fibres are so directed and controlled so as to form a bat of proper thickness.

The recital of Wells's invention, in the preamble, is equivalent precisely to this: "The mode of operation of the said invention of Wells is '*such*' that the fur fibres are directed and controlled so as to form a bat, thicker at the brim than tip, and '*it results*' from combining with a revolving brush and cone '*suitable means*,' *i. e. anything* that will suit for accomplishing this result;" or, in other words, Wells's invention extends to the use of anything in connection with a revolving picker and cone which will "*suit*," and the first claim is in terms coextensive therewith, and the patent must be held to be void, unless the claim be so construed as to be limited to the substantial devices shown in the body of the patent.

Where an improvement is made upon a machine, the patentee can only claim the part, or combination of parts, which he has invented. It is otherwise where the invention is a process, strictly so speaking, in which the treatment of substances is entirely independent of the mechanical appliances.* In *Nielson* v. *Harford*,—the Neilson Hot Blast case,—the invention consisted not in a machine, but in the discovery of a process; so in Goodyear's invention. This distinction was pointed out by TANEY, C. J., in *Morse* v. *O'Reilly*.†

III. Subject to the two former points, we contend that the reissued machine patent is void. Because,

1. It is for a different invention from that set forth in the original patent as Wells's invention.

* Corning *v.* Bowden, 15 Howard, 252.

† Id., 62; and see Nielson *v.* Harford, 1 Webster's Patent Cases, 295.

2. The original patent was not surrendered because the description or claims were "insufficient," or inoperative through accident or mistake; but because, in the language of the oath filed with the application for reissue, it was "not fully available to A. Burr as assignee." The act of Congress does not authorize a surrender and reissue upon any such ground.

But these two grounds are not pressed, except in the event of the court declaring that the defendant's machine infringes upon that patent.

Mr. Justice GRIER delivered the opinion of the court.

The great question of the case is, whether the Boyden machine infringes the patent originally granted to Wells for his invention; and if not, whether his assignees, by the use or abuse of the right to surrender and reissue their patent, can so expand it as to cover by *ex post facto* operation, all subsequent inventions.

The original patent to Wells purports to be for "a new and useful improvement in the machine for making hat-bodies." His specification recites that "it had long been essayed to make hat-bodies by throwing the fibres of wool, &c., by a brush or picker on a perforated cone exhausted by a fan below, to carry and hold the fibres thereon; that all these contrivances were defective." He alleges that he has improved this machine so as to remove all the objections, as proved by the test of experiment. "My improvement," he says, "consists in feeding the fur between two endless belts, &c., which present it to the action of a rotating brush, which moving at a great velocity throws it in a chamber or tunnel, which is gradually changed in form towards the outlet, where it assumes the shape nearly corresponding to a vertical section passing through the axis of the cone, this casing being provided with an aperture, immediately under the brush, through which a current of air enters," &c. The aperture of the chamber or tunnel is provided with a bonnet or hood hinged thereto, and at the bottom with a hinged flap.

Beside the *machine* thus described, he includes a claim

also for a *process* which consists in covering the bat before it is removed with felted fulled cloth, &c. As our present concern is with the machine, we need not describe the process more particularly.

The patentee very properly does not claim to have first invented the art of making hats on exhausted cones, but to have improved the machinery or devices used for this purpose, in important particulars. After properly describing the several devices, the combination of which compose his improved machine, he limits his claim in exact conformity with such description. He says: "What I claim as my invention, and desire to secure by letters patent, in the machinery above described, is the arrangement of the two feeding-belts with their planes inclined, &c., substantially as described, in combination with the rotating brush and tunnel placed in front of the aperture or mouth thereof, substantially as described. I claim the chamber into which the fibres are thrown by the brush in combination with the perforated cone, &c. I also claim the employment of the hinged hood and providing the lower flap, for the purpose of regulating the delivery to increase the thickness of the bat, in combination with the hood."

This patent was first surrendered in September, 1856, by the assignee, and separate patents taken for the machine and the process: the same operation of surrender and reissue was repeated in 1860. The specification of the machine patent of 1860 (No. 1087) describes the machine much as before, premising that, in 1846, William Fosket had obtained a patent for a machine in which the fibres to be formed into a hat-body are drawn by suction through a tube into the lower part of a chamber surrounding a pervious cone, the inside of which is connected with an exhausting fan; but that hat-bodies are required to be made thick at or near the brim, and thin along the crown, that the required strength may be given without making the hat too heavy. The specification thus continues: "*The said mode of operation invented by said Henry A. Wells is embodied in the following description*," &c., and the claim is modified to suit this abstraction. "What is

claimed herein as the invention of said Wells is forming bats of fur fibres by throwing the fur in properly regulated quantities, *substantially as herein described.*"

Here we have the first experiment in the art of expansion by an equivocal claim, which may be construed a claim for the result or product of the machine, or for its principle or mode of operation. By this construction another inventor may be frightened from the course. But when challenged in a court of justice as too broad, the words, "*substantially as herein described*," may be resorted to as qualifying this claim of a function, result, or principle, and arguing that as the specification described a machine, it meant nothing more.

Let us consider what was the original invention of Wells, as described and claimed by himself, without regard to this ingenious attempt by the assignee to expand it into an abstraction.

It is not within the category of those inventions which consist in a new application of certain natural forces to produce a certain result to which they had never before been applied, and which, when once pointed out, required no invention to construct devices for its application. Such inventions partake of the nature of discoveries, either found out by experiment or the result of a happy thought, which, when once expressed, is plain to all intelligent persons, who could point out at once many devices for making it effectual. Any one can perceive the difference of such a case from the invention of a labor-saving machine, which is a mere combination of certain mechanical devices to produce a desired manufacture in a cheaper or better manner. The case of *McLurg* v. *Kingsland** will serve to elucidate this peculiar sort of inventions.

A workman in a foundry observed, in pumping water into a bucket, that the water entering at a tangent to the circle of the bucket, acquired a circular motion, diminishing when it approached the centre, where bits of straw and other lighter

* 1 Howard, 202.

materials would be concentrated. In casting iron rolls, the metal required to have this rotary motion for the same purpose. This effect had previously been produced by stirring the liquid metal. The thought all at once struck the mind of this observer, that the application of this principle or law of nature might be beneficially made to the casting of rolls by merely introducing the metal at the bottom of the mould at a tangent. The thought being once suggested, it required no skill or invention to devise a plan for the application of the principle. This, though classed as an invention, partook more of the nature of a discovery. In that case the court say, "We find the invention consists solely in the angular direction given to the tube through which the metal is conducted into the cylinder in which the roll is cast. Every part of the machinery is old; the roll itself is no part of the invention." And yet, it was a patentable invention or discovery, though it came not within the description of the statute, as "a machine, manufacture, or composition of matter."

It is plain that the invention of Wells had nothing of the nature of a discovery, or the new application of some power of nature to the perfection of an art or the operation of a machine, such as the application of the electro-galvanic fluid to the art of telegraphic writing. It was simply a concrete machine, an improvement on other known machines, and nothing more. Wells was not the first who discovered that bats of fur could be made on perforated cones by means of a vacuum or exhausted chamber. The patent to Williams, in 1833, was the first great step towards applying these natural forces to labor-saving machinery in the art of hat-making. He was the first to use the power of atmospheric pressure to deposit fur or fibrous materials on any surface. He used a carding machine to disintegrate the fur or fibres; a revolving fan to throw them on the cones; the hollow perforated cones or formers connected with devices for exhausting them; and the use of a hollow perforated cone to place over the bat, to retain it in position when removed from the exhaust. His drawing exhibited, as a substitute for a trunk

or conductor, a roof without side or bottom, in the shape of a pliable deflector.

Without particularly noticing the patent of Robertson, in 1838, or of Hezekiah Miller, in 1839, we may mention that of Fosket. It is dated in January, 1846. He used a bow-string moved by machinery, in place of the rotating picker used by others. He used what he describes as "a suitable passage or tube which leads from the vicinity to what may be termed the forming or wind chamber." We refer to these previous inventions, not to show that Wells's improvement was not new or useful, but to show the state of the art, in order to properly appreciate the nature and extent of the invention of Wells.

The patent act grants a monopoly "to any one who may have discovered or invented any new and useful art, machine, manufacture, or composition of matter."

That the invention of Wells comes within the category of a "*machine*," cannot be disputed. The law requires that the specification "should set forth the principle and the several modes in which he has contemplated the application of that principle, or character by which it may be distinguished from other inventions, and shall particularly point out the part, improvement, or combination which he claims as his own invention or discovery." We find here no authority to grant a patent for a "principle" or a "mode of operation," or an *idea*, or any other abstraction. A machine is a concrete thing, consisting of parts, or of certain devices and combination of devices. The principle of a machine is properly defined to be "its mode of operation," or that peculiar combination of devices which distinguish it from other machines. A machine is not a principle or an idea. The use of ill-defined abstract phraseology is the frequent source of error. It requires no great ingenuity to mystify a subject by the use of abstract terms of indefinite or equivocal meaning. Because the law requires a patentee to explain the mode of operation of his peculiar machine, which distinguishes it from others, it does not authorize a patent for a "mode of operation as exhibited in a machine." Much less

can any inference be drawn from the statute, that an inventor who has made an improvement in a machine, and thus effects the desired result in a better or cheaper manner than before, can include all previous inventions, and have a claim to the whole art, discovery, or machine which he has improved. All others have an equal right to make improved machines, provided they do not embody the same, or substantially the same devices, or combination of devices, which constitute the peculiar characteristic of the previous invention.

The original patent of Wells has been more than once decided by the courts to be a valid patent. The specification states clearly and correctly what the invention is; what the patentee claims as his peculiar improvement on former machines; what are the devices, or peculiar combination of them, which make it to differ, and the mode in which they operate to produce the required result. He claims all he had a right to claim as new, and no more. There is no error from "inadvertences, accident, or mistake."

The aim and object of both Wells and Boyden was to construct an automatic machine which would distribute the fur on the cones so that the bat might be thicker on certain portions than on others. This was the defect of former machines, which each proposed to remedy. Fosket, though he used a spout or tunnel, so constructed it that the crown of the hat was thicker where it ought to have been thinner.

The great and peculiar characteristic of the Wells invention is a tunnel or chamber, constructed as described. Instead of the picker, he used a rotating brush to distribute the fur from the feed-aprons, and throw it forward into the chamber which conducted it to the cones. The hinged hood and flap were devices to distribute the material in unequal quantities, to accomplish the object of making the bat thicker in one part than another. This machine, although an improvement on its predecessors, was not automatic, although it professed to be such. It would not distribute the fur in proper proportions without the assistance of a skilful operator. But, finally, Messrs. Burr & Taylor, after much expense and labor, devised the plan of making this

chamber or trunk of thin sheet metal, regulated by a movable top, so that the deposit of the fibres could be regulated by adapting the form of the delivery aperture to any size required.

Now, the machine of Boyden has not one of the peculiar devices, or combination of devices, of the Wells machine, nor any substantial identity with it, unless by substantial identity is meant every machine which produces the same effect. These abstract phrases, "*substantial* identity," "equivalent," "mode of operation," &c., are often used in such a vague and equivocal manner, that they mystify and lead many to absurd conclusions, who will not distinguish between things that differ. That two machines produce the same effect, will not justify the assertion that they are substantially the same, or that the devices used by one are, therefore, mere equivalents for those of the other. There is nothing in the Wells machine or its devices which suggests the peculiar device employed by Boyden. His machine has no tunnel, no cap, no flap, nor any equivalent therefor, nor does it incorporate in its structure the substance of the first invention. There is nothing to be found in the specification of Wells which would ever suggest the peculiar device of the Boyden machine. As an improvement, it has more claim to originality than that of Wells. It is thus correctly described: "This invention relates to an improved mode of directing and guiding the fur, as hereinafter fully shown and described, whereby trunks and all other comparatively complicated appliances hitherto used for the purpose are dispensed with, and an exceedingly simple and efficient device substituted therefor. The invention consists in placing directly in front of the picker a plate so bent or curved that its surface will have a certain relative position with the axes of the picker and the surface of the cone, and give such a direction to the fur, as the latter is thrown on it by the rapid motion of the picker, that the fur will be drawn properly on the cone by the exhaust or suction within it."

Now, "an infringement involves substantial identity, whether that identity be described by the terms, 'same

principle,' same '*modus operandi*,' or any other. It is a copy of the thing described in the specification of the patentee, either without variation, or with such variations as are consistent with its being in substance the same thing. If the invention of the patentee be a machine, it will be infringed by a machine which incorporates in its structure and operation the substance of the invention; that is, by an arrangement of mechanism which performs the same service or produces the same effect in the same way, or substantially the same way."*

No one who reads the two specifications, or inspects the two machines, can aver that they contain the same combination of mechanical devices, or substantially the same, to produce the desired effect. Not one of the devices, or its equivalent, used in the one is to be found in the other, nor is its mode of operation the same. The argument used to show infringement assumes that every combination of devices in a machine which is used to produce the same effect, is necessarily an equivalent for any other combination used for the same purpose. This is a flagrant abuse of the term "equivalent." Without attempting to define this abstract term by other abstract terms, we may give examples which will best show its application to machines, as, where a simple lever is used in one, and the other substitutes a cam, or toggle-joint, or wedge for a cam, and many other cases where one mechanical power is substituted for another in a machine. In the case of *McCormick* v. *Talbot*,† we have said: "If the invention claimed be itself but an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form, or combination performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not colorable invasions of the first."

But it has been argued, that though not a colorable *in*vasion of the patentee's claim, it is an *e*vasion of his patent,

* Curtis on Patents, 322.

† 20 Howard, 405.

which is equally injurious. If so, it is "*damnum absque injuria.*" Every man has a right to make an improvement in a machine, and evade a previous patent, provided he does not invade the rights of the patentee.

Now we are of opinion that the invention of Wells was a machine which was an improvement on the machines previously known. It is not founded on any new discovery of the application of any element or power of nature to produce an effect. He was not the first to devise the application of a vacuum to cones for the purpose of forming and compressing bats for hat-bodies, nor the first to discover that such bats should be made of unequal thickness, nor of pickers to distribute the fur from the carding apparatus. He has improved this machinery by his peculiar devices of brush, trunk, cap, flap, &c., combined in a machine which failed to be automatic till further improved. We are of opinion, also, that the specification of Wells correctly set forth the peculiar combination of devices in the machine he invented, that, as required by the statute, he truly and correctly stated the principle or mode of operation of his machine, and the functions performed by its several devices. There was no mistake in his specification by inadvertency or accident. He had a valid patent claiming his whole invention,—no more, no less.

But as the respondents are charged in the bill with infringement of a reissued patent, dated 3d December, 1860, and since the patent granted to Boyden, we must give it more special attention. It is true, we might dispose of it by saying, that as the machine of Boyden is not an infringement of the original invention of Wells, it cannot infringe the reissued patent if it be for the same invention, and if the reissued patent be not for the same invention, it is void.

Without affirming or denying the charge of respondents, that this reissued patent is fraudulent as well as void, it will be proper more particularly to notice its history and contents.

The patent to Boyden was issued on the 10th of January, 1860. The complainants were invited to examine it. They

did so, accompanied by their counsel and other experts. After this, the complainants surrendered their valid patent, or rather its reissue of 1856, and have another reissue, which is now contended to have been made so elastic or expanded that it may be used to suppress all other inventions which have been or may be made to effect the same purpose. The application for this reissue, as sworn to by one of the assignees, contains the following suggestion: "That the aforesaid patent *is not fully available to him, as assignee;* that said error has arisen from inadvertence, accident, or mistake," &c.

Previous to the Patent Act of 1836, which established a board or bureau composed of competent examiners, patents had frequently been adjudged invalid from the insufficiency of the specification; usually because, by inadvertency, accident, or mistake, the patentee had not sufficiently separated the old from the new, and had claimed more than he was entitled to. Few inventors, or even learned lawyers, were capable of correctly and clearly setting forth in a specification the proper limits of the just claim of the invention. The thirteenth section was intended to remedy this evil, by permitting the patentee to surrender his defective patent, and have it renewed in proper form, "*whenever it shall be inoperative or invalid, by reason of a defective or insufficient description or specification*, or by reason of the patentee claiming in his specification as his own invention more than he had a right to claim as new, if the error has arisen by inadvertency, accident, or mistake," &c.

Since the date of this act, not only the Patent Office but the bar can furnish gentlemen fully competent to the task of drawing up proper specifications, and but little liable to commit blunders from inadvertency. Specifications now seldom issue from the Patent Office to which such an imputation can be made. Nevertheless, this privilege of surrender and reissue is resorted to more frequently than ever. Formerly, when in course of investigation in a court of justice it was discovered that a patent was invalid for any of the reasons mentioned in the act, it was resorted to for protection. *Now*, after a patent has been declared to be valid, the specification

without defect, and the claim for nothing more than the invention, after it has undergone examination for many years, and courts and juries have decided that the patent is *not* invalid, through inadvertency, accident, or mistake, the assignees come forward and make oath, that the inventor's original patent is "unavailable" for some purpose unnecessary to be divulged. In the present case the purpose is transparent. The specification of this reissued patent, instead of describing first the machine and the several devices which exhibit its peculiar mode of operation in order to produce the desired effect, and stating what the patentee claims as his peculiar invention, commences by describing "*a mode of operation*" as the thing intended to be patented, and uses these words: "The said *mode of operation*, invented by the said Henry A. Wells, is embodied in the following description of the mode of application." The claim is for the "mode of operation, substantially as herein described."

We have no leisure for a further development of this novel form of patent, or how, by the use of general and abstract terms, the specification is made so elastic that it may be construed to claim only the machine, or so expanded as to include all previous or future inventions for the same purpose.

Morse was certainly the first who successfully applied the element of electro-magnetism to telegraphing. By the eighth claim of his reissued patent he claimed "not the specific machine described, but the use of the motive power of the galvanic current however developed for printing signs or letters at a distance, being a new application of that power of which he was the first discoverer."

On which this court remark,* "It is impossible to misunderstand the extent of this claim, if it be maintained, it matters not by what process or machinery the result is accomplished. Another may possibly discover a mode of writing or printing at a distance by means of the electric or galvanic current, without using any part of the process or combination set forth in plaintiff's specification. Yet if it is covered

* O'Reilly *v.* Morse, 15 Howard, 112.

by this patent the inventor could not use it, nor the public have the benefit of it, &c. The court is of opinion it is too broad and not warranted by law."

In this case we have an attempt to convert an improved machine into an abstraction, a principle or mode of operation, or a still more vague and indefinite entity often resorted to in argument, an "*idea.*" Those who use the latter term seem to have no fixed *idea* of what they mean by it. But it may be used as successfully to mystify a plain matter as the words used in the specification.

The Patent Bureau in this country is composed of men of scientific attainments, who examine the merits of every claimant of a patent, and decide whether in their opinion it attempts to claim a monopoly of things before known or invented. They are not expected, as formerly, to grant a patent without inquiring, to every applicant who is ready to pay the fees. Such a course of conduct would be highly injurious to the public, by furnishing means to impose on the public by false pretences, and with threats of expensive and ruinous litigation.

The surrender of valid patents, and the granting of reissued patents thereon, with expanded or equivocal claims, where the original was clearly neither "inoperative nor invalid," and whose specification is neither "defective or insufficient," is a great abuse of the privilege granted by the statute, and productive of great injury to the public. This privilege was not given to the patentee or his assignee in order that the patent may be rendered more elastic or expansive, and therefore more "*available*" for the suppression of all other inventions.

We concur, therefore, in the decision of the Circuit Court, that the machine of Boyden is not an infringement of the invention of Wells; and if it be an infringement of the reissued patent, that patent is void.

2. The bill claims, also, for an infringement of Wells's reissued patent for his process. This has not been much insisted on. The respondents contend that it is void, being for the same invention patented to Ponsford, in England, in

1839, and known to Wells, who was at the time in England. This allegation we find to be fully supported by the evidence, and decide accordingly.

DECREE AFFIRMED WITH COSTS.

NOTE.

At the same time with the preceding cases, or rather immediately afterwards, two other cases, appeals from the New Jersey district, between the same parties and relating to the same general subject of hat-bodies, were heard; the same counsel who had argued the first and principal case, arguing these two also; though not at length, as from the fact already mentioned, to wit, that the principles involved were the same, it was understood that the decision of these two would follow the decision of the first and principal case. The first of these two cases decided simply a point of fact, to wit, that the machine known as the "Boyden machine," and so largely discussed in the principal case, was not an infringement of a patent granted in the same department of manufacture to a certain Hopkins: no reasons being assigned; GRIER, J., who delivered the opinion of the court, remarking that, while their honors had come to a conclusion satisfactory to their own minds, it was impracticable to "vindicate" it without the use of the "large museum of exhibits in the shape of machines and models" which had been presented on the argument of all these three cases, and which "were absolutely necessary to give the court a proper understanding of the merits of the controversy." The result, therefore, was stated; the curious being referred for reasons to those given by the defendant's witness, Mr. Tredwell, examined in the case. This decree, too, was affirmed with costs.

The other of the two cases admits of a certain kind of report, now given, as on the three pages which follow.

Statement of the case.

SAME *v.* SAME.

No. 231.

The "Boyden machine" does not infringe the patent of A. B. Taylor. The practice of reissuing patents for the purpose of interpolating abstract generalizations, so as to cover subsequent inventions made by others, is condemned.

BILL in chancery, by which the complainant charged that the defendants were using a certain machine for the manufacture of hat-bodies, which infringed a patent originally granted in 1856 to a certain A. B. Taylor, and subsequently, in 1860, *reissued*, for hardening the bodies of hats by means of rollers while on the perforated cone upon which they had been formed, with a contrivance to give them the reciprocating motion required in the operation of being hardened. In the original patent of Taylor, of 1856, the claim was limited to his "*arrangement*" for hardening the body in a dry state, by "*machinery operating substantially as set forth.*" The complainant, who had purchased this patent, afterwards, however, saw the machine known as Boyden's, and more particularly described in the preceding case. He then (1860) surrendered his patent and obtained a reissue, in which he altered his claim of invention from an "arrangement of machinery" to a claim for a "vibrating concave surface."

The difference between the invention as claimed in the original patent, and as subsequently set forth, as well as the general nature of his invention and claim, will appear more minutely by the juxtaposition of them in parallel columns.

Original Patent, 1856.

The object of my improvements is to harden the bat sufficiently to permit it to be removed from the perforated cone without the application of water, and to facilitate the removal of the bat from the cone without requiring the latter to be taken from its position in the machine. These improvements consist in a mechanical process of hardening the bat before it is removed from the cone, and in facilitating the removal of the bat from the cone by means of a blast of

Reissue, 1860.

My said invention, which relates to the hardening of the bat on the pervious cone on which it is formed, and while the fibres constituting the bat are held to the surface of the cone by the pressure of the surrounding air, consists in combining with a perforated cone, on which the bat of the fibres is held by the pressure of the surrounding air, a *vibrating concave surface, held by pressure, so as to act on the convex surface of the bat as it is vibrated*, by means of which combina-

air forced through the cone. There are also various improvements in the arrangement and construction of the machinery devised by me, as will hereinafter more fully appear.

Claim.

What I claim as my invention and desire to secure by Letters Patent, is the arrangement for hardening the hat-body in a dry state, by *machinery operating substantially as herein set forth.*

tion a large segment of the bat, along its entire length, is acted upon at once by the concave surface, while, by the rotation, every part of the circumference is brought, in succession, under the hardening operation.

Claim.

What I claim as my invention is, the combination *of a vibrating concave surface,* substantially as described, with an exhausted pervious cone, on which the bat of flocculent fibres is held by the pressure of the surrounding air, *substantially as and for the purpose specified.*

The argument was chiefly upon the points, how far the reissue was for a principle or function as distinguished from a machine, and how far such a patent was valid; and also, whether the reissue was or was not for the same thing granted in the original patent; matters discussed much more fully in the principal case.

Mr. Justice GRIER delivered the opinion of the court.

After the observations made in the preceding and principal case, it is not necessary to make further remarks on the art of extending patents. It may be ranked "INTER INGENUAS ARTES," and may have the claim of novelty, if not of usefulness.

In this case, the invention of Taylor was the application of pressure by means of rollers, with a contrivance to give them the reciprocating motion necessary to this process of hardening. He was not the inventor of the conical cover used in hardening hat-bodies formed on a cone, nor of rubbing them by a reciprocating motion, but merely of a certain combination of devices to produce a certain effect. Both the operation and the result were well known, and the invention consisted only of the devices combined to perform the operation and produce the result. It was open to every other person to make any other combination of devices to perform the operation, which was not a mere colorable adoption of the patentee's combination. The original specification of Taylor is drawn with sufficient care and

judgment to cover all the patentee knew he had invented, and the whole machine as described therein.

A comparison of the devices used in the two machines would be unintelligible without models or drawings. The Taylor patent is but for a form, or rather a combination of known devices, to perform a certain operation and produce a certain desirable effect. The combination used by Boyden is not a mere colorable or substantial adoption of the same combination of devices. It has as much claim to originality as that of Taylor; but it has a vibrating concave surface of cloth, pressing against the cone. Accordingly, the reissued patent to Taylor, or rather to Burr, got up after an examination of Boyden's machine, contained this interpolation in the description of his invention, "*A vibrating concave surface held by pressure*," &c., &c.; and the claim extended to the "combination of a vibrating concave surface;" then follow the words, "*substantially as described.*" In a contest with a previous patent, the last words can be called in to qualify the first, and narrow it down to the peculiar combination of devices described; while, in assaulting a new combination, for the purpose of suppressing it, the claim may be stretched to cover every machine having a "concave vibrating surface," by calling all the other parts "equivalents."

It is plain that this interpolation of an abstract generalization, to render the specific description of the concrete machine more elastic, was suggested by an examination of the Boyden machine. If the same construction be given to the claim of Taylor, as it would necessarily invoke in a contest with preceding inventions, to save it from the charge of being too broad, the Boyden machine would be properly pronounced as no infringement: on the contrary, such a construction of it as would include the Boyden machine, would make it void for being too broad. It matters little on which horn of this dilemma the case be put, the result must necessarily be the same.

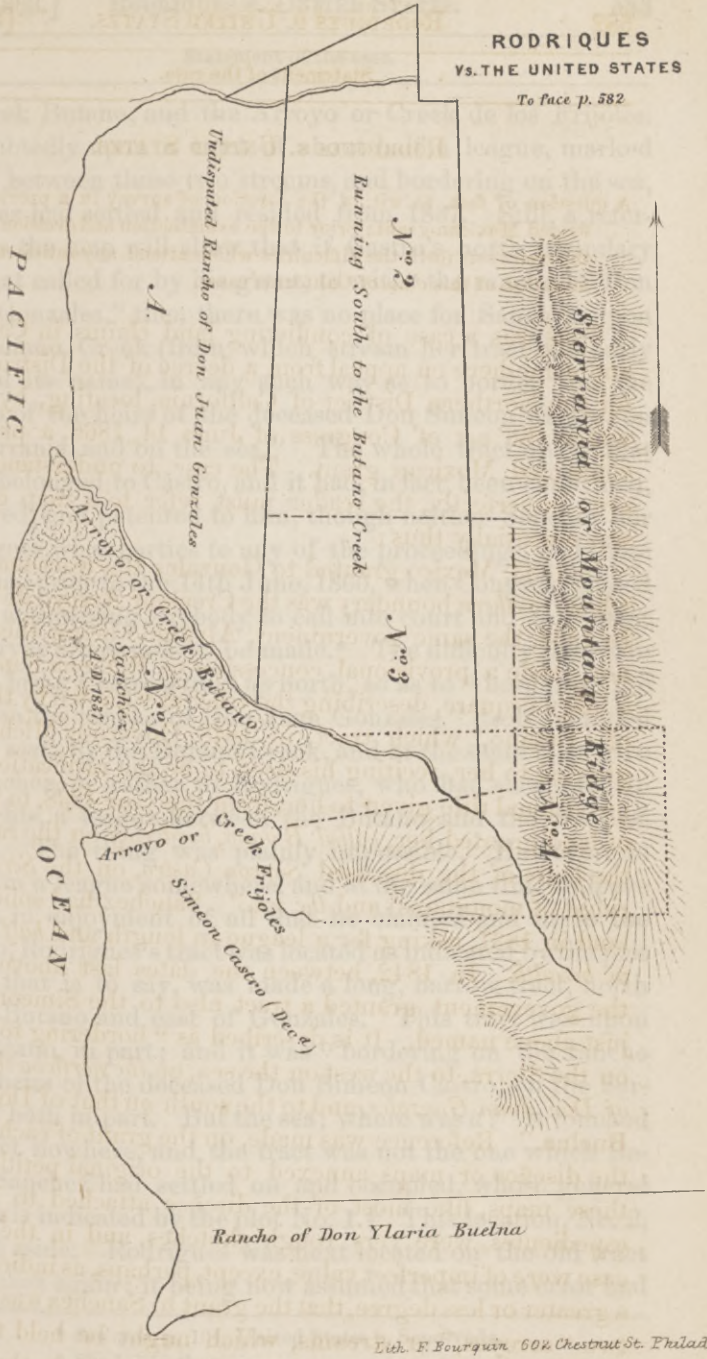
DECREE AFFIRMED WITH COSTS.

RODRIGUES *v.* UNITED STATES.

A question of fact, to wit, of the location of survey in a previously confirmed Mexican grant; prior to the examination and decision of which, the court sets forth the difficulties which attend any satisfactory determination of this class of California cases.

THIS was a case of conflicting land claims in California, and came here on appeal from a decree of the District Court for the Northern District of California, locating, by survey, under the act of Congress of June 14, 1860, a previously confirmed Mexican grant. The case, to understand which, even imperfectly, the reader must refer to a map opposite, was essentially thus:

In 1833, Mexico granted to Gonzales the tract marked A, whose *southern* boundary was the Creek or Arroyo de Butano. In 1838, the same government, Alvarado being then governor, made a provisional concession to Ramona Sanchez for a league square, describing the tract as "known by the name of 'Butano,' which tract, in 1848, Governor Micheltorena granted to her, reciting his deed to be the ratification of the provisional title given to her, from the year 1838, to the tract of land granted her, *called Butano*, *bordering* on the rancho of the heirs of the deceased *Simeon Castro*, on the *Serrania* (or ridge of mountains) and *the sea*." Sanchez had solicited the land in 1837, asking for a league in length and *half a league in breadth*. In 1842, between the dates last above named, the government granted a tract also to the Simeon Castro just above named. It is described as "bordering to the east on the Sierra, to the west on the sea, on *the north on the rancho of Don Juan Gonzales*, and to the south on that of Don Ylaria Buelna." Reference was made, on the grant of each tract, to the diseños or maps annexed to the original petitions, but these maps, like most of the diseños attached to Mexican espedientes, were very rough sketches, and in the present case were of imperfect value, except, perhaps, as indicating, to a greater or less degree, that the grant to Sanchez was between two "arroyos," or streams, which might be held to correspond with the streams known on better maps as the Arroyo


RODRIQUES
VS. THE UNITED STATES
To face p. 582
PACIFIC
OCEAN
Undisputed Rancho of Don Juan Gonzales
A.
No 2
Running South to the Butano Creek
No 3
Sierra or Mountain Ridge
No 4
Arroyo or Creek Butano
No 1
Sanchez
A.D. 1837
Arroyo or Creek Frijoles
Simeon Castro (Dec.d)
Rancho of Don Ylaria Buelna
Lith. F. Bourquin 604 Chestnut St. Philad.a

or Creek Butano, and the Arroyo or Creek de los Frijoles. Undoubtedly upon a tract of about half a league, marked No. 1, between those two streams, and bordering on the sea, Sanchez had settled and resided from 1837. Still, a reference to the map will show that if Castro's north boundary was that called for by his grant, to wit, "the rancho of Don Juan Gonzales," then there was no place for Sanchez upon the Butano Creek (from which stream her tract obviously derived its name), in any such way as to border "on the rancho of the heirs of the deceased Don Simeon Castro, on the Serrania, and on the sea." The whole tract up to that creek belonged to Castro, and it had, in fact, been confirmed, surveyed, and patented to him, though neither Sanchez nor Rodrigues were parties to any of the proceedings, and these were had prior to the 14th June, 1860, when Congress passed an act authorizing anybody to call into court and to contest any survey afterwards to be made.* The difficulty therefore was to bring Castro's tract *up* north, so as to "border on the north on the rancho of Don Juan Gonzales," itself bounded on the *south* by the Butano Creek, and at the same time give to Sanchez, or rather to Rodrigues, who had succeeded to her rights, a league between the Butano and the tract of Castro. The thing was plainly impossible. However, to give him a league somewhere, and at the same time to leave Castro in enjoyment of all that he claimed and up to the Butano, Rodrigues's tract was located as indicated by the plot No. 2, that is to say, was made a long, narrow tract, north of the Butano and east of Gonzales. This tract was upon the Butano, in part; and it was "bordering on the rancho of the heirs of the deceased Don Simeon Castro, on the Serrania," both in part. But the sea; where was *it?* It touched the tract nowhere, and the tract was not the one which Ramona Sanchez had settled on and occupied, whose general locality is indicated by the plot No. 1.† This location, No. 2, was set aside. Rodrigues was next located on the old tract of Sanchez again; it being now assumed that some error had

* See *ante*, p. 104, United States *v.* Sepulveda.

† Shaded in the map.

taken place in giving Castro's north boundary; and that while this boundary was really a creek, that creek was not the Butano, but another one, to wit, the Frijoles, south of it. It was among the facts of the case that the land granted to Castro had been originally two tracts, with different names, and that for the north one a concession had issued to a certain Bernal, who surrendered his rights to Castro, by whom a final grant for both under one name was obtained. The original papers, moreover, gave some indications, which, compared by modern surveys of the Pacific coast, tended to show that the tract did not go *up* to the Butano, and that the northern boundary of one of the tracts was the Frijoles. But everything was more or less obscure. The representatives of Castro had excepted to this location of Rodrigues on No. 1, contending that all up to the Butano was theirs, and that no one else should be put upon it. Superadded to the difficulties just mentioned there was another, to wit, that admitting Rodrigues to be rightly located between the Butano and the Frijoles, there was not enough land between those two creeks, which were small and did not run far back, to give him much more than half a league of land; whereas the grant called for a whole one. What was to be done, in view of the fact that the Butano and the Frijoles were natural boundaries, having unquestionable owners on the north and south of them respectively, and that on the east was the Sierra, or mountain range, of no use to any one, and of less than none, if she had to take care of it, to a woman like Ramona Sanchez, who in her petition represented herself as a "desamparada mujer," an unprotected woman, who asked for the land, as "*un sitio valdio aproposito pa contener en el su ganado y hacer algunos labores pa subvenir á la mantencion de su familia;*" "a vacant place, adapted to keep my cattle and carry on some husbandry for *the maintenance of my family?*" From what quarter was the deficit to come? A third survey was now made; and assuming that as the tract was only "*bordering on* the Serrania," the Government meant that it should not include any considerable part of it, as it would do if the required half league was located east of the half on the sea,

the surveyor turned the courses round, and forming an "elbow" tract, made up the deficit by a survey upon the south part of No. 2, in the manner meant to be indicated by No. 3, and the *chain* lines upon the map. The south part of No. 2 had, however, been entered on by persons who meant to acquire it from right of pre-emption.

The case was one of obvious difficulty, and Judge Hoffman, the District Judge in California, having examined the whole case with great patience, and with a careful comparison of landmarks, and having stated at length the reasons of his conclusion, finally located the easternmost portion *on* the ridge, as indicated by No. 4, his decree being thus:

"That said survey (the third) be and the same is hereby set *aside and rejected;* and that a new survey of the tract herein confirmed be made as follows, viz.: bounding the tract "on the east by the Sierra; on the west, by the sea; on the south, by the Arroyo de los Frijoles, as far as the same is delineated upon the diseño, and thence by the shortest distance to the Sierra; and on the north by the Arroyo Butano, as far as the same is delineated as a boundary upon the diseño; and thence (crossing that stream) by such line or lines as will include the area of one square league."

From this decree Rodrigues, representing Sanchez, and claiming to have No. 2, or at least No. 3, took the appeal.

Mr. Gillet, for the appellant:

1. Mexico had conveyed to Castro a tract, having Buelna on the south, and extending to Gonzales' ranch on the north, and this tract has been confirmed, surveyed, and patented: consequently it is finally and conclusively located, so far as this court and the United States are concerned. The Government has no land there now to convey.

2. The claimants in this cause are entitled to one square league of land within the outboundaries of the tract described in their grant as confirmed as they may select, which need not touch all of them.

Argument for the appellant.

It was settled in *Fremont* v. *The United States** that Fremont might, "in the form and divisions prescribed by law for surveys in California, embracing the entire grant in one tract," select the quantity named in the grant anywhere within his outboundaries, which contained about ten times the quantity granted. In *The United States* v. *Fossat*,† the land was ordered to be "located at the election of the grantee or his assigns, under the restrictions established for the location and survey of private land claims in California by the executive department of this government." Under these decisions Rodrigues has a right to claim his league square in such form as he chooses, within his outer boundaries, three of which only were given; and he cannot be compelled so to locate so as to make him include land granted, confirmed, and patented to another, and subject him to litigation and probable, if not certain loss.

The quantity claimed by him was rightly located under these decisions, by the second survey, which was bounded south by a portion of the Castro grant, and was west of the Serrania, and east of the Gonzales grant; which survey was set aside. Rodrigues was not required to go to the sea, nor to the Serrania, nor to the Castro grant. The north was left open to him indefinitely.

3. It may be questioned, too, whether the decree as finally made was not a nullity. The act of 14th July, 1860, under which the power of the District Courts of California to act in this sort of matter arises, is in these words: "And if, in its opinion, the location and survey are erroneous, it is hereby authorized to set aside and annul the same, or *correct* and *modify* it."‡ The jurisdiction of the court is limited to one of these two acts; and, under the land system of the United States as applied to California, it cannot deprive the party of his right of selecting his location within his "outer boundaries." But in this case the court neither affirmed nor set aside the survey, nor did it *modify* or *correct* it. It decided, in advance, that the Surveyor-General should make

* 17 Howard, 542. † 20 Id., 427. ‡ § 4, 12 Stat. at Large, 34.

a specified survey for one-half of the quantity in an entirely new locality, and not in conformity with the rights of the claimant. Practically it denied the authority of the cases cited above, that the claimant may locate wherever he chooses *within* the "outer boundaries," and seemed to act upon the idea that the location must touch all of them at once.

This appeal by claimants brings up for revision all the orders and proceedings in the District Court in relation to the survey which were made adversely to it. Justice can be done by this court as it sees fit; and it can set aside the last survey and order a new one, or it can restore, as we ask it to do, the second survey, which gave a full league, lapping upon no one, and which was set aside for a third and fourth survey ordered. Or, it may give us No. 2.

Mr. Willes, who filed a brief of Mr. Stow, contra.

Mr. Justice MILLER delivered the opinion of the court.

No class of cases that come before this court are attended with so many and such perplexing difficulties as these locations by survey of confirmed Mexican grants in California. The number of them which we are called upon to decide bears a very heavy disproportion to the other business of the court, and this is unfortunately increasing instead of diminishing. Some idea of the difficulties which surround these cases may be obtained by recurring to the loose and indefinite manner in which the Mexican government made the grants which we are now required judicially to locate. That government attached no value to the land, and granted it in what to us appears magnificent quantities. Leagues instead of acres were their units of measurement, and when an application was made to the government for a grant, which was always a gratuity, the only question was whether the locality asked for was vacant and was public property. When the grant was made, no surveyor sighted a compass or stretched a chain. Indeed, these instruments were probably not to be had in that region. A sketch, called a diseño, which was rather a map than a plat of the land, was prepared by the

applicant. It gave, in a rude and imperfect manner, the shape and general outline of the land desired, with some of the more prominent natural objects noted on it, and a reference to the adjoining tracts owned by individuals, if there were any, or to such other objects as were supposed to constitute the boundaries. Their ideas of the relation of the points of the compass to the objects on the map were very inaccurate; and as these sketches were made by uneducated herdsmen of cattle, it is easy to imagine how imperfect they were. Yet they are now often the most satisfactory, and sometimes the only evidence by which to locate these claims.

These difficulties have rather been increased than diminished by the act of Congress of March 3d, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," and the course of proceedings adopted under it by the Board of Commissioners and the courts. Before this board every person having a claim derived from the Mexican government appeared, and in his own way and to the best of his ability established his right. The primary object of the act was to ascertain and separate the public domain from that which had become, under the Mexican government, private property; and hence, in every case, the claimant was plaintiff, or actor, and the United States was defendant. But no other private claimant was made a party to the proceeding, and it may well be supposed, and indeed we know it has often happened, that two or three claims for the same land, or parts of the same, were progressing, *pari passu*, in the same court, and the land has been confirmed to each claimant, and probably each has received a patent for it. As if aware of the confusion which must follow such proceedings, the act of 1851 provides expressly that neither the final decree of the Board of Commissioners, or of the District or Supreme Court, or any patent to be issued under that act, shall be conclusive against any one but the claimant and the United States. In some instances the board, or the court, would construe the grant and accompanying espediente, and define the boundaries with particularity. In others, they merely confirmed the grant, without any attempt

at location. And in still other cases, they would partially define the boundaries, and refer to the espediente for that which was left indefinite.

Then came the act of 1860, which attempted to settle these difficulties in the making of the surveys under those decrees, by permitting, or perhaps we should say compelling (for it is yet to be determined whether every one interested is not bound to come in or be barred), all parties interested in the land covered by the survey, to come in and contest it. Are they permitted to contest the decree under which the survey is made? Or are they limited to denying that the survey conforms to the decree? Or can they only contest the matter where the decree has not definitely located the grant? Many such questions as these will arise under this act, and will require great care and reflection to arrive at sound, safe conclusions. In this proceeding new parties come before the court, and often demonstrate that grants have been confirmed, which necessarily conflict; and, upon a question of the location of a survey, we have all the contests renewed which should have been settled in the question of title.

The case before us is an example, containing as many of the perplexities to which we have alluded as can well exist in one case. Its consideration requires an examination of three different claims, which have each, independently of the other, been carried through the Board of Commissioners and courts, and finally confirmed.

The first of these, that of Gonzales, was the oldest in reference to the date of the grant from Mexico, being made in 1833. No party to the present record seeks to disturb its location, and it is only to be considered here as bounding the present claim. It is for three-fourths of a league, bounded by the sea on the west, and the Butano Creek on the south. The next grant in order of time is that to the present claimants, under Ramona Sanchez. She, in 1837, made application for a half league of land, and the governor issued to her a provisional concession for a league in 1838. Of the location of this we will speak hereafter. Next came Simeon Castro, who, in 1842, obtained from the government a grant

of four square leagues, bordering to the east on the Sierra, to the west on the sea, to the north on the rancho of Don Juan Gonzales, and to the south on that of Don Ylaria Buelna.

In the provisional concession of Governor Alvarado, of 19th September, 1838, to Ramona Sanchez, the land is said to be known by the name of Butano, and reference is made to the espediente for its description. This must mean the diseño accompanying her petition. In the final grant to her in 1844, by Micheltorena, which is expressed to be a ratification of the provisional title given her in 1838, it is called the Butano ranch, and is described as bordering on the ranch of the heirs of Simeon Castro, on the Serrania, and on the sea. Now, an examination of the diseño in her espediente, the place of her residence, and her long possession under the grant, with other matters, leave no doubt that if her grant was to bound on the sea she must come between Gonzales and Castro; yet Castro's grant calls for the grant of Gonzales as his northern boundary. This would leave no place for the location of claimant's land, where it seems reasonably certain it was intended to be. How are we to adjust these conflicting claims?

In the first place, we concur with the District Court in holding, that the language of the grant to Castro, which makes his northern boundary the rancho of Gonzales, is a mistake, and that it was only intended to extend north to the Arroyo Frijoles, instead of the Arroyo Butano, which latter is the southern boundary of Gonzales; and that between these two, and bounded by the sea on the west, is the half league petitioned for by Sanchez, constituting the valuable portion of the league granted her by the governor.

It would extend this opinion to an unreasonable length, discussing mere facts and inferences, to go into all the reasons which justify this conclusion. They are stated at length, and with much clearness, in the opinion of Judge Hoffman of the District Court. Among them may be mentioned the fact, that the land granted to Castro originally constituted two independent ranches, for one of which, the most northern,

a grant had been previously issued to one Bernal, but which was surrendered by Castro when he took out a new grant including both ranches. On the diseño accompanying his petition these two are laid down, together with other natural objects, corresponding with a survey of the coast since made, so as to show that the tract did not extend so far north. The diseño attached to the original grant to Bernal, the one that was surrendered, shows also that its northern boundary was the Arroyo Frijoles. The diseño found with the petition of Sanchez shows that her grant must have occupied the space between the Arroyo Butano and Arroyo Frijoles. Now, if the Mexican governor really intended that Castro should join Gonzales on the north, there was no place for the grant to Ramona Sanchez, which, he says, is bounded by the sea on the west, and borders on the lands of the heirs of Castro.

It is objected to this location of the grant that it places it on land which has already been confirmed, surveyed, and patented to the representatives of Castro. The answer to this is, that we are called on in this proceeding to determine where the grant to the present claimant ought rightfully to be located, who was not a party to any of the proceedings by which Castro's claim was confirmed, surveyed, or patented, and is not therefore bound or concluded by either the decree, survey, or patent, as expressly enacted by the fifteenth section of the act of 1851. For Castro's survey was made before the act of 1860, and there was no opportunity for this claimant to contest its location. And lastly, it may be added, that the holder of the Castro claim has made himself a party to the present proceeding, and must be bound by its result; and if the errors of his grant and survey are corrected, so that the boundary of both claims shall be rightfully established, no wrong can accrue either to him or claimant.

It has been strenuously urged that if the original half league petitioned for by Sanchez has been correctly located, that the remainder of the league granted her should be taken out of the surplus of the Gonzales grant, instead of extending the grant eastward to the Sierra for quantity. It is suffi-

cient to say that we see no reason for making the distorted survey which this would require, and encroaching upon settlers who have made pre-emptions, merely that claimant may get better land than he does by extending his grant eastward to the mountains, as his grant seems to demand.

On the whole case, without that full and satisfactory conviction of the entire soundness of the decree below, which is desirable, but which is perhaps unattainable in many of these cases, we see no better course than to

AFFIRM THE DECREE.

POMEROY'S LESSEE *v.* THE STATE BANK OF INDIANA.

1. No "exception" lies to overruling a motion for a new trial, nor for entering judgment.
2. The entries on a judge's minutes, the memoranda of an exception taken, are not themselves bills of exception, but are only evidences of the parties right seasonably to demand a bill of exceptions; memoranda, in fact, for preserving the rights of the party in case the verdict should be against him, and he should desire to have the case reviewed in an appellate tribunal. No exceptions not reduced to writing and sealed by the judge, is a bill of exceptions, properly speaking, and within the rules and practice of the Federal courts. The seal, however, being to the *bill* of exceptions, and not to each particular exception contained in it, it is sufficient if the bill be sealed, as is the practice in the first and second circuits, at its close only.
3. Where an objection is to the ruling of the court, it is indispensable that the ruling should be stated, and that it should also be alleged that the party then and there excepted.
4. This court cannot give judgment as on an agreed statement of facts or case stated, except where facts, and facts only, are stated, If there be question as to the competency or effect of evidence, or any rulings of the court below upon evidence to be examined, the court cannot entertain the case as an agreed statement. *Burr* v. *The Des Moines Co.* (*ante*, p. 99), affirmed.
5. Where a case is brought here upon a writ of error issued under the 22d section of the Judiciary Act, and there is neither bill of exceptions, agreed statement, nor special verdict brought up, the judgment, generally speaking, will be affirmed; as it was in this case. *Burr* v. *The Des Moines Co.* (*ante*, p. 99), where the case was "dismissed," simply, was special in its circumstances.

Statement of the case.

ERROR to the Circuit Court for the District of Indiana.

The suit was ejectment, brought by a nominal plaintiff, as at common law, against the casual ejector, to recover possession of a tract of land in the State of Indiana. Process was duly served upon the persons in possession; and the corporation defendants were admitted to defend the suit, and, as such defendants, filed the usual consent rule, confessing lease, entry and ouster, and pleaded the general issue. The parties waived a jury, and the *evidence* and law of the case under the issue joined in the pleadings, were by the agreement of counsel submitted to the *court*. The court found that the title of the defendants was the better title, and that they were entitled to judgment. The plaintiffs then *moved for a new trial*, and the parties were heard upon that motion, but the court after the hearing overruled the motion, and entered judgment for the defendants. Whereupon, the plaintiff sued this writ of error, and sought to reverse the action of the court upon the ground that the finding and judgment were erroneous.

The premises in controversy had belonged to one Webb, and both parties attempted to show title from that source. The lessors of the plaintiff claimed title by virtue of a deed from the marshal of the United States, given in pursuance of a sale of the premises made by that officer under an execution issued from the Circuit Court of the United States. The record showed that at the November Term, 1838, of that court, held at Indianapolis, within and for the District of Indiana, they recovered judgment against the owner of the premises, and one Shoemaker, for the sum of $1125.31 damages, and costs of suit taxed at $36.19. Execution was issued upon the judgment on the 17th December following, and on the 20th of May, 1839, the marshal made his return upon the same. The return showed that the sale was made at Indianapolis, in the county of Marion, and not in the county where the land lay, and that the lessors of the plaintiff were the purchasers at the sale for the consideration of $60, for the several tracts constituting the premises described in the declaration.

The defendants contended that the sale was void because not made in the county where the land was situated, and they claimed title under a certain trust deed previously executed by the parties before named as the judgment debtors of the lessors of the plaintiff. The trust deed was dated on the 5th November, 1838, and the title of the defendants was derived under a conveyance made by the trustee in the execution of the trusts therein declared. The grantors, by the terms of the deed, conveyed to the trustee, one Jenners, and to his executors or administrators, as successors, all the real estate, goods, chattels, judgments, notes, securities for money, open accounts, and other choses in action, bank stock and insurance stock, as more particularly set forth in a schedule inserted in the instrument. The instrument itself recited that the grant, bargain, sale, conveyance, transfer, and assessment were to be subject to certain specified trusts, and be accompanied with certain described powers. A commission to the trustee and the expenses of executing the trust were first to be paid in all cases; next, a certain promissory note due to the Branch Bank of Indiana; then certain judgments already recovered against the grantors; then all other and future judgments recovered against them, and finally, all their other debts.

The plaintiff contended that the trust deed was void, on account of the extraordinary powers conferred upon the trustee, and also on account of some unusual reservations contained therein in favor of the grantors. Evidence was introduced on both sides, and the parties were heard upon the merits and also upon a motion for new trial, before the judgment was finally entered.

The record stated that the plaintiff filed two bills of exceptions to the rulings of the court.

The first bill of exceptions stated that the court held—

1. That the proceedings under which the lessors of the plaintiff made title were all correct, that the sale of the marshal was made at the usual place of making sales, and that it was regular and sufficient to convey the title of the judgment debtors.

2. That the trust deed was also valid and effectual in law to convey the premises, and that it was the paramount and better title.

Neither party excepted to any one of these rulings of the court, but the bill of exceptions further stated in effect, that after the decision was announced, and before the entry of the judgment, the plaintiff *moved the court to grant him a new trial for the following reasons:*

First. Because the court erred in overruling the objection of the plaintiff to the admissibility of the *trust deed* in evidence.

Second. Because the court erred in holding that the trust deed was valid and constituted the paramount title as against the lessors of the plaintiff claiming under *the sale made by the marshal.*

The parties, as before remarked, were heard, and the motion overruled, and the final judgment entered. The concluding statement of the bill of exceptions was as follows, that is to say: "*To the overruling of which motion and entry of judgment as aforesaid, the plaintiff then and there excepted;*" the exception being plainly to the *overruling of the motion for a new trial, and to the entry of judgment;* not *to the ruling of the court on the subject of either the marshal's or the trust deed.*

The second bill of exceptions, which was entitled "CASE," followed. It occupied in the printed transcript of the record presented to this court, fifty 8vo. pages in small pica type. It had not the nature of a case stated, or agreed statement of facts, in the stricter sense in which that expression is used by the profession or courts, but was made up of a variety of things. It contained, on the one hand, the evidence and exhibits which the lessors of the *plaintiffs* introduced, and parts of which, as the record showed, had been admitted under objection from the other side, while other parts were received without objection. In cases where objections were made and overruled, it is *stated* sometimes that the defendants excepted; while in some instances that statement was omitted. In one instance, where evidence offered by the plaintiff's lessor was rejected, it is stated that the plaintiff

excepted. On the other hand, it contained the evidence and exhibits introduced by the *defendants*, whether admitted with or without exception; and as in regard to the evidence on the other side, when exception was made and overruled, an exception was sometimes stated and sometimes not. Over and above all which, various matters, introduced on both sides, were given, to wit: judicial records, written and oral testimony, instruments in writing and facts, sometimes admitted absolutely, sometimes introduced conditionally, and subject to the court's opinion as to their competency and value. No rulings of the court, nor its final judgment, were given; but after the signatures of the respective counsel, one representing the plaintiff and the other the defendant, the whole concluded with a statement, signed by the judge and under his seal, in these words:

"This was all the evidence given on the trial of said cause. And the plaintiff prays this, *his bill of exceptions*, may be signed, sealed, and made a part of the record herein, which is done."

Messrs. Chase and Burd, for the defendant in error: No question of merits can arise in this case; for there is nothing before the court on which it can so give judgment. There is no verdict, special or general, nor any case stated. The record brought up here by writ of error, is a multifarious congeries of everything. *Burr* v. *The Des Moines Co.*, adjudged at this term,* decides that error will not lie except upon an agreed statement of facts; a "case stated" properly, in substantial form. MILLER, J., enunciates with terseness, the principles which apply. The statement, he says, must contain "the ultimate facts or propositions which the evidence is intended to establish, not the evidence on which those ultimate facts are supposed to rest." It must "be sufficient without inference, or comparisons, or balancing of testimony, or weighing evidence to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by the

* *Ante*, p. 99.

court, but must have all the sufficiency, fulness, and perspicuity of a special verdict." This doctrine rests on precedent.*

Messrs. Carlisle and Brady, contra: There is a mass of testimony, it is true, on this record; but it is superfluous merely; for the findings of the court on facts were conclusive.† In the midst, however, of all this irrelevant matter, two points of law are discerned: one, as to the validity of the marshal's deed; the other, as to the validity of the deed of trust; precise points both; both pure law. Both are set forth in the record, and with them is set forth the judgment of the court on each. The requirements as enunciated in *Burr* v. *The Des Moines Co.* are thus satisfied before us. They were not satisfied there. The case was on a "mass of testimony" only. What we ask of this court is its judgment on the points of law distinct and *distinctly visible* in all the confusion of the case. To a record as to a deed the maxim applies: "*Utile per inutile non vitiatur.*"

If, however, the court should be of opinion that the case, as presented, is not so stated as to be adjudicable by a court of law, we trust that it will not affirm the judgment; but will order a new trial, or at least *dismiss* the writ of error. This was the course pursued in *Burr* v. *The Des Moines Co.*, relied on by the other side.

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

Exceptions to the first bill, as written out and sealed, are plainly and undeniably to the overruling of the motion for a new trial, and to the subsequent entry of the judgment, and not to the rulings of the court as to the validity of the trust deed or its legal effect as a paramount title over that claimed by the lessors of the plaintiff.

Authorities are numerous that a motion for a new trial in the Federal courts is a motion addressed to the discretion of

* Kelsey *v.* Forsyth, 21 Howard, 85; Campbell *v.* Boyreau, Id., 224; Guild *v.* Frontin, 18 Id., 135; Suydam *v.* Williamson, 20 Id., 428.

† United States *v.* King, 7 Howard, 844.

the court, and that the decision of the court in granting or refusing it is not the proper subject of a bill of exceptions. *Henderson* v. *Moore*, 5 Cran., 11; *Mar. Ins. Co.* v. *Young*, Id., 187; *McLanahan* v. *The Universal Ins. Co.*, 1 Pet., 183; *U. S.* v. *Buford*, 3 Id., 32; *Barr* v. *Gratz*, 4 Wheat., 213; *Blunt* v. *Smith*, 7 Id., 248; *Brown* v. *Clarke*, 4 How., 4.

Indeed, the universal rule of practice is, that matters resting entirely in discretion are not re-examinable in a court of errors, and there can be no departure from that rule in this court without overruling its settled practice from the organization of the court to the present time. Presumption, therefore, in this court is, that the motion for new trial was properly denied, and if so, then the defendants were entitled to judgment. Ruling of the court was that the trust deed was the paramount title, and to that ruling no exception was taken, and consequently, when the motion for new trial was overruled, the right of the defendants to judgment became complete. Entry of judgment, therefore, was properly made, and the exception to the action of the court in that behalf, as erroneous, is without any foundation whatever. Error of the court, if any, was in the ruling that the trust deed was the paramount title, and if the plaintiff desired to sue out a writ of error to revise that ruling, he should have excepted to it at the time it was made. *Y. & C. Railroad Co.* v. *Myers*, 18 How., 251.

He insists that he did so, because it is so stated in the minutes of the case as appears in the transcript, but the insuperable difficulty in supporting that proposition is, that nothing of the kind appears in the bill of exceptions. Where exceptions are taken to the ruling of the court in the course of a trial to the jury, such an entry is frequently made in the minutes of the case, or of the presiding justice, as evidence of the fact, and as a means of preserving the rights of the party in case the verdict should be against him and he should desire to have the case re-examined in the appellate tribunal, but it was never supposed that such an entry could be of any benefit to the party unless he seasonably availed himself of the right to reduce the same to writing,

and took proper measures to have the bill of exceptions sealed by the judge presiding at the trial, or, in other words, such an entry in the minutes can only be regarded as evidence of the right of the party seasonably to demand a bill of exceptions, but it is not the same thing, and has never been so considered in the Federal courts, or in any other jurisdiction where the rules and practice of the common law prevail.

II. Authority was conferred, by the seventeenth section of the Judiciary Act, upon all the courts of the United States, to make and establish all the necessary rules for the ordinary conducting of business in the said courts, provided such rules were not repugnant to the laws of the United States. (1 Statutes at Large, 83.)

Pursuant to that authority the several Circuit Courts, immediately after the judicial system of the United States was organized, adopted the form for bills of exceptions as known at common law, and the practice has been uniformly followed to the present time, without question or any material variation. Bills of exceptions, therefore, in the Federal courts, are required to be drawn as at common law, under the statute of Westminster 2 (13 Edw. I, chap. 31), passed in the year 1285, and of course they must be sealed by the judge, as therein required. 1 Pick. Stat., 206; 2 Tidd's Practice, 862; 1 Arch. Prac. by Chitty (11th ed.), 443; 2 Inst., 427; 2 Bac. Abr. by Bouvier, 113.

Justiciarii apponant sigilla sua, is the express command of the statute, and so is the commentary of Lord Coke, which has always been regarded as of the same authority as the statute on which it is founded. 2 Inst., 428; *Strother* v. *Hutchinson*, 4 Bing. N. C., 89.

Party aggrieved might, before the enactment of that statute, sue out writ of error to correct an error in law apparent on the record, or for an error of fact, where either party had died before judgment; but the writ would not lie for an error in law not apparent on the record, as for a refusal to instruct the jury as requested, or for an erroneous instruction given, or for an erroneous ruling in admitting or rejecting

evidence. Consequently, where either party alleged anything *ore tenus*, which was overruled by the court, the party was without remedy; because, being an error in law, and not apparent in the record, the appellate tribunal could not take judicial knowledge of the proceeding. Statute under consideration was passed to obviate that difficulty, and to prevent the injustice flowing from it, and throughout the long period it has continued in force, it has ever been regarded as an eminently just and highly beneficial regulation. Writs of error, it is true, bring up the whole record, and it is undeniably competent for the court to reverse the judgment for any apparent error, whether it appear in the bill of exceptions or in any other part of the record. *Slacum* v. *Pomery*, 6 Cran., 221; *Cohens* v. *Virginia*, 6 Wheat., 410; *Garland* v. *Davis*, 4 How., 131; *Bennett* v. *Butterworth*, 11 Id., 669.

But when a party is dissatisfied with the decision of his cause in an inferior court, and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the questions of law to be revised, and put the facts on the record for the information of the appellate tribunal; and if he omits to do so in any of the methods known to the practice of such courts, he must be content to abide the consequence of his neglect or oversight. *Suydam* v. *Williamson*, 20 How., 433.

Unless an exception is reduced to writing and sealed by the judge, it is not a bill of exceptions within the meaning of the statute authorizing it, and it does not become part of the record.

Were it otherwise, then a bill of exceptions would never be necessary; because if the statement in the minutes is sufficient in one case, it must be in all, which cannot for a moment be admitted, as it would overturn the unbroken practice in courts of error from the passage of the Statute of Westminster to the present time. Seal, as required, is to the bill of exceptions, and not to each particular exception therein contained. Many exceptions may be inserted in one bill of exceptions, and of course it is sufficient if the bill of exceptions is sealed at the close. Accordingly, the practice,

in the first and second circuits, is to put every exception taken at the trial into one bill of exceptions, which makes the records less voluminous.

III. Second bill of exceptions, so called, is denominated the "case" in the record, and extends through more than fifty pages of the transcript. First, it contains all of the evidence and exhibits introduced by the lessors of the plaintiff, and the record shows that portions of the same were admitted under the objection of the defendants, and other portions without objection. When objections were made and overruled, it is stated in some instances that the defendants excepted, and in others that statement is omitted. Evidence offered by the lessors of the plaintiff in one instance was rejected, and in that case it is stated that the plaintiff excepted. On the other hand, it contains, in the second place, all the evidence and exhibits introduced by the defendants, whether admitted under objection or without objection, and as in the case of the lessors of the plaintiff, when the objection made was overruled by the court, it is in some instances stated that the plaintiff excepted to the ruling, and in others that statement is omitted. Matters so introduced on the one side and the other consist of judicial records, written instruments, depositions, oral testimony, and certain other facts, either absolutely admitted by the parties or their counsel, or provisionally introduced, subject to the opinion of the court as to their admissibility and legal effect. Rulings of the court, as stated in the first bill of exceptions, are not given, nor is it stated what was the final judgment of the court. Appended to the statement are the signatures of the respective counsel, and the conclusion of the paper is as follows: "This was all the evidence in the case, and the plaintiff prays that this his bill of exceptions may be signed, sealed, and made a part of the record herein, which is done," and the same is signed by the presiding justice, and is under his seal.

IV. Nothing further need be remarked to show that no proper foundation is there laid for the revision of the rulings of the court, to which the lessors of the plaintiff now object, because those rulings are not mentioned in the paper, so

that even if it could be regarded as a bill of exceptions, it would be equally unavailing to the plaintiff as a means of accomplishing the object he desires. Where the objection is to the ruling of the court, it is indispensable that the ruling should be stated, and it should also be alleged that the complaining party then and there excepted to the same. Both conditions are wanting, and indeed the paper is irregular or defective, and insufficient in many of the substantial elements of a proper bill of exceptions.

V. Suggestion was also made at the argument, that if the paper was not available to the plaintiff, as a bill of exceptions, still the evidence, as reported, might subserve his purpose as an agreed statement of facts; but we think not, for several reasons.

First. Because it merely gives the evidence as it was introduced on the one side and the other, and leaves the results of the evidence to be found by the court, as if sitting as a jury.

Secondly. Because it does not contain the rulings of the court which the plaintiff desires to have revised; and,

Thirdly, because if both of the preceding objections were obviated, still it would not be competent to revise the rulings of the court below in that mode. 2 Tidd's Practice, 896; *Seward* v. *Jackson*, 8 Cow., 406.

Decisions of this court establish the rule that writs of error will lie where the judgment in the court below was founded upon an agreed statement of facts, as well as when founded upon the verdict of a jury. *U. S.* v. *Eliason*, 16 Pet., 291; *Stimpson* v. *Railroad Co.*, 10 How., 329; *Graham* v. *Bayne*, 18 Id., 60.

Judgments of the Circuit Court may also be revised here upon writ of error, in cases where they were founded upon a special verdict, or upon demurrer to evidence. *Suydam* v. *Williamson et al.*, 20 How. 435; 4 Chitty's Gen. Prac., 7; 2 Inst., 427.

None of the modes suggested, however, enable the complaining party to review or re-examine the rulings of the court, except that of the bill of exceptions.

1. Agreed statements rest upon the consent of the parties, and, consequently, the action of the revising tribunal must be confined to the agreed facts, and the facts cannot be said to be agreed while the parties are at issue as to the admissibility or competency of the evidence.

2. Special verdicts are where the jury find the facts of the case, and upon those facts refer the decision of the cause to the court, with a conditional conclusion, that if the court should be of opinion that the plaintiff, upon the facts found, has a good cause for action, then they find for the plaintiff; but if otherwise, then they find for the defendant. Rulings of the court, however, in admitting or rejecting evidence, are never properly included in a special verdict, any more than in an agreed statement of facts; because, when reduced to form, the verdict is then entered on the record, and the judgment of the court is based upon the findings of the jury.

3. Evidence must first be admitted before it is properly the subject of demurrer, and when a party elects that mode of trying the case, he thereby waives all objections to the rulings of the court in respect to evidence rejected, as well as to that previously admitted, so that in no point of view can the paper under consideration be regarded as sufficient to lay the foundation for a revision of the rulings which are the subject of complaint.

VI. Having come to the conclusion that the paper in the transcript is not a good bill of exceptions, agreed statement of facts, or a special verdict, the result is that it is not a part of the record, and under the circumstances of this case, it must be wholly disregarded by the court in determining whether the judgment of the court below ought to be reversed or affirmed. *Inglee* v. *Coolidge*, 2 Wheat., 363; *Suydam* v. *Williamson*, 20 How., 439.

Special circumstances induced the court, in *Burr* v. *Des Moines Nav. R. R. Co.*, decided at the present term (*ante*, p. 99), to dismiss the writ of error, and allow the parties an opportunity to make a further effort to present the case in some proper form; but the court in that case held that the legal presumption was in favor of the correctness of the

judgment. Where a case is brought here upon a writ of error, issued under the twenty-second section of the Judiciary Act, and there is no bill of exceptions, agreed statement, or special verdict in the transcript, the general rule is, that the judgment will be affirmed, as is shown by repeated decisions. *Suydam* v. *Williamson*, 20 How., 441; *Minor* v. *Tillotson*, 2 Id., 392; *Kelsey* v. *Forsyth*, 21 Id., 85; *Guild* v. *Frontin*, 18 Id., 135; *Stevens* v. *Gladding*, 19 Id., 64; *Taylor* v. *Morton*, 2 Black, 484.

In the case last cited, this court said that when a cause is brought into this court upon a writ of error sued out under the twenty-second section of the Judiciary Act, and all the proceedings are regular and correct, it follows, from the express words of the section, that the judgment of the court below must be affirmed, although there is no question presented in the record for revision.

The judgment of the Circuit Court is, therefore,

AFFIRMED WITH COSTS.

SPAIN *v.* HAMILTON'S ADMINISTRATOR.

1. A transfer by a party of his "*right and claim for any commission or compensation* for services rendered, or to be rendered *to any body corporate*," in a class of claims mentioned generally in the transfer, is not such an assignment, even in equity, of a compensation subsequently earned, as will give the transfer priority against junior assignees (without notice) of portions of a *fund* designated and appropriated to answer this claim: the case being one where, on the one hand, the older transferee did *not* make inquiries as to *what* body corporate the claim for commissions was against, and did not give notice of the paper executed in his favor, to such body corporate, nor to a third party to whom this body, subsequently to the older transfer, but prior to the junior ones, devoted a fund to answer these commissions; and where, on the other hand, the junior transferees *did* make exact inquiries and obtain precise evidences and accurate information as to the fund from which the commissions were to be derived, and *did* immediately notify to the party then holding the fund, the nature and extent of their claims, and *did* generally take measures to prevent all other persons being misled by the supposition that the fund still remained in the power of the party who had transferred this claim for commissions upon it. Such an assignment

as the one first above mentioned, is a blind assignment, and the party claiming under it cannot come into equity for priority against even junior assignees in a case where the claims of these last are on a fund specifically; and are moreover precise, well understood, and have been vigilantly protected.

2. The general doctrine of equity, that a party complaining of usury can have relief only for the excess above lawful interest, applies to the case of a person standing in the position of a claimant through bill in equity of priority on a *fund*, another claimant upon which, as defendant, is the alleged usurer. The fact that the suit is a mere contest between different parties for a *fund*, and a contest, therefore, in which each claimant may, in some senses, be considered an *actor*, does not force the alleged usurer into the position of a complainant or plaintiff, and so expose him to the penalty incurred by a person seeking as plaintiff to recover a usurious debt; that is to say, to the loss of the entire claim.

3. Where the promise to pay a sum above legal interest depends upon a contingency, and not upon any happening of a certain event, the loan is not usurious. Nor will usurious interest be inferred from a paper which, while referring to payment of a sum above the legal interest, is "uncertain and so curious," that intentional bad device cannot be affirmed.

MILLER and SWAYNE, JJ., dissented in this case.

THIS was a bill in equity, filed in the Circuit Court for the District of Columbia, by S. Spain, guardian of Mrs. McRae, a lunatic, against the administrator of the late James Hamilton, of South Carolina and Texas, extensively known as "General James Hamilton," and against Corcoran and Riggs, Hill, and others; the said bill claiming priority in the distribution of a fund in the Treasury of the United States, originally belonging to Hamilton, and arising by the assumption of the United States, in September, 1850, of certain debts of the Republic of Texas, which fund, or the source of it rather, Hamilton, having become embarrassed and insolvent, had assigned in divers ways and to various extents to different persons, parties plaintiff and defendant in this suit.

The case in its outlines as proved, or *by agreements made in the case* admitted, was essentially this: the leading facts being derived from the stating part of the opinion of the learned Justice (WAYNE, J.) who delivered the judgment of the court.

The Republic of Texas, prior to its annexation to the United States, had issued a large number of bonds, which

were due, unpaid, and the subject of speculation and purchase in different parts of the Union. Hamilton, who held a considerable amount of the bonds, had become familiar with the affairs of Texas, and especially with all that related to its debts, and was anticipating that if that republic was annexed to the United States, those debts would all be paid. He became, accordingly, an active and energetic advocate of annexation. The trustees of the Bank of the United States also owned a large amount of the bonds. But these had been pledged, in a greatly depreciated state, to a certain Wetmore, one of the defendants, as security for a loan which he had made to the bank. If, however, the bonds should be paid, enough would be obtained to pay the debt due by the bank to Wetmore, and leave a large surplus remaining. And Hamilton, being already the agent of some of the bondholders, and desirous to have the agency for others, applied to the trustees of the bank to represent *them*. On the 16th of October, 1845, the trustees accordingly wrote Hamilton a letter, in which, adverting to his knowledge of the fact that they had "now only a contingent, resulting interest in the bonds, dependent *upon the payment by us of the amount for which they are now held by Mr. Wetmore in pledge*," they say as follows:

"If you will devote your best efforts to securing the recognition and payment of said claims, and your effort shall be successful, then we agree to allow you a commission of 10 per cent. on whatever sum or amount of our claim, through your instrumentality, shall be recognized and paid over to us, over and above the amount for which the said bonds are pledged. The limitation of time during which this agreement on our part can with certainty be continued is only to the 20th of March next ensuing; but we are willing, with the concurrence of Mr. Wetmore, or in case *we* should then or sooner obtain *the entire control of those bonds and securities* now in his hands, to extend the said time to two years from this date."

The 20th of March, the first limitation, passed without the recognition by Texas of its bonds, and without the payment

of the debt due by the bank to Wetmore. Of course Wetmore's legal right to retain the Texas bonds was continued, and Hamilton was left without any claim upon the bank for commission or compensation under the agreement.

On the 16*th September*, 1850, however, the trustees wrote to *Wetmore* a letter, reciting that Hamilton had rendered his services, as he had agreed, "so far as in his power, without however realizing the money;" and then referring to an act of Congress recently passed for the payment, in part, of the Texas bonds, among which the trustees had been "informed by General Hamilton, are the bonds held by *them*," the letter goes on as follows:

"The trustees, *at the particular request of General Hamilton*, have instructed me to say to you, *if they should not have previously redeemed the bonds*, that upon the final adjustment and payment of the said bonds first above mentioned, either by the Treasury of the United States, in the manner provided for in said act of Congress or otherwise, to the satisfaction of the said trustees, pursuant to their said agreement with General Hamilton, *you will be pleased to hold, subject to the order of General James Hamilton, one-tenth of any sum over and above the amount of your claim against the said bonds.*"

This claim of Wetmore, originally £50,000 sterling, had, at the date of this letter, been reduced by payments from the bank to $55,493.24, with interest from December 9th, 1842.

Upon the bottom of this letter of 16th September, 1850, Wetmore, on presentation of the same to him, wrote as follows:

"In conformity with the above order, I will, when received by me, pay over to James Hamilton, or to his order, the tenth of the money or stock that may be received either at Austin, Texas, or at Washington, D. C., on the above certificates, subject, however, *to the conditions of the above order, and to a lien I hold by assignment for* $2500, *which sum I loaned General Hamilton in August last, with interest.* W. S. WETMORE."

Between the dates of the letters to Hamilton and that to Wetmore—that is to say, on the 12th February, 1850,—

Hamilton, who, as former trustee of Mrs. McRae already mentioned, had become indebted to her estate, and was now under arrest for the debt,—executed a paper to her succeeding trustee or committee, Spain, the complainant, which purported to secure this debt. It "transferred, assigned and made over" to Spain, committee, &c.,

"All my *right and claim for any commission or compensation for services rendered or to be rendered by me to any* and every other person and *body corporate* in the prosecution of any claim or claims for any and every such person and body corporate on the government of Texas, *subject to any previous assignment thereof.*"

As illustrating the special temper and character of Hamilton, referred to by the court and indicated in the record, it may be mentioned that his debt to Mrs. McRae had arisen from a misappropriation of the funds of her estate in his hands as trustee. "Consulting," as his answer said, "the suggestions rather of a sanguine temperament than the admonitions of experience," he had invested about $50,000 of her property "in one of the finest and most promising sugar estates in Texas, supposed to be an investment surpassed by none in the United States;" which, in the end, however, the answer proceeded to state, "*yielded more sap than sugar*," and being sold on first incumbrances, did not bring enough to pay them.

When Hamilton proposed to give the transfer, he made no mention of any Texas bondholders whom he represented, nor did he state that the bonds of the bank were held in pledge by Wetmore; nor did Spain—or rather the person who was acting for him (the arrangement having been made by a third party in his behalf),—*make the least inquiry, so far as appeared, from Hamilton, as to any of these things*, nor was notice ever given to the bank about it. It did not appear that Spain knew anything about it until long after.

This was the claim for which priority on the fund was asserted by the bill filed. The opposing claims were as follows:

1. *A claim of Wetmore, himself*, to the extent of $2500, for

money which, by an agreed statement in the case, it was conceded that he had lent to Hamilton on the 30th August, 1850, being the debt referred to in the paper mentioned *ante*, p. 607, signed by him at the bottom of the letter from the trustees to him of 16th September, 1850, and for which, as he there states, he had taken *an assignment* at the time.

2. *A claim of Corcoran & Riggs, of Washington.* Hamilton needing money in that city had applied to these persons, bankers there, for $25,000. They advanced the sum to him on the 21st September, 1850, taking an order from him on Wetmore for $30,000, "to be paid out of the first moneys received after your claims shall have been satisfied;" which order Corcoran & Riggs *immediately transmitted to Wetmore*, who, on the 24th of the same month, "accepted" it.

3. *A claim by the estate of one Hill*, made partly under an original claim, and partly by subrogation to the rights of James Robb & Co. As far back as 1848, Hamilton, reciting that the trustees of the Bank of the United States had agreed to pay him a commission of 10 per cent. on somewhere about a million of dollars, &c., assigned one-half of "all his interest and property in the commission," in trust for Hill, a creditor and friend. In regard to *this*, it did not appear that notice had been given to any one, and the history of the whole transaction, Hill being dead, was not very clear. The claim, so far as it arose from substitution to a claim of James Robb & Co., was plainer, and thus: Hamilton owing Robb a large sum, made, on the 30th April, 1851, a transfer of the "order" of 16th September, 1850, by the trustees of the bank on Wetmore, and by him accepted; the order being subject, as was stated in the transfer, to the claim of Wetmore, himself, for $2500, and to that of Corcoran & Riggs for $30,000. *Robb wrote immediately to Wetmore*, saying to him:

"We have taken an assignment from General James Hamilton of his residuary interest in an order, &c., of the Bank of the United States, addressed to you, dated September 16th, 1850. *Be pleased to make a note of this assignment*, a notarial copy of which we will send to you, and *hold the claim subject to our order, or that of W. Hoge & Co.*"

This letter and the notarial copy were received by Wetmore, who at once acknowledged their receipt to W. Hoge & Co. The history of the substitution of Hill is told by the following letter, which was duly received and preserved by Wetmore.

NEW ORLEANS, 28th May, 1853.

MY DEAR SIR: Having confided in Gen'l Hamilton's promises until our patience became exhausted with their continued violation, we commenced suit, and obtained judgment and seizure against sundry securities pledged, including the residuary interest on the Texas claim you hold, after the payment of the advances made by yourself and Mr. Corcoran. Mr. H. R. W. Hill, of this city, who is a large creditor of General Hamilton, in order to secure the margin of securities covered by our judgment and seizure, has arranged to liquidate our claim against Hamilton, and *we shall therefore subrogate him, Mr. Hill, to our interest in the Texas debt represented by you.*

Very respectfully, your ob't serv't,

JAMES ROBB.

W. S. WETMORE.

On the day previous to the date of this letter, Hamilton had executed to Hill, he present and accepting, an assignment of the order previously conveyed to Robb, and now by him surrendered.

So far as respected these three claims, in their common outlines alike, and there being nothing to show that the claimants in any one of them had the least knowledge of the paper executed by Hamilton to Spain, any more than Spain had of what was going on between *them.*

The claim of Corcoran & Riggs was, however, embarrassed by evidence not common to the other two claims, and was the subject in the bill of a charge of *usury.* At the time the money was advanced, a paper, drawn by Hamilton and in his writing, was executed by him and by Corcoran for his firm, as follows:

[Private and confidential.]

The following memorandum agreement witnesseth: That Messrs. Corcoran & Riggs have agreed to loan James Hamilton, on a certain order of the trustees of the Bank of the United

States on William Wetmore, Esq., of New York, $25,000, at an interest of 6 p. c., reimbursable on the payment of its public debt, on his order on William Wetmore for $30,000.

In case J. Hamilton does not procure Messrs. Corcoran & Riggs the agency at Washington for the settlement of said debt, then J. Hamilton is to allow a commission on the loan of $2000, *to be added to the interest of* 6 *p. c.* The balance of the said $30,000 is to be credited to J. Hamilton's account on final settlement.

This contract is not in prejudice of a liberal remuneration which Messrs. Corcoran & Riggs have agreed to allow J. Hamilton in the event of procuring said agency.

J. HAMILTON.
CORCORAN & RIGGS.

WASHINGTON, Sept. 21, 1850.

As to this paper, the answer of Corcoran said that it was executed at "Hamilton's instance and request, and after the whole matter of the said loan had been fully consummated;" that, neither suspecting nor conscious of any illegal motive or stipulation, they readily signed the said memorandum without noticing its terms, or having their attention at all drawn to the artful manner in which it appears to be expressed; that even after the controversies involved in this suit had arisen, they had readily furnished the copy of said memorandum upon which the said charge of usury was based, and that the loan was entered on their books as a loan of $25,000, at 6 p. c. As respected the proposed agency, their answer said as follows:

"The said Hamilton had proposed to procure for defendants the agency at Washington for the settlement of the Texas debt, stipulating at the same time that he should have a 'liberal compensation' from them should he succeed in so doing, as it was supposed that such agency would be profitable to these defendants in their business of bankers. In order to accomplish this object, of which the said Hamilton appeared to be very confident, he represented that it would be necessary for him to go to Texas, provided with the influence of certain persons, who were in friendly relations with these defendants and disposed to oblige them; and to induce them to exert themselves in the premises, and to confide in his assurances that he could and would procure

such agency, he proposed that he would pay to them the sum of $2000 if he failed in his undertaking, which, on the other hand, if he succeeded, he should have from them a 'liberal compensation.' It was *this* matter, and this only, which the said Hamilton represented it expedient to keep '*private and confidential*,' from motives entirely personal to himself. These defendants accordingly did put themselves to considerable inconvenience in providing the said Hamilton with the means of procuring said agency, in the profits of which he was to participate. But they repeat that the said arrangement was altogether distinct from the said loan, and was in its nature wholly contingent, and was no part of the consideration of the said loan, which was at 6 per cent. interest only. And that the said Hamilton himself so considered it, is shown by the manner in which he refers to it in the original letter from him to them, now produced."

This letter expressed a wish to make some arrangement in regard to the security of the loan of $25,000, "preserving our contingent contract inviolate in good faith."

Some reference to dates, in connection with the public history of Texas and of its admission into the Union, was given by the learned judge who delivered the opinion, and this, with a statement of the parties' knowledge and proceedings in connection therewith, will give a perfectly full view of the case.

On the 1st March, 1845, Congress passed an act for the admission of Texas into the Union, and an ordinance having been passed July 4th of that year, accepting the conditions proposed by Congress; a joint resolution was passed the same year, declaring Texas admitted. On the 20th March, 1848, the State of Texas itself passed an "act for ascertaining the debts of the late republic," and with a view, as was generally understood, of their being ultimately assumed by the Federal Government. *This act required creditors to file their bonds with the auditor and controller of the State.* Two years afterwards, that is to say, September 9, 1850, Congress passed an act, declaring that it would issue for Texas $10,000,000 in stock bonds; *provided, however*, that no more

than a portion of the fund should be issued until the creditors of Texas holding its bonds and certificates should file in the Treasury releases of all claims against the United States on their account. It was prescribed that the secretary should give notice, by advertisement for ninety days, of the time for payment of the Texas bonds on which releases had been made, and that no payment would be made on those which had not been presented thirty days before the time appointed for payment. All the legislation and government's action upon it to consummate its intention was known, of course, by persons interested in the payment of Texas bonds, and as appeared by the complainant's bill, were known to the appellant, Spain.

Spain did not take steps to secure his bonds until the 18th June, 1851. Being then in Galveston, he at that time, and as his bill stated, "with a view to make his assignment effectual, and to fasten notice thereof upon the government of Texas," caused a certified copy of the assignment to him, addressed to the Treasurer of Texas at Austin, its capital, to be deposited in the post-office. Mr. May, also, a connection and friend of Mrs. McRae, acting for Spain, prior to the 9th September, 1851, and in accordance with public notice given 22d March of that year to the creditors of Texas, "notified to the Secretary of the Treasury of the United States the transfer to Spain," with a view to prevent the payment of the claim so transferred to anybody other than the said Spain. Both these notices were received at the departments to which they were sent.

Under the act of the Texas legislature Wetmore filed his bonds, on the 9th of November, 1849, and getting certificates of debt, which he lodged at the earliest day with the Treasurer of the United States. The original Texas bonds had been delivered to him by the bank when he made his loan, and had always remained in his possession and control. And a portion of his debt being still unpaid, the certificates issued by the United States in lieu of the Texas bonds, were made out to him and in his name; he having stated, however, in an affidavit filed at the Treasury in Wash-

ington, on which they were issued, that as to one-tenth he had no claim except for $2500, and stated also the exact history of the orders of Corcoran & Riggs, and of Robb, with the substitution of Hill, upon him. On the 11th April, 1854 (subsequently to the certificates being thus made out), the bank paid the balance of its debt; and Wetmore immediately transferred to them nine-tenths of the new or substituted certificates. The remaining one-tenth, amounting to $72,505.12, was still in the Treasury of the United States, and it was this which was the subject of dispute for priority; the sum being large enough to pay Wetmore, Corcoran & Riggs, and Hill as substituted to Robb, but not large enough to pay them *and* Spain also.

It was agreed by counsel "that for the purpose of ascertaining the several parties to this controversy, and the origin and character of the fund claimed by them, that the fund now in the Treasury of the United States, amounting to $72,505.12, became due and payable to Hamilton under an agreement entered into by the Bank of the United States, which is evidenced by the two letters of the trustees of the 16th October, 1845, to Hamilton, and 16th September, 1850, to Wetmore." Several other agreements were made, the substance of which is presented in the case as already stated. Good faith and conformity to the instructions of the letter to Wetmore were considered by the court, in stating the facts of the case, to be conceded to him in accepting Hamilton's order in favor of Corcoran & Riggs; and there was no evidence—but on the other hand the contrary of it—that either Wetmore, Corcoran & Riggs, Robb or Hill had knowledge of the paper executed 12th February, 1850, to Spain, till 10th May, 1856 (about the time the bill was filed), when Wetmore heard of it.

The court below held that the letter of the trustees to *Hamilton* (the letter of 16th October, 1845), gave him no *lien* on the Texas bonds for his commissions, but "only a personal claim against the bank for his ten per cent.;" that, accordingly, "the notice of the complainant to Texas was void;" that the legal title of the one-tenth under mort-

gage, and the letter of the trustees to Wetmore of the 9th of September, 1850, with the assent, and at the request of Hamilton, was in *Wetmore*, and was not intended to be reconveyed; that the condition in the letter to Wetmore, by which any reverter on payment of the mortgage debt could be claimed, was for the benefit of the bank only; and that by accepting the deed of 11th April, 1854, for the nine-tenths, they renounced any such benefit as to the remaining one-tenth; that from the 16th September, 1860, Wetmore was trustee to pay Hamilton's debts. The court decreed that they should be paid in this order:

1. Wetmore's own $2500 with interest from date of loan.
2. Corcoran & Riggs's $30,000,—this sum being less than the $25,000 lent with interest on it.
3. Hill, assignee of Robb, his debt with interest.

Any balance was ordered to be reported into court.

It was from this decree that the appeal came to the Supreme Court.

Messrs. Brent and Bradley, for Spain, the appellant: By the terms of the bank's letter to Wetmore, the direction to "hold subject to the order of General James Hamilton," &c., was made expressly subject to the proviso, "if the trustees have not *previously* (*i. e.* previously to the 'final adjustment *and payment*') *redeemed* the bonds," and Wetmore's acceptance was subject to the *conditions* of the order. Now the trustee did previously redeem the bonds, and thus carried away the entire basis on which Wetmore's "acceptance" of the order of Corcoran & Riggs, and of the notification by Robb, was based. The payment of the debt determined the special title of the pawnee.* The bonds became the property of the bank. All that Wetmore did to keep the one-tenth in his own hands he did of his own head and to protect his $2500, which he could not otherwise secure. Of what use, then, were notices to Wetmore? If notices to any one were obligatory it was to the bank. It is not pretended that any one of the appellees gave notice to *it* or to its trustee.

* Ratcliff *v.* Davis, Noy, 137.

The assignment of 1848 to Hill was never notified even to Wetmore, and if it had been the notice would have been valueless, since the assignment was itself merged by Hill's acceptance of the subsequent assignment to Robb. Each one of the assignments set up is, therefore, subsequent to the meritorious and interesting one in favor of Mrs. McRae. It is no answer to our claim to say that by the terms of our assignment we took subject to "any previous assignment," for there was no previous "assignment." Equitable assignees take in order of time, unless where by superior diligence a junior assignee has secured an advantage.* When Hamilton made the assignment to Spain, he had assigned to nobody but Hill, which assignment is not now in our way, having been merged, if, indeed, it existed. We neither asked about other assignments, nor did he speak of them, for none others then existed. There is no evidence that any were contemplated, and if they were it was unimportant, since they would be subsequent ones, and subject to ours, as ours had been to "any previous."

The debtor was, first, the State of Texas, and subsequently the United States. To both notice was given. Here were no laches, but on the contrary, in both cases, diligence. Even admitting Wetmore to hold a legal title, we deny that the subsequent assignees have a prior equity, unless Spain was guilty of laches in giving notice to Wetmore, after the former had knowledge where this legal title was; and this is not shown. A prior assignee is not postponed by a failure to give notice, unless guilty of fraud or of gross neglect. The subsequent assignee takes subject to the prior equities.

As to Wetmore's claim for $2500, he notified it to no one. The order of the bank to him was to accept in one way: he accepted in another, for his own benefit; and he gives no notice to the bank of his departure from the terms on which they had asked him to accept. He has notice, at any rate,

* 2 Leading Cases in Equity, by Hare & Wallace, part 2d, p. 218, ed. of 1852, note to Row *v.* Dawson, &c.; Berry *v.* Mutual Insurance Co., 2 Johnson's Chancery 609.

of our older claim, prior to his getting the money from the United States, and is bound to postpone himself.

As to Corcoran & Riggs, their claim is usurious on its face; and even supposing Spain to be postponed by their prior notice to Wetmore, he may drive them out entirely by the illegality of their loan. The right to object is not personal to the borrower.* Suppose Corcoran & Riggs had filed a cross-bill here. Could we not object? Can they, then, vary our rights by assuming the position of a defendant, and asking only to be let alone? In *Scott* v. *Nesbitt*,† which may be thought to oppose our view, the party sought to vacate a *judgment* on the usurious debt. We do not desire to destroy any legal advantage obtained by these persons. It is they who seek to postpone *our* prior equity.

So far, therefore, as Wetmore, or, indeed, anybody else, sets up other assignments as entitled to priority over ours, they become actors, and the court must decide on priorities to the fund. We cannot assent to the proposition, that because Wetmore intends to pay a usurious claim to one who declines to file a cross-bill for fear of the plea of usury, and through Wetmore and the grounds taken in his answer becomes an actor and claimant of the fund, therefore the holder of that claim is not an actor, as he clearly would be if Wetmore refused to pay over to him and he sought relief. On a bill to settle priorities the decree is a judgment in favor of each incumbrancer.

Mr. Carlisle, contra: On the 12th February, 1850, the day when all the rights of the complainant accrued, whatever they were, Hamilton himself had only a personal contract upon which he might sue, if within the time limited thereby he should become entitled to claim compensation of the trustees of the bank. Of consequence, this contract was all that it was legally possible to assign; so that the assignee would have the right to sue in the name of Hamilton, for his (the assignee's) use, on that contract, when, by its terms,

* Lloyd *v.* Scott, 4 Peters, 225.

† 2 Brown's Chancery, 649.

Hamilton himself might sue. The subsequent paper, of 16th September, 1850, under which these appellees claim, recapitulating the terms of the agreement of 1845, without any variation from them, referred to it as a personal contract and not as a lien specifically on the fund. In this fund, *created in September*, 1850, the complainant could have had no interest on the 12th of February previous, the date of the assignment to him, for the fund did not then exist. Indeed the paper does not purport to assign any interest in any specific fund, but only the claim, as general creditor, which he might have against the trustees of the bank for services rendered. It is not possible to convert a personal contract into the pledge of a particular fund.*

2. But if the complainant has a specific assignment of the fund, and may sue upon it here, he is postponed to the appellees, Wetmore, Corcoran & Riggs, and Hill.

At the date of the complainant's assignment Hamilton's only claim to the fund rested on the letter to *him*, of October 16, 1845. The existence of these bonds, and that they were held by Wetmore, and that the interest of the bank was only "*contingent and resulting, dependent upon the payment of the amount for which they are now held by Mr. Wetmore*," was expressly notified to him in that paper, and his previous knowledge is there imputed to him. The complainant claims to stand in his place, and before us, upon that paper. Therefore, it was plainly his duty to give notice to Wetmore. If he had done so, we should have been safe from any fraud. The obligation of the equitable assignee in cases like the present is set forth in *The Leading Cases in Equity*,† where it is said that "in order that third parties may be bound, it is necessary with regard to a chose in action to do all that can be done to perfect the assignment;" and again, that "if the assignee of a chose in action, or of a trust estate in personalty does not perfect his title by giving notice of the

* 2 Leading Cases in Equity, by Hare and Wallace, part 2d, p. 233, ed. of 1852; note to Row *v.* Dawson, &c.

† By Hare and Wallace, vol. 2, part 2d, pp. 212, 213, ed of 1852; note to Row *v.* Dawson.

assignment to the debtor or trustees, a subsequent purchaser or incumbrancer giving notice of *his* assignment will thereby acquire priority."

No such notice from Spain or from any one is pretended, either before or after our assignments, except the notice of this bill, filed in 1856, nearly six years after our rights accrued. Spain's laches every way were great. We need not recapitulate the evidence, as the court, we are sure, will perceive and enforce our view of the case, on the facts as stated in the case. *Judson* v. *Corcoran*, in this court, is in point.*

3. The question of usury as regards Corcoran and Riggs, is a question of fact, of intent. If neither party intend it, but act *bonâ fide* and innocently, the law will not infer a corrupt agreement.†

The complainant, unable to deny the well-known rule, that a third person complaining in equity of usury can only have relief for the excess of the real debt, seeks to avoid it by a supposed distinction in cases of several claimants upon a fund, the question being as to priority of equities. But there is no foundation for the distinction. It is believed that in all cases *in equity* the rule is unyielding. *Scott* v. *Nesbit* is to the point.‡ Even in an action of trover,§ Lord Mansfield refused to allow the plaintiff to recover his goods, which had been pledged on a usurious agreement, because he had not offered to pay the real debt and legal interest.

It is settled, moreover, that, notwithstanding the statute declares all usurious securities absolutely void, this is by way of defence to a suit founded on such security. To this extent the rule applies to the holder of a negotiable promissory note (the most favored in this respect), when he sues on the infected instrument; because the defence is provided absolutely by the statute. The policy of the statute was to protect the necessitous borrower; but, by legal reasoning, it

* 17 Howard, 612.

† Bank of the United States *v.* Waggener et al., 9 Peters, 378.

‡ 2 Brown's Chancery, 649; see Mason *v.* Gardiner, 4 Id., 438.

§ Fitzroy *v.* Gwillian, 1 Term, 153.

has been extended to his legal representatives; yet only as defence. If the assignee of the borrower sue in ejectment, and the purchaser under the usurious mortgage is defendant (at least not being *particeps criminis*), the instrument under which the defendant claims is not *void;* for the fact of usury is not used in such case as a defence, but as a weapon of attack, which was not the intent of the statute, and would be against conscience.* So that, even at law, the imperative terms of the statute only make the usurious securities void, *sub modo;* the equitable rule being applied even by courts of law, whenever, consistently with technical reasons, it can be done.†

Mr. Justice WAYNE delivered the opinion of the court.

He stated facts at length; and after quoting the letters of the bank to Hamilton of 16th October, 1845, and to Wetmore of 16th September, 1850, and Wetmore's indorsement on it,—which latter, of the 16th September, his honor observed, "is a substantial repetition of the conditions upon the performance of which the bank would give to Hamilton 10 *per centum*, with a full acknowledgment that he had rendered such services as entitled him to have it,"—proceeded as follows:

Viewing *the case as the parties have chosen to make it by agreement*, we must consider it differently from what we would otherwise have done, and will consider, as the purpose of the suit is declared to be to settle priorities between the parties to it, what are the rights of the complainant in that particular, and how the priority which he claims has been affected by his own remissness and negligence.

It must be remembered that he rests his claim upon a paper executed by Hamilton of all his "right and claim for any commission or compensation for services rendered or to be rendered by him to any person and body corporate, in the prosecution of any claim or claims for any and every person and persons and body corporate, on the said government of

* Jackson *v.* Henry, 10 Johnson, 195. † Jackson *v.* Dominick, 14 Id., 435.

Texas, subject to any previous assignment thereof, which Hamilton might have made before."

Mr. Spain, the complainant, is in a court of equity asking a priority of payment over other creditors, out of a fund held in trust by Mr. Wetmore for the benefit of Hamilton, who became assignee of Hamilton on his acceptance in the discharge of his duties of the relation to them as the trustee of the fund. No inquiry was made by the complainant, as he had a right to make, when he accepted the paper from Hamilton, as to who were the persons or body corporate from whom he anticipated commissions or compensation for the successful prosecution of their claims upon Texas. He certainly had the right to make such an inquiry from Hamilton, and in the situation in which Hamilton and himself were at the moment, could either have coerced at least such a reply as would have enabled him to protect himself by notices of his interest in the matter, knowing as he then did that Hamilton was an insolvent man, and being admonished by the paper itself that the rights which Hamilton was professing to give him were but secondary to the right of other assigness of Hamilton, as the paper declares they were. Instead of any such care and caution, he accepted the paper, or assignment as it is called, not in any way guarding himself from the power which Hamilton might exercise to sell and borrow money upon the same fund from innocent parties, without any possibility of the buyer or lender having any knowledge of the claim which Mr. Spain now makes upon the fund in controversy. Mr. Spain neither asked for information to secure his own rights, or to protect the rights of others from such a result. And it was not made until some time after Mr. Wetmore had accepted Hamilton's draft in favor of Corcoran & Riggs, that Mr. Spain thought of giving a notice of any kind of his claim upon the fund. He then says in his bill, that to make his assignment effectual, and to fasten notice of it upon the government of Texas, that he had sent through the post-office at Galveston to the treasurer of Texas a copy of Hamilton's assignment to him, which appears to have been received. It was dated the 8th

June, 1851. If Mr. Spain had been vigilant in his inquiries as to what had been done by Texas for the payment of its debts, he would have learned by inquiries, while he was at Galveston, that Wetmore, as the assignee of the bank's Texas bonds, had, two years before the date of his notice, filed those bonds, as the act of Texas directed it to be done, with the treasurer and comptroller of Texas. But if that had not been done by Mr. Wetmore, and the notice of the complainant had come to his knowledge, it could not in any way invalidate the loan of Corcoran & Riggs, or his acceptance of Hamilton's order in their favor, which had been made prior to the date of the letter from the complainant, transmitting to the treasurer of Texas a copy of the paper under which he claimed to be the assignee of Hamilton.

The same may be said of the paper given by Mr. May, on the 9th September, 1851, to Mr. Corwin, the Secretary of the Treasury, which was intended to prevent the payment of the fund to any other person than Mr. Spain. No one will doubt that such a paper for that purpose was written and placed by him in the Treasury Department; but it cannot in any regard affect the claim of Corcoran & Riggs upon the fund, as their dealings with Hamilton, and Wetmore's acceptance of Hamilton's order in their favor, took place twelve months before, on the 21st and 24th September, 1850. The paper left by Mr. May with the secretary cannot be presumed to have been made known to Wetmore to affect his rights, as the legal holder and trustee of Hamilton, to the fund, or those of Robb & Co., or those of Hill, as it has not been presented and proved in the manner that the law requires all papers or documents to be, from either of the departments of the Government, before they can be received as testimony in courts of justice. In fact the complainant, Mr. Spain, neither made inquiries to protect himself or to secure others from being imposed upon by Hamilton. He knew, as his bill shows, all the proceedings of this Government for the payment of the Texas debt, and where to go for information, and was advised of the notice given by the Secretary of the Treasury to the holders of Texas bonds as early as March,

1851. Instead of acting promptly and with vigilance, he delays all notice to Wetmore for more than six years; until he brought his bill. The complainant says, in excuse for not having given earlier notice to Wetmore, that he was ignorant of the existence or terms of the papers connecting Hamilton and Wetmore with the fund in controversy. The answer to that is, that he should have made inquiries, and should not have left himself ignorant, as he did, when he took the paper from Hamilton upon which he asks for a priority of payment. On the contrary, Wetmore and Corcoran & Riggs used every precaution to protect themselves before the latter lent to Hamilton $25,000, and also to warn others who might come afterwards as dealers in the fund with Hamilton.

No creditor has a right to take a blind assignment from his debtor upon the latter's anticipation of becoming interested in a particular fund to be realized thereafter, without making such inquiries as the occasion may require, and then to ask in equity for a priority in the payment of his debt merely from the precedency in date of his assignment over those who became subsequently assignees for part of the same fund for actual value given to the *cestui que trust* of the fund. It is our opinion that Wetmore, Corcoran & Riggs, and Hill are meritorious creditors of Hamilton, and that their claims upon the fund were acquired without notice or the possibility of their having had it, when they became the assignees of Hamilton, and that the complainant in this case has no priority of payment out of the fund in consequence of remissness in not having given notice of his claim as the assignee of Hamilton.*

This case has been examined by us very fully and with every regard for the arguments of the able counsel representing the complainant. We think it to be clearly within the principles decided by this court in *Judson* v. *Corcoran*.†

* Foster *v.* Blackstone, 1 Mylne & Keen, 297; Tirson *v.* Ramsbotham, 2 Keen, 25; Meaux *v.* Bell, 1 Hare, 73; Loomis *v.* Loomis, 26 Vermont, 198; Ward *v.* Morrison, 25 Ibid., 593.

† 17 Howard, 612.

It is clearly within the cases which have been so fully and ably reported, of *Dearee* v. *Hall*, and *Leveridge* v. *Cooper*, in 3 Russell.* The interests of Wetmore, Corcoran & Riggs, and Hill in the fund, are valid and operative as assignments. To constitute an assignment of a debt or other chose in action, in equity, no particular form is necessary. A draft drawn by A. or B. in favor of C. for a valuable consideration, amounts to a valid assignment to C. of so much of the funds of A. in the hands of B. Any order, writing, or act which makes an appropriation of a fund, amounts to an equitable assignment of the fund. The reason is, that the fund being a matter not assignable at law, nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in a court of equity. As the assignee is generally entitled to all the remedies of the assignor, so he is subject to all the equities between the assignor and his debtor. But in order to perfect his title against the debtor it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee before such notice.† No cases can be cited, or were in conflict with those upon which we rely for the judgment which we are about to give in this case.

In respect to the question of usury alleged by the complainant against Corcoran & Riggs, to affect their right to recover their loan to Hamilton, we do not deem it necessary to follow the arguments of counsel. The complainant, as a suitor in equity, could only have relief for the excess over the real debt, as he admits it to have been a loan by Corcoran & Riggs to Hamilton of $25,000, in the way and at the date mentioned in their answer to his bill.‡ The application of the rule in this case cannot be denied, because the complainant alleges his bill to be for claims upon a fund

* Pages 1–64.

† 2 Story's Equity Jurisprudence, 376, § 1047, and the cases cited.

‡ Stanley *v.* Gadsby et al., 10 Peters, 521.

by several parties contesting their equities to a priority of payment.

The charge of usury against Corcoran & Riggs depends altogether upon a paper marked "private and confidential," bearing date the 21st of September, 1850, the day that Hamilton drew his order upon Wetmore in favor of that firm. The paper is admitted to be in the handwriting of Hamilton, and is signed by himself and by Mr. Corcoran for his firm. Though drawn and signed on the day that the loan was made, the reading of it shows that it had no connection with the arrangement between Hamilton and Corcoran & Riggs for lending the money. The paper is begun by a recital of the loan at an interest of six per cent., and it proceeds to say, without any mention of the subject, that he, Hamilton, in case of his not procuring for Corcoran & Riggs the agency at Washington for the settlement of the Texas debt, will allow a commission on the loan of two thousand dollars, to be added to the interest of six per cent. Not that he would pay, but that he would allow, and that the balance of the $30,000 was to be credited to his account on a final settlement of the same, concluding the paper with a provision characteristic of Hamilton, as this record shows, that the "contract was not to be in prejudice of a liberal remuneration which Corcoran & Riggs have agreed to allow him in the event of his procuring for them the agency for the settlement of the Texas debt." It must be observed that Hamilton in this paper promises nothing absolutely, though he secures or stipulates for a payment to himself by Corcoran & Riggs of a liberal remuneration in the event of his getting for them the agency. It cannot fail to be remarked, in reading the paper, that Hamilton is left by it either to get the agency for Corcoran & Riggs or not to do so, as it may be his interest to do, and that he is not obliged by words of any force amounting to a contract to pay the two thousand dollars which he says shall be added to the interest of six per cent. upon the loan. It would be difficult, indeed, to find anything like a paper of this kind in any attempt by parties to a usurious loan. From the whole of

it, it is certain that no part of it contains a promise to pay anything absolutely in addition to the loan, and the six per cent. interest for which it stipulates. The payment of anything additional depends also upon a contingency, and not upon any happening of a certain event, which of itself would be deemed insufficient to make a loan usurious. No part of the paper, taken in connection with all the circumstances of the case, could be used as a predicate from which it could be affirmed that the commission to be allowed by Hamilton was an intentional device between himself and Mr. Corcoran to make the loan to the former usurious. The paper is uncertain and so curious that if any conjecture can be allowed as to the temper and character of Hamilton, as they are shown by the record, it may be supposed to have been intended by him to allure Mr. Corcoran into the belief that Hamilton's influences in Texas were so prominent that he was willing on his part to promise to forfeit the sum of $2000, if Corcoran & Riggs would make him other advances to aid him in procuring for them the agency. Whatever may have been the motives of Hamilton for drawing such a paper, we cannot infer from the paper itself and all the circumstances attending it, that it was designed by those who signed it as a device to make the contract for a loan usurious. Mr. Corcoran, however, by having incautiously signed it, has subjected himself, in the pleadings and argument of the cause, without there having been any foundation for such a charge, to a professional imputation of having intended to make a usurious loan.

We have discussed this case in all the relations which its circumstances, proofs and admissions place the parties with each other. Mr. Spain, as the representative of Mrs. McRae, claims a priority of payment out of the fund on the ground that it had been assigned to him for that purpose. If the paper, as executed by Hamilton and received by Mr. Spain, could by the force of its provisions have the efficacy of an assignment, there would be some coloring for the claim of a priority of payment. But it has not, for it is expressly declared that it was made subject to other assignments which

had been previously made. To whom or for what amounts is not said. Hamilton then executed the paper subject to them, and Mr. Spain so received it, without knowing that he could have any interest in the fund. Had they been otherwise, Mr. Spain's claim of priority would have been lost by his omission to make those inquiries suited to the occasion, and he leaving it in the power of Hamilton to make assignments to others of parts of the same fund. There is no doubt that he did so to Corcoran & Riggs, to Robb & Co., and to Hill, without either of them having had notice of any dealing between Hamilton and Spain. They have the right to a priority of payment out of the fund, and we affirm the decree of the Circuit Court with costs.

CASE REMANDED.

Messrs. Justices MILLER and SWAYNE dissented.

GRAY *v.* BRIGNARDELLO.
BRIGNARDELLO *v.* GRAY.

1. The ancient doctrine that all rights acquired under a judicial sale made while a decree is in force and unreversed will be protected, is a doctrine of extensive application. It prevails in California as elsewhere; and neither there nor elsewhere is it open to a distinction between a reversal on appeal, where the suit in the higher court may be said to be a continuation of the original suit, and a reversal on a bill of review, where, in some senses, it may be contended to be a different one. But purchasers at such sale are protected by this doctrine only when the power to make the sale is clearly given. It does not apply to a sale made under an interlocutory decree only; or under a conditional order, the condition not yet having been fulfilled.
2. A decree *nunc pro tunc* is always admissible where a decree was ordered or intended to be entered, and was omitted to be entered only by the inadvertence of the court; but a decree which was not actually meant to be made in a final form, cannot be entered in that shape *nunc pro tunc* in order to give validity to an act done by a judicial officer under a supposition that the decree was final instead of interlocutory.

IN July, 1853, Franklin C. Gray, of California, died in the State of New York, leaving there a widow, Matilda, and an infant daughter, Franklina, and property held in *his* name,

in California, appraised at $237,000. In January, 1854, administration was granted to J. C. Palmer and C. J. Eaton. In February, 1854, William H. Gray, a brother of deceased, filed a bill in chancery in one of the State courts of California, to wit, the District Court of the Fourth Judicial District, against Palmer, Eaton, the widow, and infant daughter (*service on the infant, then residing with her mother in Brooklyn, New York, being made by advertisement in a California newspaper*, and one H. S. Foote being appointed by the court her guardian *ad litem*), alleging a partnership between him and the deceased in his lifetime. In April, 1855, *Eaton, who had now resigned his administratorship*, commenced a similar suit against his late co-administrator Palmer, *but not at this time making William H. Gray a party*. In October, 1855, these two suits were consolidated by *consent of parties*, and *on the 27th October*, 1855, a decree was entered by *consent, the fact of consent, however, not being stated in the decree itself*. The decree adjudged that a partnership existed between Eaton and the deceased, and a different partnership between William H. Gray and the deceased, each partnership embracing *all business and all property, real and personal, of the parties*, and decided that the partnership of William H. Gray was subject to that of Eaton; it further settled the proportionate interest of each partner, and directed an account of the partnership transactions to be taken by a certain James D. Thornton, who was appointed a commissioner for that purpose, and that he should make a report of his actings and doings. The decree proceeded further in these words:

"And the court doth further decree, that the commissioner, *after he shall have made such reports as aforesaid, and the same shall have been passed upon by the court, and in accordance with such further directions in this behalf, if any, which the court may give him, do proceed to sell*, as in sales under execution, all the property, *real* and personal of the said *partnerships*, both or either of them, of whatever name or nature, for cash."

In pursuance of the directions of this decree, the commissioner made a report on the 25th of March, 1856, and *this*

report being still unconfirmed, he proceeded to sell the decedent's property, and, on the 3d May, 1856, sold a lot in San Francisco to a certain Brignardello, for $19,040. The sale was public; every way fair, apparently, so far as concerned Brignardello. The price was a very good one, and it had been paid. The commissioner subsequently, May 14, 1856, made a report to the court of his sale, stating that he had "sold the real estate *ordered to be sold by the decree pronounced on the 27th October*, 1855." The whole proceeds amounted to about $70,000.

It will be observed that the decree above set forth contemplated, apparently, a sale only after the commissioner should have made a report, and the same had been passed on by the court. This circumstance appeared to have struck some of the parties concerned, and the record brought up to this court disclosed the following further proceedings in court, *dated eleven days after the sale;* and *the only further proceedings which it did disclose.* They read thus:

DECREE AMENDING INTERLOCUTORY DECREE.

W. H. Gray

v.

J. C. Palmer, adm'r of F. C. Gray, dec'd, et als., and

C. J. Eaton

v.

J. C. Palmer, adm'r of F. C. Gray, dec'd, et al.

On this day came the several parties, Palmer and defendant, by their respective attorneys, and it appearing to the court that copies of the rule to show cause made on the 10th day of May, 1856, and of the affidavit on which said rule was founded, have been duly served on the respective attorneys of the several defendants, and on H. S. Foote, guardian *ad litem* for the infant defendant, and the said defendants having shown no cause why the motion of said W. H. Gray, *to amend the interlocutory decree entered in the above causes on the 7th day of April*, 1856, should not be granted, *and the court being satisfied that said interlocutory decree and that said error was the result of a mistake and inadvertence on the part of the attorney who drew up the same:* It is ordered

that the motion of the said W. H. Gray to amend said interlocutory decree, so as to make the same conform to the original decree and to the commissioner's report filed herein, on the 25th day of March, 1856, be and the same is hereby granted.

And ordered, on motion of said W. H. Gray, that the following amended interlocutory decree be entered *nunc pro tunc, in lieu* of the said decree which was entered on the 7th of April, 1856, to wit:

Same Parties

v.

Same Parties.

James D. Thornton, the commissioner, appointed, &c., having filed his report herein on the 25th day of March, 1856, it is hereby ordered, that the said report be, and the same is hereby confirmed; and it is further ordered, that said commissioner do proceed to sell all the property, real and personal, of the said partnership, as directed in the former decree of the court, and to receive the proceeds, out of which he *shall pay the costs and expenses of this suit*, and the remainder shall be paid and distributed to the several parties according to their respective rights, &c. But it is ordered, that before making said distribution, &c., commissioner report to this court his proceedings in the premises and the amount in his hands subject to such distribution, and the several interests of the respective parties therein upon the basis settled in his former report.

Indorsed: Filed May 14, 1856.

The result of all the sales, payments, and other proceedings in the business was, that the property, real and personal, of the decedent, was wholly absorbed, and the estate left in debt to the surviving brother, William H. Gray, in a sum of $3533.17; there not having in fact been enough of the estate of $237,000 left to pay for a tombstone that had been erected to the Gray deceased; and $900, or thereabouts, being, by common consent of parties, appropriated to that purpose, and made "a charge upon the estate generally."

The widow now conceiving that the proceedings had been collusive and irregular, took an appeal from the decrees obtained by Eaton, as also by Gray, against her husband's estate. This was about six months after the sale. On the

Statement of the case.

hearing of the appeal, the decree was reversed in the case of Eaton's bill, as to the infant, on the ground that she being in New York, had not been sufficiently served by a publication in California, and in the case of W. H. Gray's bill, as to all the defendants, because the proof was not sufficient to establish a partnership.*

Brignardello and others being in possession, however, under his purchase, the widow and infant daughter, joining in their action, now brought ejectment in the Circuit Court of the United States for the Northern District of California, the suit on which the writs of error now here were taken.

The title of Gray, the decedent, being undisputed, and the land having passed by his death, intestate, under the laws of California, to his widow and child, in equal shares, a *primâ facie* title was made in favor of the plaintiff. In order to defeat this title the defendants set up that they were *bonâ fide* purchasers, at a judicial sale under decree of a court having jurisdiction, putting in evidence the judicial proceedings already mentioned. Various objections, on the other hand, were set up to the validity of the proceedings prior to the rendition of the decree, as *e. g.* that the infant, being in New York, was not properly served with process by a publication made in California. The court below charged that the infant was not served, nor brought into court; that the judgment-roll in the consolidated action was no record as to her; and that the deed of Thornton the commissioner was void as to her, and this notwithstanding that the purchasers were innocent purchasers, for full price and at a sale fairly conducted; but it charged also—this instruction being specifically excepted to—that the decree did operate to divest the title of the widow. Judgment was accordingly entered in favor of the infant for an undivided moiety of the lot, and against the widow as to the other half; such several judgment being permitted by the rules and practice of the court. Two writs of error were now sued out; *one* by Brignardello and others, the defendants

* 9 California, 616.

below (case No. 169 upon the docket); the other by the widow, Matilda C. Gray, one of the plaintiffs (case No. 223). The points raised here were the correctness of the judgment, as above stated.

Mr. Galpin, for the widow and infant, relied on several grounds taken in the court below against the validity of the proceedings, prior to the rendering of the judgments in the equity suits. He also contended,

1. That the decree of sale, having been reversed for not serving the infant, and for error, the sale fell with the decree by which it was supported. The general doctrine, that "the *judgment* may be reversed for error, but the authority of the *writ* [of sale] stands, for it is distinct from that of the judgment," was not denied; but it was contended that the present case was peculiar. Here, on appeal, it was declared that no partnership had ever existed. Every semblance of authority to sell was thus carried away. There was not a "distinct authority" existing after reversal of a judgment, but an annihilation of any semblance of "authority" for what had been done. The case thus fell within the authority of the New York case, *Wambaugh* v. *Gates*.* On a reversal upon *a bill of review*, indeed, the title of the purchaser is not lost; because a bill of review commences a new action, and a different one from that in which the decree was rendered. But an appeal is part of the same action, in which and out of which the title grew, and the action is not terminated until the appeal is determined.† Having bought prior to that determination, the purchaser bought *pendente lite*, and took subject to the result of the appeal.

2. There was no existing authority to sell when the sale was made, and no subsequent proceeding mentioned in the record shows an authority that acted retrospectively, even if such authority could be given, which it could not be. Can an illegal act, done without any authority, be supported

* 4 Selden, 138.

† Fenno *v.* Dickinson, 4 Denio, 84; Traver *v.* Nichols, 7 Wendell, 434.

by a subsequently made but antedated direction? If so, a sheriff may take one's property or life, in advance of the verdict, and find his authority in a subsequent execution or sentence, entered *nunc pro tunc*, as of the day of trial.

Mr. Carlisle, *contra*, and after replying to the grounds taken by the other side as to the validity of the proceedings in the equity suits prior to the order of sale:

1. There is no suggestion of fraud on the part of the purchaser. The sale was public and fair; the price more than full; and having been made while the decree was in force, the purchaser's rights are not affected by a reversal. This ancient and generally settled principle of law is acknowledged in this court, and in the courts of California alike.* It must be settled everywhere, as well for the interests of heirs and debtors as of purchasers themselves. No man would buy or bid at a judicial sale, if he was to lose the land because of the subsequent reversal of the judgment.

Acts done under even a *fraudulent* judgment, so far as they affect third persons, are valid.†

2. That part of the record dated May 14, 1856, shows that there was a power to make the sale. From the recitals in that part it may be *inferred* that the court did, on the 7th April, 1856, make an order of sale, and that the omission to put it in proper form "was the result of a mistake and inadvertence on the part of the attorney who drew up the same." An entry *nunc pro tunc* is accordingly made, and the sale is validated. The recital of record, that a decree was entered on the 7th April, 1856, is sufficient evidence that one was made; though it may not appear in the record brought up.

Mr. Justice DAVIS delivered the opinion of the court.

The character of the suits brought in the State court by C. J. Eaton, by W. H. Gray, the parties to them, the kind

* Grignon *v.* Astor, 2 Howard, 340; United States *v.* Nourse, 9 Peters, 8; Reynolds *v.* Harris, 14 California, 667; Farmer *v.* Rogers, 10 Id., 335.

† Sims *v.* Slacum, 3 Cranch, 300; Blight *v.* Tobin, 7 Monroe, 619.

of evidence on which they were sustained, and their ultimate termination, provoke comments, but we forbear to make them.

The vital question in these cases is this: "Did the decree of the 27th of October, or any subsequent decree or proceeding in the court, authorize the sale that was made of the real estate of Franklin C. Gray, and under which sale the defendants below claimed title?"

Numerous objections have been taken here, and were taken in the court below, to the validity of the proceedings prior to the rendition of the decree, which, although interesting, will not be discussed, and no opinion given, as it is not necessary to decide them.

It is a well-settled principle of law, that the decree or judgment of a court, which has jurisdiction of the person and subject-matter, is binding until reversed, and cannot be collaterally attacked. The court may have mistaken the law or misjudged the facts, but its adjudication when made, concludes all the world until set aside by the proper appellate tribunal. And, although the judgment or decree may be reversed, yet, all rights acquired at a judicial sale, while the decree or judgment were in full force, and which they authorized, will be protected. It is sufficient for the buyer to know, that the court had jurisdiction and exercised it, and that the order, on the faith of which he purchased, was made and authorized the sale. With the errors of the court he has no concern. These principles have so often received the sanction of this court, that it would not have been deemed necessary again to reaffirm them, had not the extent of the doctrine been questioned at the bar.*

But did the decree or decrees relied on to defeat the plaintiffs' title authorize the sale that was made?

The decree of the 27th of October, 1855, found the existence of the partnerships, and the interest of each member of the firm, and a commissioner was appointed to take and

* Voorhees *v.* Bank of United States, 10 Peters, 449; Grignon's Lessee *v.* Astor, 2 Howard, 319.

state the accounts, and to ascertain the nature and extent of the partnership property, and to report to the court. The decree proceeds to say, that the commissioner, "*after he shall have made such reports*, and the same *shall have been passed upon by the court*, and in accordance with such further directions in this behalf, if any, which the court may give him, *do proceed to sell* all the real and personal estate of the said partnership, both or either of them." This decree is manifestly interlocutory. No authority was given to sell until the commissioner had reported the state of the accounts, and what property was owned by the different firms, and the court had passed on the report. The court, properly enough, reserved the right to approve or disapprove the report before the authority to sell was complete. How could the court know, until the accounts were stated, whether anything was due William H. Gray, or Eaton, and consequently, whether there was a necessity to sell real estate? It is monstrous to suppose that any court would order a sale to be made, especially where the interests of an infant defendant would be imperilled, until it was judicially ascertained that the rights of others demanded it. In pursuance of the directions given by the decree, the commissioner made his report on the 25th of March, 1856, and without waiting for its confirmation, actually sold, on the 3d day of May following, real estate to the value of nearly $70,000. And, as if to fix beyond question the authority under which he acted, he states to the court in his report of sales, made May 14th, that he sold "the real estate ordered to be sold by the decree pronounced on the 27th day of October, 1855."

But it is claimed that a *nunc pro tunc* decree, subsequently entered, gave the power to make the sale, and rendered valid what, without it, would have had no validity.

The only proceedings which the record discloses are those set out, *ante*, p. 629–30, and under them the claim is made.

The motion there speaks of an interlocutory decree having been entered on the 7th day of April, which it was desired to correct. And the court, in passing on the motion, say that there was an error in the decree, which was the re-

sult of a mistake, and direct an amended decree to be entered *nunc pro tunc*, in lieu of the one which was entered on the 7th of April.

This motion and order are predicated on a state of facts which did not exist. No decree was ever entered on the 7th of April, nor on any other day prior to the sale, and we cannot, therefore, even conjecture what the errors and mistakes were which it was desirable to correct. If the court had said, that on the 7th of April, the report of the commissioner was approved, and the sale ordered, but through inadvertence or neglect on the part of the court or its officers, the proper entries were not made, then it might well be argued that a *nunc pro tunc* decree could be made. A *nunc pro tunc* order is always admissible, when the delay has arisen from the act of the court.* But that is not this case. There is nothing to show that the report of the commissioner was approved prior to the sale; no evidence that any decree was entered, or any authority even to make one, on the day stated, nor in fact that the court was in session on that day. By no rule of law can a decree, which was clearly an afterthought, and made subsequent to the sale, bolster up the authority to make it. Purchasers at a judicial sale are protected, when the power to make the sale is expressly given, not otherwise. It is only when they buy on the faith of an order of the court, which clearly authorizes the act to be done, that the shield of the law is thrown around them. An officer of the court may erroneously suppose that the power to sell is given by a decree, yet, if he does sell, his act is without authority of law, and is void.

The sale made by James D. Thornton, the commissioner appointed by the judge of the District Court of the Fourth Judicial District of California, on the 3d day of May, 1856, was without authority of law, and void. The purchasers at that sale acquired no rights against the heirs of Franklin C. Gray, and the deeds given by the commissioner conveyed no title. These general views are decisive of this controversy.

* Fishmongers' Co. *v.* Robertson, 3 Manning, Granger and Scott, 970.

The court below directly charged the jury, that it was their duty to find a verdict against the plaintiff, Matilda C. Gray, which instruction was particularly excepted to, and was erroneous.

Case No. 169, in which Brignardello and others are plaintiffs in error, is affirmed with costs; and case No. 223, in which Matilda C. Gray is plaintiff in error, is reversed with costs, and remanded, and a *venire de novo* awarded.

JUDGMENT ACCORDINGLY.

BEAVER *v.* TAYLOR.

1. Under the *first* section of the Statute of Limitations of March 2, 1839, of Illinois, entitled "An act to quiet possessions and confirm titles to land,"—which section gives title to persons in "actual possession of land, or tenements, under claim or color of title made in good faith, and who for seven successive years continue in such possession, and during said time pay all taxes,"—the bar begins with the *possession* under such claim and color of title; and the taxes of one year may be paid in another. But under the *second* section of the same act, which section says that, "whenever a person having color of title, made in good faith, to *vacant* and *unoccupied* land, shall pay all taxes for seven successive years," he shall be deemed owner,—the bar begins *with the first payment of taxes* after the party has acquired color of title. Hence, in a trial of ejectment, when the said different sections of this statute are set up, any instructions, outside of the facts, which do not keep this distinction between the two sections in view, and by which the jury, without being satisfied as to the requisite possession under the *first* section, *might*, under the *second* section, have found for the party pleading the statute, upon the ground that the taxes had been paid for seven successive years, although the first payment was made less than seven years before the action was commenced, will be reversed, upon the well-settled principle that instructions outside the facts of the case, or which involve abstract propositions that *may* mislead the jury to the injury of the party against whom the verdict is given, are fatally erroneous.

2. To prove payment of taxes, the defendant offered in evidence two *receipts without dates;* and to prove the date offered two *letters having dates,* which letters inclosed the receipts; also to prove the date, and the agency of the person who had made the payment and written the letters, offered certain *entries in the account books of the parties* on behalf of whom the payment was alleged to have been made. These persons

residing away from the land, and the clerk who made the entries being dead, of which death and of the handwriting proof was also offered: *Held*, that the evidence was all admissible: the receipts on the plainest principles of evidence; the letters and entries on principles not *so* plain, but still admissible, as falling within the category of verbal facts; neither of them being hearsay, nor declarations made by the party offering them, and tending, both of them, to illustrate and characterize the principal fact, to wit, the transmission of the receipts, and to put that fact in its true light, and to give to it its proper effect.

THIS was an action of ejectment, brought in the Circuit Court for the Southern District of Illinois, by Beaver, the plaintiff in error, against Taylor et al., to recover premises described in his declaration. *The action was brought on the* 17*th July*, 1854. The date is important. Upon the trial, the plaintiff having shown title in himself, the defendants relied upon the first and also upon the second section of the Statute of Limitations of the State of Illinois of March 2, 1839, as making a bar.* The two sections were thus:

"*First.* Every person in the actual *possession of land or tenements* under claim and color of title made in good faith, and who shall, *for seven successive years*, continue in such *possession*, and shall also, *during* said time, *pay all taxes* legally assessed on such land or tenements, shall be held and adjudged to be the legal owner of said land or tenements to the extent and according to the purport of his or her paper title.

"*Second.* Whenever a person *having color of title made in good faith*, to *vacant and unoccupied land*, shall *pay all taxes* legally assessed thereon *for seven successive years*, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land, to the extent and according to the purport of his or her paper title."

The defendants, to show color of title, gave in evidence a certain deed. The deed itself was admitted to be void, but the good faith of the defendants and the sufficiency of the deed for the purpose for which it was offered were not dis-

* "An act to quiet possessions and confirm titles to land," §§ 8 and 9 of the chapter "Conveyances," in the Revised Code of 1845.

puted. The defendants also gave evidence tending to prove possession for more than seven years before the commencement of the suit.

In making proof of the *payment of the taxes* the defendants offered in evidence two receipts, *without date*, from the collector to one Gilbert, one for the State and county taxes, and the other for the road tax, of the year 1847. They proved that the "collector had made a final settlement of the State and county taxes for the year 1847 with the proper officers;" and they gave evidence tending to prove that, *during* the years 1847 and 1848, Gilbert was the agent of Taylor & Davis (claimants of the premises under the statute) in respect of the taxes. The plaintiffs objected to the receipts as evidence, because it did not appear *when* the taxes were paid, nor that Gilbert had any connection with the color of title relied upon by the defendants. To meet the objection as to the time of payment, the defendants offered in evidence two *letters* from Gilbert to Taylor & Davis; one of the 10th of March, 1848, inclosing the receipt for the State and county taxes, and the other of the 4th of May, 1848, inclosing the receipt for the road tax. They offered also certain *entries in an account book of Taylor & Davis*, relating to the property in question and other property held by them in the same right. The letter gave an account in detail of Gilbert's debits and credits as agent in respect of the taxes, and referred particularly to the receipts in question. The books contained entries relating to the same subject and showing the recognition of his agency in the transaction. It appeared that the book was kept in Philadelphia, where Taylor resided, and that the clerk who made the entries was dead. Proof was offered of his death and of his handwriting. The letters and book were also objected to. The court admitted all the evidence, and the plaintiff excepted.

The evidence being closed, the counsel of the plaintiff asked the court for nine different instructions to the jury; the only ones important to be here mentioned, however, being three, which were in regard to the defence arising under the *second* section of the Statute of Limitations already

mentioned. In regard to such defence the instructions prayed for were these:

"1. That if the jury believe from the evidence that the land in controversy was vacant and unoccupied in the year 1847, they will find for the plaintiff, unless they also believe from the evidence that Taylor & Davis paid the taxes assessed on said lands for the year 1847, *before the seventeenth day of July*, 1847.

"2. That the second section of the act of 1839 does not begin to run until the payment of the first of the series of taxes required by that act, and the bar under that section is not complete *until the end of seven years from the time of the payment of the first of said series of taxes.*

"3. That to constitute a bar under the second section of said act of 1839, the payment of taxes must concur during seven successive years *prior* to the bringing of suit with the color of title; and it must also appear to the jury by the evidence that during such seven years the land was vacant and unoccupied, that such bar does not begin *until the first of such series of taxes is paid* by the person having color of title, and is not complete until the payment of taxes for seven successive years thereafter has concurred with such color of title, and that the burden of proof of such facts as constitute such bar is on defendants."

The court refused to give these instructions, and instructed the jury as follows:

"Three things must unite to give a party the benefit of this section:

"1. He must pay all taxes levied on the land for seven successive years.

"2. The land must for the same time be vacant and unoccupied.

"3. He must during the same time have color of title to the land acquired in good faith."

The court had previously charged that to bring a party within the *first* section:

"1. He must have actual possession of the land for seven successive years.

"2. He must pay all taxes levied on the land for the same seven years.

"This possession and payment must be under claim and color of title to the land made in good faith."

The plaintiff excepted to the instructions given, including those in regard to the *second* section, and to the refusal to instruct as prayed. The jury found for the defendants.

On error here the matters complained of were the admission of the evidence excepted to, and the refusal to give the instructions as asked, and the giving of those that were made.

Mr. Grimshaw, for the plaintiff in error; Mr. Trumbull, contra.

Mr. Justice SWAYNE (stating the facts) delivered the opinion of the court.

Under the *first* section of the Statute of Limitations of the State of Illinois, of the 2d of March, 1839, it was necessary for the defendants to show actual possession of the premises for seven successive years; the payment of all taxes for seven successive years; and that the possession was under "claim and color of title made in good faith." Under this section, the period of limitation begins with the possession.*

A void deed taken in good faith is a sufficient color of title.† It is not necessary that each year's taxes should have been paid within the year. The taxes "for one year may be paid in another of the seven years."‡

Under the *second* section, the defendant must show the payment of the taxes for seven successive years; that the land was "vacant and unoccupied" during that time, and that he had, during the same time, "color of title made in good faith." Under this section the bar begins with the first payment of taxes after the party has acquired color of title. Payment of taxes without color of title is unavailing.§

* Hinchman *v.* Whetstone, 23 Illinois, 185.

† Id., 187; Goewey *v.* Urig, 18 Id., 242; Woodward *v.* Blanchard, 16 Id., 424; McClellan *v.* Kellogg, 17 Id., 501; Wright *v.* Mattison, 18 Howard, 50.

‡ Hinchman *v.* Whetsone, 23 Illinois, 187.

§ Stearns v. Gittings, 23 Id., 390.

2. *As respects the evidence admitted and excepted to.*

In connection with the proof of Gilbert's agency in paying the taxes, it was clearly proper to allow the receipts to go in evidence to the jury. His agency could be proved by evidence *aliunde*. Such testimony was admissible upon the plainest principles of the law of evidence. The jury were the judges of its weight.

The letters and account stand upon a different footing, and their competency is not so free from doubt; but after the fullest consideration, we are all of opinion that there was no error in admitting them. It was proper for the agent to transmit the receipts to his principals. What was said and done in that connection was a part of the *res gestæ*. The contents of the accompanying letters relative to the receipts are within the rule upon that subject. The entries in the books of Taylor & Davis, after the receipts came to hand showing their action, were admissible for the same reasons. Both the letters and entries belong to the same category with what are called "verbal facts," and neither fall within the rule which excludes "*res inter alios acta*,"—hearsay and declarations made by the party offering them in evidence. The principal fact was the transmission of the receipts. The other facts so illustrate and characterize it, as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its true light and give it its proper effect.

It is, perhaps, not possible to lay down any general rule as to what is a part of the *res gestæ* which will be decisive of the question in every case in which it may be presented by the ever-varying phases of human affairs. The judicial mind will always be compelled frequently to apply the general principle and deduce the proper conclusion. The circumstances to which we have just adverted furnish the tests by the light of which the question, whenever it arises, must receive its solution.*

* Bruce *v.* Hurly, 1 Starkie, 20; Murray *v.* Bethune, 1 Wendell, 196; Cox *v.* Gordon, 2 Devereux, 522; Enos *v.* Tuttle, 3 Connecticut, 250; Allen *v.* Duncan, 11 Pickering, 309; B. & W. R. R. Corp. *v.* Dana, 1 Gray, 83;

3. After the evidence was closed, the plaintiff's counsel submitted numerous prayers for instructions to the jury. The learned judge refused to give them, but submitted the facts with instructions according to his own views. This was proper, provided the instructions given were correct.* We find nothing in these instructions which calls for remark, except what related to the second section of the statute. [His honor here repeated this portion of the instructions, as already given.] In regard to these there is a material difference between the instructions refused and those given. The former directed the attention of the jury particularly to the proposition, that, as regards this section, the statute did not begin to run until the first payment of taxes was made, and that seven years must have elapsed after that time to render the bar complete; while the latter overlooked this point, and made no distinction between the payment of taxes under this section and the preceding one. The language, he "must pay all taxes levied on the land for seven successive years," is substantially the same with that used by the learned judge in regard to the first section. Under that section, as we have shown, the bar begins with the time of the possession, and the taxes for the seven years "may be paid in one year for another." This was an error.

But it is said that the bar was complete under the first section, and that what was said as to the second section was needless, and in the nature of an abstract proposition. We cannot so regard it. The bill of exceptions purports to contain all the evidence. The action was commenced on the 17th of July, 1854. To raise a bar under the second section, the first payment of taxes must have been made as early as the 17th July, 1847. There is no proof of any payment earlier than that referred to in the first letter of Gilbert. That letter bears date on the 10th of March, 1848, and shows

Lund *v.* Tyngshorough, 9 Cushing, 36; Sessions *v.* Little, 9 New Hampshire, 271; Thorndike *v.* Boston, 1 Metcalf, 242; Mitchell *v.* Planters' Bank, 8 Humphrey, 216; Robertson *v.* Smith, 18 Alabama, 220; Clealand *v.* Huey, Id., 343.

* Law *v.* Cross, 1 Black, 533.

the payment to have been made prior to that time. How much earlier it was made does not appear. It is clear that so far as this section is concerned the plaintiff was entitled to recover, and the court should have so instructed the jury. The defence rested wholly upon the first section.

Under that section, as before remarked, there must be possession for seven years prior to the commencement of the suit. The first payment of taxes may be later than the beginning of that period. As the jury were instructed, they may not have been satisfied as to the requisite possession under the first section, and have found for the defendants under the second section, upon the ground that the taxes had been paid for seven successive years, although the first payment was made later than seven years before the action was commenced.

The law, as to instructions outside of the facts of the case, or involving abstract propositions, is well settled. If they *may* have misled the jury to the injury of the party against whom their verdict is given, the error is fatal.*

The judgment below is reversed, and a

VENIRE DE NOVO AWARDED.

ROGERS *v.* THE MARSHAL.

1. The marshal is not responsible on his official bond for the act of his deputy in discharging sureties on a replevin bond, in any case where the attorney of the plaintiff in that suit, though he gave no direct and positive instructions to the deputy, has still done that which was calculated to mislead the deputy, and to induce his erroneous act. And in the consideration of a question between the deputy and attorney, it is to be remembered that the former is but a ministerial officer, unacquainted with the rules which discharge sureties from their obligations, while the latter, in virtue of his profession, is supposed to be familiar with them.
2. Where an instruction, though not in the best form of words, is sufficiently intelligible, and has been rightly interpreted by the jury, in reference to the evidence, a reversal will not be ordered in the indulgence of a nice criticism.

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* Clarke *v.* Dutcher, 9 Cowen, 674; Wardell *v.* Hughes, 3 Wendell, 418.

Statement of the case.

3. It is the duty of counsel, excepting to propositions submitted to a jury by the court below, to except to such propositions distinctly and severally; and although the court below may err in some of the propositions—which in this case it did—yet, if the propositions are excepted to *in mass*, the exception will be overruled, provided *one* of the propositions be correct, which was the case here.
4. Where the decision of a question depends at all upon the fact, whether the plaintiff in a suit had assented to an act which was a deviation from the actor's strict line of duty, and of a kind for which the plaintiff could hold him responsible, it is proper enough to ask what the plaintiff's attorney said *after* the act was done; the case being one where an adoption by the plaintiff of the act illegally done concluded his remedy.

ERROR to the Circuit Court for the District of Wisconsin; the case being thus:

Rogers had issued a writ of replevin in the District Court for the district above named, against a certain Remington and one Martin to replevy a quantity of lumber. By the code of Wisconsin, which was adopted in the District Court as its rule of proceeding, it was provided that on "a written undertaking executed by one or more sufficient *sureties*," approved, &c., for the prosecution of the action for the return of the property to the defendant, the marshal should take the same, and deliver it to the plaintiff, unless, &c. In the replevin suit just mentioned, the deputy marshal, one Fuller, took a bond, and delivered the property; but the bond taken by him, on suit brought upon it, was decided to be void,* and was now confessedly so. A suit—the present action, to wit, in the court below—was now brought against the *marshal* and his sureties, on his *official* bond; the ground of the suit being the mistake of the deputy marshal, Fuller, in taking a bond that was void instead of taking one that was valid. The defence set up was that the deputy, Fuller, acted in the matter under instructions from one Hopkins, *the attorney of the plaintiff in the replevin suit.* And one point involved in the suit accordingly was, whether Fuller, the deputy, had so acted.

That point rested on the testimony of the attorney, Hopkins, and the deputy, Fuller, both of whom were witnesses in the suit.

* See Martin *v.* Thomas, 24 Howard, 315.

Fuller, the deputy, swore as follows:

"After I took the lumber, Remington came to me, and inquired the form of a bond. I gave him a form, and the next day he brought a bond signed by himself and Martin. I took the bond to Mr. Hopkins, who was attorney for the plaintiff in the replevin. He said *he would not have Remington on the bond at all.* I took the bond back to Remington, and told him what Hopkins said. Remington took the bond, and the next day he returned it with the name of John Keefe on it. I took the bond to Hopkins, who said he did not know anything about Keefe, but that if I could get Andrew Proudfit's name on the bond to take it. I told this to Remington, who took the bond again, and brought it to me with Proudfit's name on it. I said to Remington, 'I cannot receive the bond, your name is on it.' He said he would take his name off, and I said that would be in accordance with my instructions by Hopkins. I handed the bond back to Remington. He went to the desk, erased his name in my presence, in all the places where it now appears erased, and brought it back to me in its present shape. No one was present when the erasure was made but myself, my clerk, and Remington."

The testimony of Mr. Hopkins was to the same general effect; he stating that when the bond was brought to him, in the first instance, he told Fuller "the statute requires the bond to be signed by *sureties:* and *I do not want Remington's name on it.*" Hopkins had never seen the bond after Fuller took it away; nor heard of the erasure until he heard of it casually, and long after it was made.

In the course of the examination of the deputy marshal, the defendant's counsel asked him (under objection, overruled, to the question), what Mr. Hopkins said *afterwards* about the bond. The witness answered,

"Mr. Hopkins told me a month afterwards, that it was necessary to have Remington's name on it; that he was then mistaken in the code; he thought it was the same as the New York code. He said the New York code did not require the defendant's name to be on the bond, and the code of this State did. He gave that as a reason why he would not have Remington's name on the bond. The marshal knew nothing about the

transaction. He was away from town at the time. I was acting under the direction of Mr. Hopkins, the attorney of the plaintiff, who had charge of the whole thing."

The evidence being closed, and it having been made to appear that Mr. Hopkins was not only attorney of the plaintiff in the replevin suit, but was also attorney for the plaintiff in the suit brought on the replevin bond, the court charged as follows:

"If the deputy marshal in the execution of the writ of replevin was in the due service of the writ in taking the bond on the part of the defendants to retain the property, and the altered bond was accepted by the deputy marshal in pursuance of instructions *or the interference* of the attorney for the plaintiff, then these defendants are not to be held liable.

"The bond given to the deputy in the first instance, with the name of Remington on it as principal, was valid so far as it related to his being a party or obligor on said bond. *It is for the jury to determine whether the erasure was made in consequence of the interference of Mr. Hopkins, the attorney.*

"*The interference or consent of the plaintiff's counsel may be inferred in part from the fact of his afterwards acting on the bond as valid, and bringing suit thereon.*"

The bill of exceptions, after reciting this charge, as above given, proceeded in these words:

"To *which said* instructions and charge to the jury the plaintiffs by their counsel then and there, in open court, did except, *according to the course of practice of this court.*"

In regard to the form of the exceptions it is necessary here to say, that a rule of the Supreme Court* directs that "judges of the Circuit and District Courts do not allow any bill of exceptions which shall contain the charge of the court *at large* to the jury, in trials at common law, upon any *general* exception to the *whole* of such charge, but that the party excepting be required to state *distinctly* the *several* matters in law in such charge, to which he excepts, and that such mat-

* Rule 38, adopted at January Term, 1832.

ters of law and those only, be inserted in the bill of exceptions, and allowed by the court."

The questions now before this court were:

1. Did the court err in any of its instructions?

2. If so, can the plaintiff in error, in the face of the rule of court already mentioned and the practice of the court, profit of the error on a bill so *general* as the one here?

3. Was the objection to the question asked of the deputy marshal as to what Mr. Hopkins said *after* the bond was taken, and the lumber given up, rightly overruled?

Mr. Carpenter, for the plaintiff in error:

1. There is no more pretence for saying that Hopkins directed or consented to the erasure, than there is for saying that he directed the marshal to *forge* the name of Proudfit to the bond. He objected to the bond because Remington's name was on it, and because Proudfit's was not; but it was the duty of the marshal, even under these instructions, if they were instructions, to get the name of Proudfit legally upon the bond, and the name of Remington legally off from it, in other words to draw a new bond and to have Proudfit sign that. It would have been correct to charge the jury that if the plaintiff or his attorney directed the erasure to be made in the absence of the other signers, and the marshal erased it, acting under such instructions, the plaintiff could not recover. But the charge in substance was, that if the marshal made the erasure in *consequence* of the interference of Hopkins—that is, because Hopkins interfered—the plaintiff could not recover. Now it is true that in a popular sense, and as it would be understood by a jury, the erasure was made in *consequence* of what Hopkins said: that is, if Hopkins had said nothing, the marshal would not have erased the name. So, if the marshal, after the first interview with Hopkins, had *forged* Proudfit's name to the bond, it might be said that he had done so, in consequence of Hopkins desiring his name on the bond. It was in the sense we have indicated that the jury understood the charge. It must have been so intended by the judge; for there was no testi-

mony tending to prove that Hopkins directed the erasure; on the contrary the marshal rather testified that the last instructions of Hopkins were to take the bond, if Proudfit's name was obtained upon it, *waiving the objection that it was signed by Remington.*

Again, the judge charged the jury that the interference or *consent* of the plaintiff's counsel (to the erasure) may be inferred in part *from the fact of his afterwards "acting on the bond as valid, and bringing suit thereon."* This was clearly erroneous; the testimony proved that Hopkins did not consent to the erasure at all, or even know of it till long afterwards. The erasure was a fact; the legal consequence of that fact upon the validity of the bond was matter of opinion. Conceding that when months afterwards Hopkins discovered that the erasure had been made, he thought as matter of law that the bond could be recovered upon, how does that opinion even *tend* to show that he *consented to the erasure?* This is the first time that a lawyer's erroneous opinion as to the legal consequences of an act has been held competent evidence tending to prove that he consented to the commission of the act itself.

2. *As to the form of the exceptions.* The rule of this court was sufficiently observed by the judge in allowing the exceptions here. The bill does not set out the whole charge, but only "the several matters in law in such charge to which" we excepted; and the bill of exception then says: "To *which* said *instructions*," &c., "the plaintiffs, by their counsel then and there in open court, *did except*, according to the course of practice of" the District Court: that is, according to the practice prescribed by the rule; or, in other words, *did except to each of the several matters in law in said charge, which are inserted in this bill of exceptions.* The principle of this rule is, that the party excepting should call the attention of the court specifically to the matters objected to, so as to give the court below an opportunity to correct any mistake in the charge. And the party will not be permitted to except generally to the charge, and afterwards make up his mind which particular propositions are erroneous. Now

here the *three matters* which we excepted to are stated in the bill of exceptions, and it appears that to those we excepted *according to the practice of the court;* that is, severally to each.

3. The question, "what did Mr. Hopkins afterwards say about the bond?" meant "what did he say about it, *after you had received it and redelivered the property?*" and it invited the witness to testify to what was said a month after such redelivery. This question was objectionable:

1. Because the marshal could not have been induced to take the bond by anything that was said *after* he had taken it; and

2. Because, admitting that what Hopkins said at the time he objected to the bond, was binding upon Rogers, whom he was then representing in that behalf; yet, what he *afterwards* declared or admitted about it, could not bind Rogers. While no doubt the rule is that where the acts of the agent will bind the principal, there his representations, declarations and admissions, respecting the subject-matter, will also bind him, *if made at the same time*, and constituting part of the *res gestæ;* it is equally the rule that this is so, only when such representations, &c., are made at such same time.

Mr. Lynde, contra.

Mr. Justice DAVIS delivered the opinion of the court as follows:*

1. It is unquestionably true that a marshal is answerable for the misconduct of his deputy. If Fuller, the deputy, who served the writ of replevin in the case of *Rogers* v. *Remington & Martin*, and took the statutory bond, erased the name of the principal, without the direction of some one having authority, he violated a plain duty, and his principal can justly be held liable. The officers of the law, in the execution of process, are obliged to know the requirements of the law, and if they mistake them, whether through ignorance

* Mr. Chief Justice Taney, and Messrs. Justices Wayne, Grier, and Field, had not been present at the argument.

or design, and any one is harmed by their error, they must respond in damages. But this case involves the extent of the power of an attorney to control and direct the execution of process, and the liability of the marshal where the default of his deputy has been induced by the conduct of the attorney.

The attorney is the agent of his client to conduct his suit to judgment, and to superintend the execution of final process. It is true that he cannot discharge the defendant from execution without the money is paid to him;* but his authority is complete to control the remedy which the law gives him to secure or collect the debt of his client.† And if the client suffers by the ignorance or indiscretion of the attorney, the officer shall not be prejudiced, for the attorney may give such directions to the officer as will excuse him from his general duty.‡ The attorney can give such general instructions to the officer as he may deem best calculated to advance the interests of his client, and if followed (erroneous though they be) they will bind his client and exonerate the officer.§

But it is said that Hopkins, the attorney, never instructed Fuller to erase Remington's name after the execution of the bond; which, being done without the knowledge and consent of the sureties, discharged them.

It is clear that no direct and positive instructions were given; for if there had been, in view of the power of the attorney to make the officer his agent, no controversy could have arisen. But the true question is this: Did Hopkins give such directions to Fuller as were calculated to mislead him, and must have induced the taking of the defective bonds? If he did, the marshal is not chargeable. After Fuller had taken the property in the replevin case he went to Hop-

* Jackson *v.* Bartlett, 8 Johnson, 361.

† Jenney *v.* Delesdernier, 20 Maine, 183; Kimball & Company *v.* Perry, 15 Vermont, 414.

‡ Walters *v.* Sykes, 22 Wendell, 568.

§ Crowder *v.* Long, 8 Barnewall & Creswell, 605; Gorham *v.* Gale, 7 Cowen, 739.

kins with a bond signed by Remington, the principal, and Martin or Keefe as sureties. Fuller swears that Hopkins said "he would not have Remington on the bond at all;" while the testimony of Hopkins is, that he "did not want" Remington's name on the bond. The two statements are not essentially different. Each would clearly enough convey the idea that Remington's name must not be on the bond. Hopkins excepted to the sufficiency of the surety, and told Fuller, that if he would procure Proudfit's name in addition to the name already on it, he would be satisfied. Remington was present at the interview, and took the bond away, and the following morning brought it to Fuller with Proudfit's name. Fuller told Remington that he could not receive the bond, because his name was on it. Remington said that he would take his name off, and Fuller replied that if he did so, it would be in accordance with the instructions received from Hopkins. Remington's name was then erased.

Now it is true that Hopkins did not direct Fuller to erase Remington's name from the bond, after it was executed, without the knowledge and consent of the sureties. But it should be remembered that Fuller was a ministerial officer and unacquainted with the rules which discharged sureties from their obligations, while Hopkins was supposed to be familiar with them. Fuller knew that Hopkins objected to the retention of Remington's name, while he was satisfied with Proudfit's in addition to that of Keefe, and, as the bond complied with the wishes of Hopkins, he had a reasonable right to infer that it was satisfactory. That Fuller acted under this belief is evident from the fact that he did not, until some length of time, say anything further to Hopkins; and there is nothing in the record to question the *bonâ fides* of either Fuller or Remington.

Hopkins had the right to refuse to direct Fuller at all in relation to the manner in which the bond should be executed, but he had no right to say anything which would necessarily tend to mislead him. If he had told Fuller, I will give you no instructions or advice; you are the officer, and must determine for yourself all questions that arise in

the performance of your duty, *then* Fuller, having been properly cautioned, could have no right to complain. And it is fair to infer that he would at once have sought legal advice, and thereby avoided the difficulties that occurred. But Hopkins chose another course, and what he said was well calculated to mislead Fuller. Any officer of common mind, and unacquainted with legal proceedings, would have concluded, from the conversation, that the bond would be satisfactory, if the additional surety was obtained and Remington's name left off; and it is clear, from Fuller's testimony, that Hopkins mistook the requirements of the Wisconsin code. Hopkins thought the New York and Wisconsin codes were alike, but afterwards ascertained his error, and that the Wisconsin code required the name of the principal on the bond, while the New York code did not. This admission relieves the case of all difficulty. It explains the reason of Hopkins in refusing the bond with the name of Remington on it, and accounts for the erasure which was made under the direction of the officer. If Hopkins chose to direct at all about the manner in which the bond should be executed, it was his duty, both to his client and the officer, to have taken the entire supervision of it. Having thought proper, as an attorney, to exercise his right to direct what names should go on the bond, he cannot, nor can his client, complain that the officer, in literally fulfilling his wishes in that regard, mistook the law and destroyed the efficacy of the instrument. When Fuller produced the bond with Remington's name on it, and Hopkins told him that he must have another surety, and would not have Remington's name on the bond, why did he not also inform him that the validity of the bond required that no erasures should be made after it was signed? This principle of law he doubtless well knew, and it is reasonable to infer that Fuller was in ignorance of it. The direction which Hopkins did give, and his failure to direct further, caused the loss which followed, and his client should suffer, and not the marshal.

These views are decisive of this case. The court charged the jury that it was their province to determine whether the

erasure was made "in consequence of the interference of Hopkins, the attorney," and the charge was right. It would have been better to have used the words "direction" or "instruction" instead of "interference," but, applying the evidence in the case, it is manifest that the jury rightfully interpreted the charge. A nice criticism of words will not be indulged when the meaning of the instruction is plain and obvious, and cannot mislead the jury.

2. But it is said that if the court was right in one proposition, it erred in submitting others to the jury.

This is true, but the plaintiffs in error cannot avail themselves of their exception, which was general and not specific. In *Johnston* v. *Jones** this court say, "It is well settled that if a series of propositions be embodied in instructions, and the instructions are excepted to in mass, if any one of the propositions be correct, the exception must be overruled."

3. It is urged that the court was in error in permitting the defendants to ask the witness (Fuller) what Hopkins said about the bond after Fuller had accepted it and given an order for the lumber. The exception is to the question, and not the answer. The question was pertinent and proper. If Fuller had deviated from the strict line of his duty, yet if Hopkins adopted what was done, his client cannot hold the marshal responsible.† And if Hopkins, after being informed of the circumstances under which Fuller took the bond, assented to it, his client is concluded.‡ It was surely important, then, to ascertain whether that assent was given. The answer to the question, even if improper testimony, cannot be complained of here, because no exception was taken to it in the court below. The answer, however, could not have affected the verdict, and it is not necessary to discuss its pertinency. On the whole, we find no error in the record, and are not disposed to disturb the finding of the jury.

JUDGMENT AFFIRMED WITH COSTS.

* 1 Black, 220. † Corning & Horner *v.* Southland, Sheriff, 3 Hill, 552.

‡ Stuart *v.* Whitaker, 2 Carrington & Payne, 100; Bevnon *v.* Garrat, 1 Id., 154.

BLOSSOM *v.* THE MILWAUKEE, &c., RAILROAD COMPANY.

A bidder at a marshal's sale made on foreclosure of a mortgage in a Federal court below, may, by his bid, though no party to the suit originally, so far be made a party to the proceedings in that court as to be entitled to an appeal here. Whether or not, this court will not dismiss an appeal by such person, on mere *motion* of the other side; the decision involving the merits of the case, and such an examination of the whole record as can only be made on full hearing.

A DECREE foreclosing a mortgage and ordering a sale of the road had been obtained in the District Court of the United States for the District of Wisconsin, in a suit by one *Bishop and others* against *The Milwaukee and Chicago Railroad Company;* and the road being offered for sale by the marshal, under the decree, Blossom, the appellant in *this* case, made a bid for the property. The sale was suspended at this point, and never actually proceeded further. Blossom then went into the District Court, and by petition prayed to have the sale completed and confirmed. His application was, however, refused. From this order of refusal he took an appeal,—the present suit. A motion was now made to dismiss this appeal, the grounds of the motion being these:

1. That the appellant was not a party to the suit in the District Court, and was therefore not entitled to prosecute an appeal.

2. That his right had accrued in the mere *process* of executing the final decree; and that, accordingly, no appeal lay.

3. That the refusal of the District Court to confirm or complete the sale was a matter within its discretion, and, therefore, not the subject of review here.

Mr. Justice MILLER delivered the opinion of the court.

1. Is the appellant so far a party to the original suit that he can appeal?

It is certainly true that he cannot appeal from the original decree of foreclosure, nor from any other order or decree of the court made prior to his bid. It, however, seems to be well settled, that after a decree adjudicating certain rights

between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders; and that they may in like manner acquire rights in regard to the subject-matter of the litigation, which the court is bound to protect. Sureties, signing appeal bonds, stay bonds, delivery bonds, and receipters under writs of attachment, become *quasi* parties to the proceedings, and subject themselves to the jurisdiction of the court, so that summary judgments may be rendered on their bonds or recognizances. So in the case of a creditor's bill, or other suit, by which a fund is to be distributed to parties, some of whom are not before the court; these are at liberty to come before the master after the decree, and establish their claims to share in the distribution.

A purchaser or bidder at a master's sale in chancery subjects himself *quoad hoc* to the jurisdiction of the court, and can be compelled to perform his agreement specifically. It would seem that he must acquire a corresponding right to appear and claim, at the hands of the court, such relief as the rules of equity proceedings entitle him to.

In *Delaplaine* v. *Lawrence*,* Chancellor Walworth says, that "in sales made by masters under decrees and orders of this court, the purchasers who have bid off the property and paid their deposits in good faith, are considered as having inchoate rights which entitle them to a hearing upon the question whether the sales shall be set aside. And if the court errs by setting aside the sale improperly, they have the right to carry the question by appeal to a higher tribunal."

This principle, to which we see no objection, seems to decide the point before us in regard to parties to the suit.

2. The next ground assumed is that the right of appellant having accrued in the mere process of executing the final decree of the court, no appeal lies in such case.

* 10 Paige, 602; see, also, Calvert on Parties to Suits in Equity; side pages 51, 58; note page 61.

Although this court has frequently decided that where the act complained of was a mere ministerial duty, necessarily growing out of the decree which was being carried into effect, no appeal would lie, it has never decided that in *no* case arising after a decree, which is final only in the sense which would allow it to be appealed, will an appeal be allowed from an order of the court, however it might affect important interests, or decide matters not before the court when the first decree was rendered. Such a doctrine would place a very large proportion of the most important matters adjudged by courts of chancery beyond the reach of an appeal. On the contrary, this court has repeatedly considered appeals from the decrees of the Circuit Courts, upon matters arising after the case had been here, and the courts below had entered decrees in accordance with the directions of this court. At the present term, in the case of *A. R. Orchard* v. *John Hughes*, the court refused to dismiss an appeal from an order confirming a sale under a decree of foreclosure, and directed that the case should be heard, with the appeal from the principal decree in the suit which ordered the sale.*

3. It is said that the act of the court, in refusing to confirm or complete the sale, was entirely within its discretion, and, therefore, cannot be reviewed here.

The case of *Delaplaine* v. *Lawrence*, just cited, seems to imply a different doctrine. However this may appear on investigation, we think that its decision involves the merits of the case before us, and requires such an examination of the whole record as can only be made fairly on a full hearing. We are not disposed to deprive the appellant of this, by dismissing his appeal on motion.

MOTION OVERRULED.

* This was a *motion*, and was heard before the present reporter was appointed to office. These facts account for there being no report of the matter in this volume.—REP

UNITED STATES v. VALLEJO.

As a general rule a warrant for public land should be so located and surveyed that the surplus left to the United States shall be in one connected piece. But a large discretion must be left in this class of cases to the surveyor, and the rule is not one of universal application. Hence, in a California case, where the surplus was left in two very large parcels, one of three thousand five hundred and the other of two thousand acres, the rule was held to be controlled by the facts that the survey was located as desired by the claimant, that it had a reasonably compact form, and that it included two "adobe houses," probably twenty years old, now and long inhabited by the heirs of the original grantee, the present owners of the claim, and one of which houses would be excluded, if the survey were made in the more usual form. The court declared that while it is not prepared to say that it will, in no case, review the discretion which belongs to the surveyor, it does not hesitate to announce that it will not determine whether this discretion has been exercised with the nicest discrimination or the highest wisdom.

THIS was a question of a survey of a California Mexican grant, of two leagues in quantity, to be located within a larger outboundary, and came by appeal from the District Court for the Southern District of California. The area of the larger tract was about three leagues and a third of a league. It resembled in shape a sack or purse, and the ranch was hence called the *Bolsa* or Sack de San Cayetano.

The United States, appellants in the case, objected to the survey upon two principal grounds; namely, that the two leagues of claimant were taken out of the central part of the sack, leaving to the government the remnant, in two detached corners; and because the land thus left was not equal in quality to that which the claimant got.

As regarded the first point, it was true that the land surveyed for the claimant was so taken out as to leave remnants; one of about three thousand five hundred acres, the other of about two thousand. As respected the quality of the land, the surveyor testified that the portion given to the claimant was of the *average* quality of the whole sack; parts were better for some purposes, parts worse. It appeared, however, that the land had been located as the claimant desired; that

it was of a form sufficiently compact, and that, as surveyed, it embraced two "old adobe houses," inhabited now and for many years by the heirs of the original grantee, the present owners of the claim.

Mr. Wills, for the United States.

Mr. Justice MILLER delivered the opinion of the court.

The objection to the quality of the land does not seem to be sustained by the testimony. If there be a difference in quality between the part surveyed and the part left, it must be too slight to be the subject of consideration here.

It is certainly true that the surplus left to the United States should have been in one connected piece, if there were not sufficient reasons to justify a different course. In all these locations of a limited quantity within a larger one, many rules deserve attention. But as some of these may, and often do conflict with others, they cannot all be observed in every case.

In the present case the survey is supported:

1. By the fact that it was located as desired by the claimant.

2. That it is in a reasonably compact form.

3. That it includes two old adobe houses, inhabited now and for many years past by the heirs of the original grantee, the present owners of the claim.

Both of the first-named two considerations are prominent among the rules laid down by the Commissioner of the General Land Office for the location of this class of claims.

As respects the third, it appears that if the two leagues were taken from either end of the sack as claimed by the government, the one of these houses must be left out. They were both there when the grant was made, and are, probably, twenty years old. This raises a strong presumption that the grant was intended to cover them both.

These reasons, we think, overbalance the inconvenience of having the surplus left to the United States in two disconnected parcels; especially when one of these parcels contains

as much as three thousand five hundred acres, and the other about two thousand acres.

Besides, in this class of cases, a large discretion must necessarily be left to the surveyor; and while we are not prepared to say that we will not in any case review the exercise of that discretion, we have no hesitation in saying that we do not sit here to determine whether it has been accompanied with the nicest discrimination, or the highest of wisdom.

DECREE AFFIRMED.

WHITE *v.* UNITED STATES.

Where there is no archive evidence of a California grant, and its absence is unaccounted for, and there has been no such possession as raises an equity in behalf of the party, and especially where, in addition, the *expediente* produced is tainted with suspicions of fraud, the claim must be rejected.

APPEAL from the District Court for the Northern District of California; the following case being presented.

The appellant, White, claimed a tract, or rancho of land, known as *San Antonio*, under a grant alleged to have been made to one Antonio Ortega. The United States, appellees in the suit, claimed it under a grant alleged to have been made by the same authority to a certain Juan Miranda. One question, therefore, was as to the validity of the respective documentary titles thus set up. But this question was complicated by other questions: one of actual occupation, another of agency or representation, and a third of abandonment. Ortega had married the daughter of Miranda, and both Ortega and Miranda had occupied the tract,—Miranda and his family being sometimes in occupation, as Ortega and his wife were at others; and the additional question therefore was, whether Ortega was occupying under Miranda, or Miranda occupying under Ortega,—a question made more difficult to solve by the fact that Ortega and his wife were in hostile relations, leaving it uncertain when *she* was in pos-

session, as she was at times, whether she was occupying under her husband or under her father. In consequence of his domestic difficulty, moreover, Ortega left California in 1843 for Oregon, remaining there till 1847; between which years Miranda got *his* grant: and a question was whether Ortega had *abandoned* the property. Ortega's title was partly of a documentary kind and partly of an equitable sort, and resting on parol evidence. *The documentary title* consisted of a sheet of paper containing:

1. Petition to the governor, Alvarado.
2. A marginal order of reference.
3. An informe; and
4. A decree of concession.

There was also produced a map of the land solicited; though *when* made was a question in the case. The petition was in the name of Ortega, and was dated June 12th, 1840. The marginal order was in the handwriting of and signed by Governor Alvarado, and dated June 20th, 1840; this date, however, being an *altered* one, as hereinafter stated. The informe was signed by M. G. Vallejo, and dated July 30th, 1840. The decree of concession was dated August 10th, 1840, and, translated, in its important parts as follows:

"I grant to Don Antonio Ortega the land petitioned for, with the understanding that in order to obtain the issue of the respective titulo, and to regularly make up the necessary expediente (by which the boundaries should be marked), and the necessary proceedings be taken, he *shall* make a map as required by law, which he shall present without delay, together with this instancia, which shall serve him as security during the further proceedings indicated."

These documents were produced, together with the map, *from the custody of the claimant.* It did not appear that they were at any time on file in the public archives. *The oral testimony* came from a great number of witnesses.

Governor Alvarado, who was twice examined, testified that he executed and delivered this grant to Ortega at the time it bears date; and that some time afterwards, in the last of 1840, or first of 1841, Ortega brought to him the original

expediente and map, and left them with him, and that he kept them for Ortega until about 1848, when he gave them up to him.

As respected the date of the diseño, now produced by the claimants under the title of Ortega, testimony of Alvarado, given on his second one, was as follows; Ortega himself testifying also to the same effect as to the diseño:

"*Question* 23. You have said that Ortega twice presented himself to you in Monterey, in 1840, in relation to this grant; state what papers, if any, he presented to you on the occasion of his first visit, and what papers on the occasion of his second visit.

"*Answer* 23. My recollection is that he brought with him each time the same papers, that is the petition, but the first time without any map; the second time the petition and diseño together. He might have come other times, but I only recollect those two times."

It was at the *second* interview *that the "concession" was given.*

General Vallejo, agent of colonization under the Mexican government, testified that in 1838 or 1839, Ortega applied to him, as was customary, with his petition for permission to settle upon this rancho; that he gave him the permission asked for, and he immediately moved on the rancho, taking with him his father-in-law, Juan Miranda, and his family; that he built a house and corrals,* and stocked the place with horses and cattle; that he (Vallejo) furnished him with stock for that purpose; that Miranda occupied the land *for* Ortega; that Ortega obtained the grant from Governor Alvarado in 1840; that he saw the grant himself; and that he never gave Miranda any license or permission to occupy this rancho, or any portion of it.

Richardson testifies that this rancho was granted to Ortega by Governor Alvarado in the year 1840; that he knew the boundaries of the rancho by seeing the original grant, and having it in his possession; that Miranda occupied the rancho

* By this term is meant an inclosure to shelter horses or other cattle. It is originally a Spanish word; but is given in Worcester's English Dictionary of 1850, as a term of our own language.

under Ortega by virtue of a special contract between Miranda and Ortega; that they *both* told him so.

De la Rosa testified that he wrote Ortega's petition for him, and made the very map now exhibited in the case; that he made it in 1839 or 1840; that he saw the grant, saw it in the house of Ortega on the rancho in question; that Miranda occupied the rancho for Ortega; that Ortega's family lived on it during his absence in Oregon; that Miranda applied for a grant of this land to himself while Ortega was absent in Oregon; he (Rosa) drawing and presenting the petition; that a grant to him was written out in the office of the secretary of state, but was never signed by the governor.

Jacob Leese, alcalde of Sonoma at the time Miranda applied for a grant, testified that he gave him the certificate found in his expediente wholly upon the allegation set forth in his (Miranda's) petition, and from the fact that he (Miranda) lived upon the land. He also says: "But the fact of the former grant (to Ortega) being concealed or contradicted by the petition, I was deceived; and if the grant was obtained from the governor through the deception practised upon the alcalde, that grant would be fraudulently obtained, and would be void."

Father Accolti, a priest, testified that he became acquainted with Ortega in 1845 in Oregon [to which place, as mentioned, Ortega went in 1843, remaining there till 1847 or '8], and at that time Ortega urged him and some other priests and some sisters of Notre Dame to come to California and establish a school, stating that he would give them, together with "that piece of land, half of his stock of cattle on the land." He stated that he had the grant to the rancho from the Mexican government. The offer was made on condition that he would educate his (Ortega's) children. He also testified that the original title-papers in this case, viz., the expediente and map, together with a deed subsequently given by Ortega to Brouillet, were all placed in his possession in December, 1849.

Father Brouillet, another priest, the person just mentioned by Father Accolti, testified that he made an agreement

with Ortega in 1849 to educate his children; and that, in consideration thereof, Ortega made a deed to him of all this rancho, excepting one league. He identified the original deed as the one delivered him by Ortega. He also testified that he was put in possession of this rancho by Ortega, May 1, 1849, in the presence of one Miller and Theodore Miranda, a son of Juan, who was also present as a witness, and acquiesced to the possession given in his presence by Ortega. This possession was given on the rancho, and at the same time the deed from Ortega was delivered to him, as well as the original title-papers of the rancho. He also testified that the title-papers, viz., the expediente and map, are the same which were delivered to him by Ortega, May 1, 1849, on this rancho, in presence of Miller and Theodore Miranda; that before he delivered to Ortega his contract to educate his children, he consulted General M. G. Vallejo as to the validity of Ortega's title, and that Vallejo assured him the title was genuine; that in the same year he took the said Ortega's expediente and map to Monterey, and there showed them to Governor Alvarado; and that Alvarado, at that time, assured him that the said title to Ortega's rancho was genuine; that there was but one question that could be raised in it, which was, that the Departmental Assembly had not acted upon it, but that he did not think that would be any objection in the courts of the United States.

Miller, the person mentioned by Brouillet, confirmed this account of delivery of possession

Bojorques testified that Ortega owned this rancho as early as 1841, was in possession of it in 1839, and had a small house on the creek of San Antonio; that Juan Miranda and his son, Teodoro Miranda, occupied the rancho *for* Ortega; that he obtained his information from Ortega and *both the Mirandas*.

Walker testified that he knew Ortega in Sonoma in 1843; that he told him at that time that he owned this rancho; and that he often heard him talking about his rancho in the presence of others; and he "never heard it denied or contradicted that it was his rancho," and that it was generally

reported to belong to Ortega. He also stated that he went to Oregon in the same company with Ortega; that before leaving Sonoma for Oregon, Ortega went to his rancho and brought stock away from there; and that he saw him driving the stock, and he said he had taken them from the rancho for the purpose of driving them to Oregon; and, when in Oregon, he often heard Ortega say that he intended returning to his rancho of San Antonio and to his family.

In addition to this and other similar testimony, it appeared that the French traveller, *Duflot de Mofras*, who was in California in 1841, in his published *Exploration du Territoire de l'Oregon, des Californies*, &c.,* a work whose general good authority had been recognized by this court,† in giving the names of the owners of ranchos in this region, includes Ortega among them. The passage in De Mofras's book, translated, reads thus:

"At the bottom of the great *anse* of Sansalito, to the north of the tongue of land which divides, and at two leagues to the east of Richardson, one meets with the rancho of the deceased Irishman, Read. . . . Behind the farms of Richardson and of Read, to the north and the west as far as the sea, arise the small ranchos of Las Gallinas, Berry, Garcia, and Ocio, near the Punta de los Reyes, and Bojorques, the nearest to the port of La Bodega. Finally, more to the north and the east, ORTEGA, Martin, Pituluma, the Vallejos, Dorson, and Mackintosh, the most northern establishment of the Mexican territory. Five miles to the north of the rancho of Read, one meets, not far from the shore, with the mission of Saint Raphael. . . . The lands of the mission are excellent. We saw in its gardens superb plants of tobacco, cultivated by a man named ORTEGA."

Ortega, who had at the time of the suit no interest in the result, was himself examined. After testifying positively to having obtained the grant in 1840, he said thus:

"After the making of the decree of Governor Alvarado, and during the same year, I went to Monterey, and applied to Alva-

* Vol. i, 443–445.

† United States *v.* Sutter, 21 Howard, 170.

rado for a full and formal title; but it was during the recess of the Departmental Assembly, and I could not obtain it. *I did not occupy the land in person*, but my father-in-law, Juan Miranda, occupied it for me in the year 1840. Miranda occupied the land by placing his son there, who remained there six years, having a hut there, and he had fifty cows there. I applied to Governor Alvarado, with the paper before mentioned, and presented a map, *and then I went to Oregon*, leaving the papers with the governor.

"My father-in-law occupied the land on my account for the whole six years, *but never paid me anything whatever for the use of it.* I think my father-in-law died in 1845; I went to Oregon in 1843, and was there four years, and he died the year before I returned. I do not know whether Juan Miranda obtained a grant of the land to himself or not. Teodoro Miranda, a son of Juan Miranda, was occupying the land when I returned from Oregon, the same that was occupying it when I went. He continued occupying the land from 1841 to 1848. *I do not know who occupied the land after* 1848. I claimed the land after I came back from Oregon; I went to Alvarado and got the papers for the purpose of establishing my claim. This was *after* the country had been taken by the Americans. I kept the papers about a year, and then delivered them to a French priest by the name of Brouillet; I made a *present* of the land to the priest, in pay for the education of my children for eight years. *I never received judicial possession of the land.* I have no interest in the success of this claim, or the want of it.

"*Question.* Did you ever demand of Teodoro Miranda the possession of the land?

"*Answer.* I did not; I went to his *mother*, who had the control, and demanded *it of her.* She told me the rancho *belonged to her;* that she had a paper from Murphy, and from Leese, the alcalde of Sonoma. I did *nothing afterwards* towards getting the occupancy of the land, but went to Alvarado and got the papers before mentioned."

On the other hand, the Miranda title was thus supported:

The expediente of Miranda. This was found in the archives, duly numbered and entered on Jimeno's Index. It consisted of:

1. A petition of Miranda, dated February 21, 1844.

2. A certificate by Jacob Leese, alcalde of Sonoma, that the land had been occupied several years, and that it did not belong to any pueblo or corporation. Dated February 20, 1844.

3. A report by Jimeno, dated May 2, 1844, that the land had been occupied for four years by the party interested, by cultivation, and by having a house thereon, with all his goods; and that it does not belong to any one in particular.

4. An order that the title issue, signed by the governor, and dated May 30, 1844.

5. A decree of concession, dated October 8, 1844, declaring Juan Miranda owner of the place called Arroyo de San Antonio, and directing the corresponding title to be made out, and entered in the respective book, and the expediente to be sent to the Departmental Assembly for its approval.

6. Two copies of the formal grant or titulo, dated October 8, 1844, but unsigned.

The grant to Miranda, however, was not consummated by delivery of the title-paper, it not having been signed, said the witness, De la Rosa, "on account of the civil disturbances and the breaking out of the revolution about that time;" though Miranda's daughter, the wife of Ortega, swore that her father was taken sick and could not attend to it.

Numerous witnesses were produced to show that Miranda was the reputed owner, and that *he* was in possession for twenty years; positive testimony being adduced that such possession began so far back as 1838. One person swore that he had "put three hundred head of cattle upon it, thirty wild mares, and some tame horses, branding the cattle with his brand, which he had made at the blacksmith's shop." It was incontestable that in an expediente of one Padilla, to whom was granted a tract called the *Roblar de la Miseria*, and adjoining the one in question, the tract granted to Padilla was described as bounded on one side by "land of Don Juan *Miranda;*" and the same designation of ownership was on the accompanying diseño or map. In this case, General Vallejo had certified to the alcalde "that the boundaries bordering are the same as those mentioned

in Padilla's petition." The petition, in that case, was dated November, 1844. In another case, a petition and grant to one Bojorques, for the *Laguna de San Antonio*, the former dated August, 1844, and the latter November, 1845, the rancho San Antonio was described in the same way, as "lands of Juan Miranda;" and the same characterization was found on the map of an adjoining rancho, called *Olimpale.* So, too, it was obvious that the date of the marginal order of Governor Alvarado, on Ortega's petition, had been altered from 1841 to 1840; the ink in which the alteration was made being of a different color from that in which the marginal order was itself written. So it was a fact that, by inspection of the papers themselves, the diseños of Ortega and of Miranda appeared to be transcripts one from the other, and to have been made by the same person and at the same time. The edges of the paper on which they were made so tallied that they made "indentures."

As respected Ortega himself, while it was testified that he was a man whom one never "heard anything against," it appeared that his life had been of a singularly miscellaneous character. He was a Mexican by birth, and born in 1781, being of course about sixty years old at the date of his petition, as he was seventy-two when he was examined in the case. In 1802-3 he was living in New Orleans. Afterwards he took holy orders, and exercised the office of a priest for about three years. He then entered the Mexican army, and served there for about twenty years, rendering, said Governor Alvarado, "many meritorious acts for his country." In 1834–5 he appears to have been "keeper of the keys" at the mission of Sonoma; "mayordomo" of the same.* In 1838 he mar-

* The "obligation of mayordomos," as set forth in certain directions made for them, are of a kind quite peculiar; and though a mention of them is of no great value in this case, it may serve to give a view of the picturesque sort of life common in California before the conquest.

1. To take care of the property under their charge, acting in concert with the reverend padres in the difficult cases.

2. To compel the Indians to assist in the labors of the community, chastising them moderately for faults.

3. To see that the Indians observe the best morality, and frequent church,

ried Maria Francisca Miranda, daughter of the Miranda under whose title the appellees claimed; a handsome woman, greatly younger than himself, who soon fell in love with a man named Salvador. The character of the lady and the nature of the new relations appear in her own testimony, which, in question and answer, was thus:

"*Question.* What is your name, age, and place of residence?

"*Answer.* My name is Francisca Miranda; *I don't know my age;* I live in Petaluma, California.

"*Question.* Are you acquainted with Leonito Antonio Duque de Ortega?

"*Answer.* Yes, I *know* him; I am his wife.

"*Question.* How long has it been since you were married to the said Ortega?

"*Answer. I do not know.* I was married to him a long time before he went to Oregon.

"*Question.* How many times, before your husband abandoned you, did you and he quarrel?

"*Answer.* I never quarrelled with *him.* It was he who did with *me.*

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at the days and hours that have been customary; in which matter the reverend padres will intervene, &c.

To remit to the inspector's office a monthly account of the produce they may collect into the storehouses, of the crops of grain, *liquors,* &c., and of the branding of all kinds of cattle. Said account must be authorized by the reverend padres.

4. To take care that the reverend padres do not want for their necessary aliment, and to furnish them with everything necessary for their personal subsistence, as likewise with servants, which they may request for their domestic service.

5. To provide the ecclesiastical prelates all the assistance which they may stand in need of, when they make their accustomed visits to the missions through which they pass; and, under the strictest responsibility, to receive them in the manner due to their dignity.

6. In missions where the said prelates have their residence, they will have the right to call upon the mayordomos at any hour when they may require them; and said mayordomos are required to present themselves to them every day at a certain hour, to know what they require in their ministerial function.

7. After the mayordomos have for one year given proofs of their activity, honesty, and good conduct, they shall be entitled (in times of little occupation) to have the Indians render them some personal services; but the consent of the Indians must be previously obtained.

"*Question.* Before leaving you, did he not charge you with inconstancy?

"*Answer. He* never accused *me; he* was the guilty one.

"*Question.* Have you been divorced from him or legally separated?

"*Answer.* After his return from Oregon, he charged me before an American, who was represented to me as the Governor of the State of California, with having a man. I appeared with my witnesses; and he appeared, but had no witnesses, and the matter was dropped.

"*Question.* Since your husband abandoned you, have you had any children, and how many?

"*Answer.* Since my husband abandoned me I have had three children, besides the one with which I was *enceinte* when he left.

"*Question.* Since your husband left you and went to Oregon, have you ever lived with him?

"*Answer.* I never have."

In 1841, Ortega kept a little liquor store in Sonoma, cultivating some land, and near the same time "used to be knocking about General Vallejo's (who was Commandant General), as a sort of steward." In 1843 he went to Oregon. "He said he was going to Oregon to remain; that he had reasons for leaving the country, family reasons; he accused his wife of inconstancy to her marriage vows, and said he was never coming back." He took with him "one cow and a couple of horses." In 1845 he set off from Oregon to return to California by sea; but the vessel was wrecked, and after losing everything he had, he "returned to Oregon almost naked." He here stayed with a man named Walker, who "gave him blankets, took care of him, fed, clothed, and sheltered him." During his second stay in Oregon, as appeared by a witness who was "head sawyer in a sawmill there, and kept a boarding-house for the hands," Ortega's occupation was "that of waiting on the house, bringing wood and water;" he paid nothing for his board, the witness "thinking a great deal of him." "He had an Indian boy, who worked all the time for him, to endeavor to get money to return to California." In 1848 "he was started off home

again." In 1849 he was "bell-ringer to the church. . . . I don't know," said one witness, "any occupation he had at that time beside that. He officiated in the church, ringing the bell, attending round there. He was a good deal about General Vallejo's as a sort of steward. He had no property that I know of, except one cow and a couple of horses that were *given to him*, and which he took with him to Oregon."

The court below decided in favor of the Miranda title; assigning among the minor reasons for its opinion the character of Rosa, "as disclosed by his own avowal, that in 1844 he was endeavoring to obtain for Miranda a grant of lands which he knew had already been granted in 1840 to Ortega; or, as established in the case of *Luco et als.* v. *The United States*,* and other cases, in which the unreliability of his statements, and those of several other of the claimant's witnesses, have been judicially declared by the Supreme Court;" referring also to the fact that other ranchos, granted about 1844, as the *Roblar de la Miseria*, *Laguna de San Antonio*, and the *Olimpale*, referred to this tract, one of their boundaries, as "lands of Juan Miranda;" that the alteration of dates in the case was a circumstance not explained; that the preponderance, both of proofs and probabilities, was, that Miranda's possession was not that of a tenant; and that "in 1843, Ortega departed to a foreign country, under circumstances from which an intention to abandon his own might well be inferred." The circumstance of the *maps* in Miranda's petition, though this last was presented in 1844, being apparently made at the same date as the one in Ortega's petition, though alleged to be of an earlier date, and both made by one person, De la Rosa, was adverted to as a circumstance indicating that Ortega's map was possibly made *after* the date when it ought to have been, and was inserted posthumously in his papers.

Messrs. Cushing and Gillet, for the appellants (title of Ortega):

1. Where witnesses are not impeached by the evidence in

* 23 Howard, 543.

the case, and allowed to defend their characters, if attacked, they must be treated as witnesses of good character, and entitled to full credit. What has been said by this court in opinions given in former cases, cannot be referred to in order to discredit them. Such a course is not tolerated in tribunals of justice. This bench has recently settled that question. "The former opinions of the court," says GRIER, J., speaking for the court, "may be referred to on questions of law, but cannot be quoted as evidence of the character of living witnesses."* Certainly witnesses cannot be convicted of perjury as "matter of law."

2. The acts of third persons are not admissible evidence against the claimant to defeat his legal rights. The United States seek to avoid the rights of the claimant by showing that certain persons had asked for or obtained grants of land in the vicinity of those in question, describing the latter as Miranda's. This is not legal evidence for any purpose. Such descriptions cannot affect third persons who had no agency in making them. If admissible, it would merely show that the applicant did not discriminate between ownership and possession, or did not know the relation of landlord and tenant which existed between Ortega and Miranda, or the facts in relation to the ownership.

3. The United States cannot set up a wrongful act of Mexican officers to defeat rights which that government had previously conferred. The rights conferred upon Ortega by the concession were within the lawful powers of the governor. If any governor made a second grant when the first was outstanding, his act was a fraud upon the first, and void. Such a fraudulent and void act is no evidence to prove the first grant had not been made, or that it had ceased to be effective. A party cannot thus make evidence for himself to avoid or do away with his own acts conferring rights upon others. It follows that all the evidence given in this case concerning the Miranda grant is illegal, and cannot be considered as affecting the rights of Ortega.

* United States *v.* Johnson, *ante*, 329.

4. Ortega had such a claim that Mexico, under her laws, usages, and customs, would, on a proper application, have completed and confirmed his title. By the laws of Mexico she gave away her land in large tracts to settlers, those having rendered important military services—within which class Ortega was—being entitled to high consideration. By usage, the formalities to be observed in granting were far from a technical character, and might be varied by the granting officer, and even statute requisites dispensed with, as held in *Fremont* v. *The United States*,* and for the reason that formalities did not enter into or constitute the essence of the matter, and were unimportant. By custom, permission to occupy conferred a right to possession, and such occupation under an expectation of acquiring a full title gave the occupant an equitable claim to be furnished with a legal title. As Mexico gave away her lands, she was liberal in her usages and customs, and as proved in this case, as it has been in others, and under the present circumstances, would have promptly completed the title. The United States are bound, without reference to the change of government and of circumstances, to do now what Mexico would have done. It cannot be questioned that, had Mexico remained the owner, her governor, Alvarado, or any other one, would have completed Ortega's title. That Ortega received permission to occupy the land in question is proved by Vallejo and Rosa. This confers the same rights as are required under incomplete grants by express authority of the Mexican government.†

5. A grant cannot be set aside on mere suspicion. Here, however, not even a case of suspicion has been developed. Not a witness has sworn that Ortega did not present his petition; that Vallejo did not give permission to occupy, and did not sign the report, and Alvarado the grant, or Richardson and De la Rosa did not see the grant, as stated by them respectively. We have the right, then, to assume

* 17 Howard, 561.

† Arguello *v.* United States, 18 Howard, 54; United States *v.* Peralta, 19 Id., 343.

that there was a grant to Ortega, and made at the time stated, which he then had in his possession, because we have proved it, and that proof has not been overcome by conflicting proof. This fact is fixed. It follows that Ortega had a right to possession, conferred by proper authority. It has been suggested that Ortega's map was not made in 1840, when it purported to be, and was copied from Miranda's made in 1844. But why may not Miranda have got his as well from Ortega's?

6. Then, it is proved that Ortega went into possession in 1839 or 1840 by Vallejo, who let him have stock to put upon the land; proved by Rosa, by Richardson, and by Ortega himself. That he claimed to be in possession, by his father-in-law, is also proved by the same, and others. It is proved by Walker that he took stock from there to drive to Oregon. It is proved by Father Brouillet, Miller herein confirming him, that when he sold to and put the former in possession, Theodore Miranda, the only one on the land, raised no objection, thereby admitting Ortega's right to the land and possession. Under these circumstances the possession was, in fact, by Ortega personally, and by Miranda, as his tenant, at first, and by his son afterwards, for him. None of the government witnesses know or swear, as a matter of fact, that Miranda did not occupy for Ortega. They infer otherwise, from what they saw, which is not inconsistent with the supposition that he held under and represented his son-in-law, as sworn to by him and several others. That the possession in law was that of Ortega, and followed the permission given to occupy and the title, cannot be reasonably questioned.

7. It is a presumption of law, when Miranda entered under Ortega, who had a claim of title, that the possession continued under Ortega until the contrary is fully proved. Miranda could not throw off his allegiance as a tenant, and assume control on his own account. This, however, is what he sought to do when he sought to obtain title in the absence of Ortega. The law will not let him do this. He entered as a tenant, and continued as a tenant. Those who

set up the change in the character of the possession must prove it, which in this case has not been done. Having entered under Ortega, the presumption of law, in the absence of clear proof, is that while he continued there, he was a tenant under the owner by whose permission he entered. Hence, the concession or grant and continued occupation are established, and a confirmation must follow.

8. Abandonment of claim to land can only take place where the party in fact intends to and does abandon, which must be manifested by acts of a decided and unequivocal character showing such intention, and which can be in no other manner accounted for. Abandonment is a matter of intention, demonstrated by significant and pertinent acts. There are none such on the part of Ortega in this case. He has not in fact abandoned, nor has he said one word looking to abandonment. Leaving a wife, who was an adulteress, is wholly different from abandoning his lands. The case is that of a man who having put a tenant into possession, and leaving that tenant in occupancy, took a portion of his stock, and went away, but who, while away, was continually talking of his land and stock, and of his intention to return, and who proposed to transfer a portion of both to the clergy, if they would go home with him, and educate his children. He started to return, and was shipwrecked, and as soon as he could procure means, started again, and entered upon his land, and, in presence of his tenant still holding under him, conveyed and delivered possession of all his grant but a league, since conveyed. All this, instead of showing abandonment, disproves it, and establishes the fact that there was none actual or intended, but that he clung to his rights from first to last.

Messrs. Black, Reverdy Johnson, and Wills, contra:

1. The facts show a secret grant of the land in controversy; a grant retained in the private custody of the Governor of California until after the cession of that country to the United States; one of which no public record in the archives of that country was made at the time at which the grant

purports to have been made, or afterwards during the Mexican dominion; one of which the successors of Alvarado and other Mexican officers had no knowledge; one which is first made known to the public by the production of the appropriate evidence of its existence only after the Mexican dominion over that country had ceased; one, in regard to which, during all the antecedent period of time, the land granted had been in the actual and visible occupancy of another, while the alleged grantee himself was absent for the greater part of the intermediate time in Oregon, a foreign country. In view of these facts, we contend:

1st. That archive evidence of the existence of an alleged Mexican grant for lands in California is necessary in order to secure the confirmation of a claim founded on such a grant; and that, without such evidence, neither this claim nor any other can be confirmed by this court, without the previous reversal of a long line of its decisions on that very point.

This proposition is fundamental, and, if true, disposes of the whole case. The foundation of it was laid by this court in the case of *United States* v. *Cambuston*.* The doctrine, in another form, was quite strongly reasserted in the following year, to wit, at December Term, 1857, in *United States* v. *Sutter*.† In *Fuentes* v. *United States*,‡ a direct application of what was announced in *United States* v. *Sutter*, as a test of truth, was made to determine the validity of another grant, and the doctrine was reannounced at the same term in other cases.§ In *United States* v. *Bolton*,‖ we have a yet more pointed application of the doctrine. The claim was rejected. The want of archive evidence to authenticate it, left it without any "legal foundation to rest upon." The language of this court, however, in *United States* v. *Luco*,¶ is so remarkable that it must be quoted as the announcement of a *general*

* 20 Howard, 59. † 21 Id., 175. ‡ 22 Id., 453–4.

§ United States *v.* Teschmaker, 22 Id., 404; Same *v.* Pico, Id., 415; Same *v.* Vallejo, Id., 422. ‖ 23 Id., 350.

¶ Id., 543; and see United States *v.* Castro, 24 Id., 346; Palmer *v.* United States, Id., 125; United States *v.* Knight's Adm., 1 Black, 245.

principle applicable to all California land cases. "In conclusion," says Mr. Justice GRIER, "we must say, that, after a careful examination of the testimony, we entertain no doubt that the title produced by the claimants is false and forged, and that, as an inference or corollary from the facts now brought to our notice, it may be received as a general rule of decision, that no grant of land purporting to have issued from the late government of California should be received as genuine by the courts of the United States, unless it be found noted in the registers, or the expediente, or some part of it be found on file among the archives where other and genuine grants of the same year are found; and *that owing to the weakness of memory* with regard to the dates of grants signed by them, the testimony of the late officers of that government cannot be received to supply or contradict the public record, title of which there is no trace to be found in the public archives." How wise are the rules here laid down, the case before us proves. The claim is supported, as we see, by the testimony of General M. G. Vallejo and De la Rosa, whose bad character and bribeworthy avocations are graphically drawn by this court in the case just named. De la Rosa is the same gentleman who declared in that case, "that the only right way of swearing was by the priest on the Catholic cross." The claim is also supported by the testimony of Ortega, the pretended grantee, another of Vallejo's dependents, who, according to the evidence, exercised at various times the functions of priest and soldier; was keeper of a little liquor store at Sonoma; hanger-on at Vallejo's; at one time mayordomo of the mission of Sonoma; at another, keeper of the keys at the same mission; sometimes a bell-ringer at a church, and sometimes a waiter, a carrier of wood and water in a private house, and a lumberman at a saw-mill in Oregon; during the latter and the greater part of which time, according to the theory of the claimant, he was the owner of four leagues of land in California!

2. While the Ortega title has no record evidence in its favor, it has a mass of such evidence against it.

The Miranda title shows a petition, dated February 21, 1844, alleging *an antecedent possession for four years* of the land solicited; certificates by the alcalde of the district, and by the secretary of state, *that he had occupied it for four years*, and merited the grant; an order that a title be issued; a decree of concession, followed by two copies of the grant, made in pursuance of the decree of concession; and finally an extract from Jimeno's Index, showing that the grant had actually been issued by the governor in favor of Miranda, and that the proper record of the fact had been made in Jimeno's Index, one of the registers of the archives, as required by law.

But this is not all. It appears that Padilla, in 1844, petitioned for a certificate to enable him to obtain a grant for the land known by the name of *Roblar de la Miseria*, and calling for the land of Don Juan Miranda as his boundary on the southeast; that General Vallejo, in 1844, certified to the alcalde that the boundaries of the land solicited by Padilla, as described, were true. The same facts, substantially, also appear in the petition of Bojorques for the grant of the *Laguna de San Antonio*, and with regard to the rancho called *Olimpale*. It is said on the other side, that this is the evidence of third persons, and cannot be used to dispossess Ortega of his property. But it is the same sort of evidence, and far better in quality, than that given us on that same side in the book of Monsieur Duflot de Mofras, the French traveller, who seeks to dispossess Miranda.

3. Admitting the original genuineness of the Ortega title, still, by his removal to Oregon to reside in 1843—at that time a foreign country to Mexico and California—he lost, by the law of Mexico, whatever title he had previously acquired, and the land then became grantable to Miranda, or to any other Mexican citizen. By the colonization law of 1824, it is enacted as follows: "*No one* who, by virtue of this law, shall acquire the ownership of lands, *shall retain them if he shall reside out of the territory of the republic.*"* Now, it is

* Halleck's Report, Appendix No. 4; Jones's Report, p. 34, § 15.

undisputed that Ortega left California in 1843, and resided in Oregon until 1848.

It is not necessary to put this point on the ground of intentional abandonment. But the fact no doubt was, that when Ortega left California, he went abandoning everything he left behind, and intending never to return. The cause of his leaving was a quarrel with his wife, whom he suspected of conjugal infidelity. He separated from her, took all his goods with him—one cow and a couple of horses—and went. He said he was going to Oregon to remain; he said he had reasons for leaving the country, family reasons; he accused his wife of inconstancy to her marriage vows, and *said he was never coming back.* The facts that he was jealous of his wife, and that he left the country for that reason, are not denied. The facts that, years afterwards, he endeavored to return to California, but was prevented for a time by shipwreck, and afterwards did actually return, show only the states of his mind at those times. That, however, is unimportant. The true inquiry is: What was his intention when he first went away? If he went away with the intention of residing permanently abroad, and had any title to the rancho San Antonio previously, he lost it by the express law of Mexico. It is also to be observed in this connection, that it was not until after the removal of Ortega to Oregon that Miranda applied for his grant, even admitting, for the sake of argument, that he had not been occupying the land previously on his own account. Under the law of Mexico, therefore, after that event he had a clear right to ask for a grant of the land to himself.

4. In point of fact, the documentary and other evidence on which this claim is founded is false and fraudulent. The discussion of this question of fact involves a consideration of the oral evidence, in connection with the archive evidence already considered. The alteration of dates is a bad circumstance. The identity in appearance of the two maps, another. Miranda's map cannot have been copied from Ortega's; for the latter, if it had existed, was, according to the case set up, in Alvarado's private custody, and not

accessible to Miranda. The oral evidence, considered separately, presents a distressing conflict of testimony. One class of witnesses swear strongly in favor of the genuineness of the Ortega title-papers; to the fact of the occupancy of the land by Ortega (although he himself swears that he never did occupy it); to the tenancy of Miranda under Ortega, and generally to the validity and *bonâ fides* of that title throughout. Another class of witnesses swear to the occupancy of the land by Miranda, for his own benefit; to his notorious ownership of the land; to the poverty of Ortega; to his abandonment of California, and absence from the country until after its cession to the United States,—in short, to the validity and integrity of the Miranda title.

In this labyrinth of conflicting statements, one leading fact appears to guide us, and that is, while the one class of witnesses seeks by oral evidence not only to create a valid title, in the absence of archive evidence, but contrary to it, the testimony of the other class, on the contrary, is fortified by archive evidence, and is in harmony with it from beginning to end. Supposing the weight of oral evidence on each side to be equal, this fact alone is sufficient to determine the preponderance against the claim in this case.

Mr. Justice SWAYNE delivered the opinion of the court.

The appellant claims the land in controversy under a grant alleged to have been made by the proper Mexican authority to Antonio Ortega. In support of the title the following documentary evidence was introduced:

A petition by Ortega to Governor Alvarado of the 12th of June, 1840.

A reference of the petition, on the 20th of the same month, by the governor to Vallejo for a report.

An informe by Vallejo, of the 20th of July following. A decree by the governor, of the 10th of August, 1840, in which he says:

"I grant to Don Antonio Ortega the land petitioned for, with the understanding that, to expedite the respective title and to regulate the necessary documents, by which he shall mark out

the lines and perform the necessary acts, he shall make a map as required by law, which he will present opportunely. This decree shall be returned to him, that it may serve to him as a security during the other operations indicated."

And lastly, a diseño of the land.

These papers were all produced from the private custody of Ortega.

An expediente of Juan Miranda for the same land is also found in the record. It consists of the following documents:

A petition by him to the alcalde of Sonoma, of the 21st of February, 1844. (It states that he had been in possession four years, under a concession from Vallejo, but that the papers had been lost.)

A certificate from Jacob Leese, that Miranda had been in possession several years, and that the land did not belong to any pueblo or corporation.

An order of the 30th of April, 1844, by Governor Micheltorena, that the secretary of state should report upon the petition.

An informe of May 2d, 1844, by Jimeno, setting forth that Miranda had occupied the land four years "by cultivation and by having a house with all his goods thereon," as appeared by the report of the justice of Sonoma, and advising that the grant be made.

An order by the governor, of the 30th of May, 1844, that the title issue. A diseño of the land.

And two drafts of an instrument, granting the land to Miranda, prepared for the signature of the governor, but not signed.

Ortega was examined as a witness. [His honor here read the testimony of Ortega as given, *ante*, p. 665.] A large mass of testimony from other witnesses was taken by the parties. It would be a waste of time to analyze it, to weigh against each other the parts which are in conflict, or to attempt to explain or reconcile their antagonisms. Such a process could subserve no useful purpose. It will be sufficient to indicate the conclusions at which we have arrived.

The expediente of Miranda was found among the proper archives. It is referred to in Jimeno's Index. The title never passed into a formal grant by the governor, but it is shown that this arose from the illness of Miranda and the disturbed condition of the country. The record is wholly silent as to any objection by the governor or from any other quarter. Ortega testified that he was never personally in possession. It is clearly proved that the possession of Miranda commenced as early as 1838, and continued from that time. The petition of Bojorques in 1844, and the grant to him in 1845; the petition of Padilla in 1844, and the accompanying map, and the diseño of the rancho Olimpale, all refer to the rancho in controversy as "the land of Juan Miranda." These documents show that Miranda was regarded in the neighborhood as the owner, and not as a tenant. We are entirely satisfied, from the evidence found in the record, that he held in his own right and not vicariously for Ortega. The petition of those claiming the title of Miranda was withdrawn from before the Board of Land Commissioners. Why, does not appear. Whatever the cause, its withdrawal cannot lessen the light which the facts relating to it throw upon the merits of the claim of Ortega.

The expediente of Ortega is confronted by strong suspicions of its *bona fides*. There is no trace of it among the proper archives. It does not appear that any paper belonging to it was ever in any public office before the petition in this case was filed by the appellant's intestate. The Mexicans of the Spanish race, like their progenitors, were a formal people, and their officials were usually formal and careful in the administration of their public affairs. Full archive evidence exists in the case of Miranda. Its absence in this case is not satisfactorily accounted for.

Ortega abandoned his wife in 1843, and went to Oregon. He was poor and had been so for years. It does not appear that, from the time of the concession to the period of his departure, he made the slightest effort to consummate his title. He returned in 1847. There is reason to believe that when he left the country he intended finally to abandon his

claim, if he had not done so before, and that such was the understanding of the Mexican authorities.

It appears that the order of reference made by the governor, which is found in the margin of the petition, was originally dated in 1841, and that this date was subsequently changed to 1840 with ink of a different color. A clerical mistake in writing the date originally, by antedating it a year, is unnatural and improbable. As it then stood it was subsequent in date to the report for which it called. It has been suggested that 1841 was the true and proper date, and that the concession was made after the return of Ortega from Oregon, and that it was antedated in 1840,—the writer not observing that the order of reference was dated in 1841,—and that, upon this fact being discovered, the date of the reference was changed to cure the discrepancy. The alteration is unexplained and unaccounted for. The evidence leaves us in the dark as to the time, the motive, and the circumstances.

It seems to be admitted that the diseño of Ortega and that of Miranda were prepared by the same hand and at the same time. Alvarado made the order of reference at Monterey on the 20th of June, 1840, and the order of concession at the same place on the 10th of August, 1840, or 1841. In his last deposition this passage occurs:

"*Question.* You have said that Ortega twice presented himself to you in Monterey, in 1840, in relation to this grant; state what papers, if any, he presented to you on the occasion of his first visit, and what papers on the occasion of his second visit?

"*Answer.* My recollection is that he brought with him each time the same papers—that is, the petition; but the first time without any map; the second time the petition and diseño together. He might have come other times, but I only recollect those two times."

Ortega testified to the same effect as to the diseño.

That both are mistaken upon the subject is shown by the concession. In that instrument, which was given at the second interview between them, Alvarado says: "He" (Ortega) "shall make a map as required by law, which he will

present opportunely." There was, then, no map present at that time. When was it prepared and added to the other papers? It is claimed, on behalf of the United States, that it was made when the diseño of Miranda was prepared in 1844, and came into the hands of Ortega by some means unexplained after his return from Oregon. Upon this subject, as in regard to the altered date of the concession, the evidence is inconclusive and unsatisfactory. The obscurity is increased by the character of some of the leading witnesses who have testified in support of the claim. But the solution of these difficulties is not necessary to the determination of the case. It has been held by this court, in a long and unbroken line of adjudications, that where there is no archive evidence, and its absence is unaccounted for, and there has been no such possession as raises an equity in behalf of the party, and especially where, in addition, the expediente produced is tainted with suspicions of fraud, the claim must be rejected. We feel no disposition to relax the rule, and it is fatal to the case of the appellant.

DECREE AFFIRMED.

PARKER *v.* PHETTEPLACE ET AL.

A question of fact, arising upon a bill to set aside conveyances as made in fraud of creditors, in which, though the court agreed that "there was ground of suspicion," it gives weight to an answer positively denying the facts and fraud charged; this answer being supported by the positive testimony of a witness, who, though not a defendant in the case, was a principal actor in the transactions charged to be fraudulent. MILLER, J., dissenting.

APPEAL from the Circuit Court for the District of Rhode Island.

The complainants below, appellants here, filed a bill as judgment creditors, to set aside conveyances of the property of one Edward Seagrave, their debtor, and made, as they alleged, to hinder and delay the execution of their judg-

ment. The judgment was recovered in the Circuit Court of the United States, at November Term, 1854, against the said Seagrave, for $60,520.88, and costs, in a suit commenced on the 26th October previous. Execution was duly issued and part of the debt collected, the remainder still remaining due and unpaid. The conveyances charged to be fraudulent were executed by the judgment debtor on the 17th November, 1854, and the 4th January, 1855; the *first* to Phetteplace & Seagrave, a firm in Providence, Rhode Island, of certain real estate and stocks; the *second*, an assigment to one Updike, of all his real and personal property, in trust for the benefit of creditors; giving certain preferences specified in the assignment. The Seagrave of the firm of Phetteplace & Seagrave, was *George* Seagrave, a *brother* of Edward, the debtor. Both were residents of the same place, Providence.

It appeared from the proofs, that in the early part of 1853, Edward Seagrave, the debtor, Merrit & Co., and S. Harris, associated together to speculate in the purchase and sale of wool, the purchases to be made upon the credit of the paper of the parties, to be discounted at the banks. In this way, Seagrave's liabilities from acceptances and indorsements amounted, in July, 1853, to about $176,000. Becoming alarmed at the magnitude of this debt, he made an arrangement with his associates, by which he sold out his interest in the business to them; and in consideration that they would pay all the outstanding paper, and would indemnify him against the same, he agreed to pay them $33,500. This sum was paid and the indemnity given. These associates failed to take up the paper, and on the 4th February, 1854, went into insolvency. Seagrave stopped payment on this partnership paper the same day, but continued his individual business until the 4th January, 1855, when he made the assignment to Updike for the benefit of his creditors. In the autumn of 1854, Phetteplace & Seagrave, the defendants below and appellees here, a firm in Providence, as already stated, finding the outstanding paper of the associates in the wool speculation, held by the banks, at a great discount, purchased of that paper to the amount of some $45,000, at the

rate of from fifteen to twenty cents on the dollar, and afterwards applied to Edward Seagrave, the judgment debtor, one of the parties to the paper, for payment or security. The stocks and real estate conveyed for the security and payment of this indebtedness, together with the property assigned to Updike for the benefit of creditors, constitute the subject of complaint in the bill.

The bill charged that this outstanding paper against Edward Seagrave was purchased under an arrangement or understanding that he should have the benefit of the difference between the nominal value and the per cent. paid; that this proportion of the stocks and real estate transferred to the purchasers to secure the payment belong to him, and is held in trust for his benefit; and that the scheme was contrived for the purpose of hindering and defeating their execution; and further, that the assignment to Updike was a part of the same fraudulent device.

The answer denied positively the allegations of the bill, and Edward Seagrave, who being now resident out of Rhode Island, was not made a defendant in the case, and was called by Phetteplace & Seagrave as a witness, testified in like positive manner that there was no understanding between him and Phetteplace & Seagrave, such as was alleged; that he had no interest in the paper, and that he had never received any profit from it.

The court below, after a full hearing of the case, dismissed the bill; which was the matter complained of here.

Mr. Jenks, for the creditor, plaintiff in error—admitting that by the law of Rhode Island an insolvent debtor might make preferences, if fair ones—relied largely on the special facts of this case, which he brought together from every part of the testimony, and presented in a strong and highly colored aspect. It was not to be expected that proof could be brought of a covenant in writing to commit this fraud, nor even proof of words. The parties here were intelligent men; far too intelligent for that. *That* would be gross and vulgar fraud. But the deed, not the less, was done. The greatest

Argument for the plaintiff in error.

crimes which power ever has commanded have been done without a word.*

An understanding—"signs" parleying again with "signs"—is all that is necessary to allege. The relations of the parties speak trumpet-tongued.

George Seagrave was Edward's brother; both lived in the town of Providence; both had the means of knowledge, and

* The great poet of our language touches finely on the sentiment which counsel here enforced. And when the murder of a prince was to be accomplished by a royal villain uncle, it was done upon "the *winking* of authority." Every one recalls the two great scenes in King John, before and near the death of Arthur. The king is now addressing his attendant, Hubert. I quote from memory.

King John. I had a thing to say,—but let it go.
If that thou couldst see me without eyes,
Hear me without thine ears, and make reply
Without a tongue, using *conceit* alone,—
Without eyes, ears, and *harmful sound of words*,—
I would into thy bosom pour my thoughts:
But ah! I will not. . . . .
He lies before me. Dost thou understand me?
Thou art his keeper.
Hubert. And I will keep him *so*,
That he shall not offend your majesty.

At a later day, when remorse and terror have seized the conscience-stricken king for Arthur's death, he reproaches his attendant, Hubert, with having understood him when only he "*faintly* broke" the subject.

King John. It is the curse of kings to be attended
By slaves, that take their humors for a warrant
To break within the bloody house of life;
And, on the winking of authority,
To understand a law. . . . .
Hadst thou but shook thy head, or made a pause,
When I spake *darkly* what I purposed,
Or turned an eye of doubt upon my face,
As bid me tell my tale in *express* words,
Deep shame had struck me dumb.
But thou didst understand me by my *signs*,
And didst *in signs* again parley with sin;
Yea, without stop didst let thy heart consent,
And consequently thy rude hand *to act*
The deed which both our tongues held vile to name.

REP.

actually knew the amount of property held by Edward, and that a conveyance to them by Edward, of the property described in the present suit, would deprive him of all means of paying his other creditors. This knowledge, Mr. Jenks contended with force, threw upon them the burden of proving the fairness of the transaction. That they had not done; and it is admitted that they purchased depreciated paper, which Edward Seagrave had neither paid, nor expressed the least intention of paying, and then claimed payment in full, knowing that such payment would deprive the debtor of all means of paying anything to his other creditors. They were not ordinary or just creditors. They came to be creditors at all but as purchasers of discredited paper. The simple idea of the thing—the idea of one brother going into the street, to purchase for almost nothing the notes of his dishonored brother, whom, in the purchase, it was his interest of course to dishonor further; and then, with his business accomplished, coming back with the notes in his hand to obtain payment of them in full,—was disgusting; and would, of itself, fill every honorable mind with suspicion and disesteem. Did he buy the notes, meaning to put into operation against *a brother* the sharp and cruel means of adverse process of the law to collect them? Certainly not. He knew they would be paid without this. Such was the understanding, and herein was the fraud.

The assignment to Updike was void, and was part of the scheme to cover up the fraud by which the property of Edward Seagrave was placed in the hands of his own brother and Phetteplace. Such assignments are no obstruction to the execution of legal process, or to the granting of relief in equity.*

Mr. Potter, contra, contending that the purchase of the notes of an insolvent merchant was a practice perfectly known and legal, denied the existence of fraud, and relied

* 1 American Leading Cases, 17–75; Stewart *v.* Spenser, 1 Curtis, 157; Heydock *v.* Stanhope, Id., 471; In the matter of Durfee, 4 Rhode Island, 401.

largely, among other testimony, on the effect of the positive denials in the answer, which not only were uncontradicted by two witnesses, or by one witness and circumstances, but were fully supported by Edward Seagrave, the person best competent to declare his purposes and property.

Mr. Justice NELSON delivered the opinion of the court.

The case turns upon the answer to be given upon the evidence to this charge in the bill, as it is agreed that, according to the law of Rhode Island, the debtor in insolvent circumstances has a right to prefer creditors in the distribution of his estate, or in the application of it to the payment of his debts.

The charge is denied in the answers, and Edward Seagrave, the debtor, not made a party to the bill, who was called as a witness for the defendants, sustains the answers. He testified that there was no agreement or understanding between him and the firm of Phetteplace & Seagrave that he was to share in the profits arising out of the purchase of this paper, nor had he any interest in the same, nor has he ever received any share of the profits, nor do the purchasers hold any portion of them in trust for his benefit. His testimony upon this point, and which constitute the main issue in the case, is full and explicit in the denial of any participation, directly or indirectly, in the transaction. The evidence relied on on the other side to overcome the answers of the defendants, and the testimony of this witness, is circumstantial and argumentative.

The court below, on a very full consideration of all the proofs, came to the conclusion that the purchase of the paper by Phetteplace & Seagrave was an independent transaction, without any agreement or understanding with the debtor; that their title to the paper was absolute and unqualified, and that the debtor had no interest in the same, legal or equitable, present or future, and rendered a decree dismissing the bill. We agree that there is ground of suspicion that the purchase was made by the friends and for the benefit of Edward Seagrave, the debtor, but concur with the court that the weight

of the proofs is otherwise, and the bill properly dismissed. The question upon the assignment to Updike is so intimately connected with the transaction we have just examined, the conclusion arrived at in the one must control that in the other.

The principal point made against this assignment is, that the preference in it in favor of Phetteplace & Seagrave for certain debts and liabilities, embrace the outstanding paper which they had purchased, and which was secured by the previous conveyances. But, on looking into the assignment, this interpretation is not warranted. The preference relates to other indebtedness and liabilities.

It is also said that Edward Seagrave embraced in this assignment the purchased outstanding paper which he took up, on giving security to the purchasers. But this was proper, as Merrit & Co., and Harris, who were on the paper, had bound themselves to indemnify Seagrave against it, and were, therefore, still liable upon it; and were to the assigns on the transfer of it to him.

DECREE AFFIRMED.

Mr. Justice MILLER dissented.

UNITED STATES *v.* GOMEZ.

Where the question was, whether a party should be heard on appeal, and the effect of refusal to hear him would have left in full force a decree that the court was "not prepared to sanction," it was *held:*

1. That an order to enter up a decree was not to be taken as the date of a decree entered subsequently "*now for then,*" but that the date was the day of the actual and formal entry.
2. That the object of a citation on appeal being *notice,* no citation was necessary in a case where in point of fact, by agreement of parties, actual and full knowledge by the party appellee of the other side's intention to appeal appeared on the record; and where, moreover, by such a construction as the court was inclined to put on part of the case, the appeal was taken in the same term when the decree was made.
3. That a certificate that a transcript of a record was a "full, true, and correct copy of *all* the proceedings, entries, and files in the District Court

for the Southern District of California, *except* the transcript sent up from the Board of Land Commissioners in the case," was so far good that the party alleging it to be bad was referred, if dissatisfied with the transcript, to his remedy of a suggestion of diminution and motion for *certiorari*.

MOTION to dismiss an appeal from the decision of the District Court for the Southern District of California, as not having been taken in time, that is to say, within five years; as having been made without citation, and as not founded on a properly certified transcript. The case was thus:

Gomez had presented a petition to the board appointed by the act of Congress of March 3d, 1851, to settle private land claims in California, praying for confirmation of a tract called the *Panoche Grande*, and which, he alleged, had been granted to him in 1844 by Governor Micheltorena. The board rejected his claim, and he appealed to the District Court accordingly. The case came on to be heard in that court *June 5th*, 1857, and the record proceeds:

"Whereupon the court being fully advised in the premises, delivered its *opinion*, confirming the claim to the extent called for in the transcript and papers, *three* leagues; and a *decree was ordered to be entered up in conformity to said opinion.*"

This entry is dated *June 5th*, 1857, the same day the cause was heard. On the *7th of January*, 1858, a decree *in extenso* was filed, making the usual recitals of form, describing the land "confirmed" as "*three* leagues, more or less, situate in the county of Monterey, State of California; bounded on the north by lands of Julian Usura, on the south by the hills, on the east by the Valley of the Jularés, and on the west by lands of Francisco Arias." The decree ended thus:

"And it appearing to the court that on the 5th June, A. D. 1857, the lands in this case had been confirmed by the court to the said claimant and appellant, and it having been *omitted to sign and enter a decree therefor at the date last aforesaid, it is ordered that the same be done now for then.*"

On the *4th of February* of this same year the court "or-

dered that the appellant have leave to *amend the decree filed in the case, by substituting another in its stead.*" Gomez did accordingly, on the day following, to wit, the 5th of February, 1858, procure another decree to be entered in form and *in extenso*. It was much like the former decree, except that it described the tract by name, "*Panoche Grande*," giving the boundaries as before, describing it as containing *four* leagues. This decree ended thus:

"It appearing to this court that heretofore, to wit, on the 5th day of June, 1857, at a regular term of this court, the claim of the appellant in this case had been confirmed by this court, but that it had been omitted by this court to sign the decree of confirmation at the time the same was made: It is therefore further ordered by this court that the same be signed *now as for then.*"

Subsequently to this entry the United States obtained a rule to open the decree and reinstate the case, with leave to take testimony, assigning, as reason, that the decree had been improvidently entered; that new evidence, now discovered, would show the claim to be fraudulent; and that the decree itself had been fraudulently procured. Evidence was accordingly taken tending to show that the District Attorney of the United States himself—one P. Ord—had been a party interested in the claim. The court (Ogier, J.), thereupon, on the 21*st March*, 1861, made this order:

"Whereas it has come to the knowledge of this court that a decree heretofore rendered by this court in this case, was *fraudulently obtained* by misrepresentations of the then district attorney, P. Ord, and other counsel in the case; and it appearing to the satisfaction of the court, from testimony on record in the case, that the then district attorney, counsel for the United States, was, at the time of making said decree, interested in the land claimed in said cause, adversely to the United States, and representing to the court that there was no objection to the confirmation of the claim aforesaid on the part of the United States, a decree was entered without an examination by the court into the merits of said claim, thus deceiving the court and obtaining a decree in his own favor under the false pretence of represent-

ing the interest of the United States. It is therefore *ordered that all proceedings heretofore had in said cause be set aside, and the cause be put on the calendar and set for trial* de novo *according to law.*"

Another judge having afterwards been appointed to the bench of the District Court, a motion was now made to vacate this order of March 21st, just before recited, and on the 4th of August, 1862—June Term of that year—the new judge remarking that he was not surprised that his predecessor, on learning the facts, "should have been indignant and set the whole aside," yet conceiving that after the lapse of a term the court could not alter, change or modify a decree unless to correct some clerical error, "with great reluctance" *vacated* the last order which that said former judge had made, and by which the proceedings had been set aside and the case placed on the calendar for trial *de novo.*

At this same term, on the 25th August, 1862, *on motion in open court*—no citation, however, having been issued—an appeal was allowed the United States to the Supreme Court of the United States "from the *decision* and *decree of this court confirming the claim of the claimant herein;*" and on the 6th October following, the district attorney, by writing filed, reciting that the claimant was "desirous of moving the court to set aside" the order for an appeal, agreed that all proceedings should be stayed till the next term, "so as to give the claimant an opportunity to make such motion." The counsel of the claimant, on the 24th of November following, gave notice that on the opening of the court, on the 1st December, 1862, he would make a motion to vacate the order granting the appeal, and the motion was accordingly heard, and the order for appeal subsequently vacated.

The transcript of the record in the case was certified (under the act of Congress of 6th August, 1861, § 2), by Mr. B. C. Whiting, "United States District Attorney for the Southern District of California," and certified "that the foregoing one hundred and seven pages are a full, true, and correct copy of *all* the proceedings, entries, and files in the District Court of the United States for the Southern District of California,

except the transcript sent up from the late Board of Land Commissioners in the case of *United States* v. *Vincente Gomez*, No. 393, on the docket of the said court, for the claim called '*Panoche Grande.*'"

The motion to dismiss the appeal as already indicated was on three grounds:

1. Because no appeal had been taken until more than five years after the decree had been entered in the case, and not taken within the time therefor, which this court had decided to be the limit.

2. Because there had been no citation to the opposite party.

3. Because what purported to be the transcript was not made and certified according to law, and was defective both for omissions and additions, and contained matters forming no portion of the record.

Messrs. Brady, Gillet, and Eames, in support of the motion:

1. By the Judiciary Act of 1789,* it is enacted, that "writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of," and by the act of 1803,† that "appeals shall be subject to the same rules, regulations, and restrictions as are prescribed by law in cases of writs of error." In *United States* v. *Pacheco*,‡ it was held, that as the act of Congress of the 3d March, 1851, does not specify the time within which an appeal must be made to the Supreme Court from the District Courts of California, the subject must be regulated by the general law respecting writs of error and appeal. An appeal, therefore, must be taken within five years from the final decree. The first inquiry, therefore, is, from when does the time begin to run? From the time the decision is pronounced and entered in the minutes, or not from until the day when the decree is formally drawn up, signed, and entered? In *Fleet* v. *Young*,§ the Court of Errors in New York

* 1 Stat. at Large, 84. † 2 Id., 244. ‡ 20 Howard, 261.
§ 11 Wendell, 522; and see Silsbee *v.* Foot, 20 Howard, 295.

held that the time for suing out the writ of error commences from the time of the entry of the rule for judgment, and not from the time of filing the record. The statute of New York is similar to the law of Congress. The chancellor said, in the case cited: "The language of the statute, as contained in the recent revision, is that the writ of error shall be brought within two years after the rendering of the judgment or final determination of the court, and not after," &c. Both the law of Congress and the statute of New York differ from the English statutes as they were when this decision was made. By the English statute, a writ of error could be brought within twenty years after the judgment record signed and filed, and judgment entered; by rule of the House of Lords, an appeal must be brought within five years after the enrolment of the decree. In *Fleet* v. *Young*, the chancellor discusses the difference between the New York statute and the English statute, and also says: "In point of principle, it is not very material whether one construction or the other is adopted, *as the plaintiff in error may himself obtain permission to make up the record, if the adverse party neglects to do it within a reasonable time after the actual rendition of the judgment*,* and it is not necessary to wait for the filing of the record before a writ of error can be sued out. It is sufficient if the judgment be signed and filed at any time before the actual return of the writ of error, although after the return day is past."†

The case of *Lee* v. *Tillotson*, before the Supreme Court of New York,‡ is also in point. That was a motion by the defendant for leave to draw up a statement of facts from the special report made by referees, and to have such statement settled and inserted in the judgment record, to the end that he, the defendant, might bring a writ of error. It was objected that more than two years had elapsed since the decision of the motion to set aside the report, but not since judgment was perfected by filing the record, &c. The court say:

* Jackson *v.* Parker, 2 Caines, 385.

† Arnold *v.* Sandford, 14 Johnson, 417. ‡ 4 Hill, 27.

Argument in support of the motion.

"Although it does not appear upon the papers that a rule for judgment was entered at the next term after the report was made, there can be no doubt that it was done; and, besides, if the rule was never entered, *it would be almost a matter of course to allow it to be done nunc pro tunc.* But we think the question of limitation does not turn on the time of entering the rule for judgment, but on the time when the final determination was made on the motion to set aside the report. The rule for judgment was undoubtedly entered in May Term, 1837, and, if we date from that, the time for bringing a writ of error had expired before the motion for a rehearing was made, which was in May, 1840. The question, then, is whether the limitation dates from the final determination of the court, which was in July, 1840, or from the subsequent filing of the judgment record in January, 1841. The statute provides that 'all writs of error upon any judgment or final determination rendered in any cause, shall be brought within two years after the rendering of such judgment on final determination, and not after.' The judgment on final determination in this cause was rendered in July Term, 1840, when the motion which had been made to set aside the report of the referees was denied. The record which was afterwards filed was not the judgment, but only a written memorial of the judgment which had been previously rendered. The Court of Errors arrived at the same conclusion, on this question, in *Fleet* v. *Young*. It follows, that the time for bringing a writ of error has already expired, and we ought not to put the plaintiff to the expense and ourselves to the inconvenience of settling a case when we see it can do no good."

In the English case of *Smythe* v. *Clay*,* the decree was actually enrolled within five years from the time of bringing the appeal, but more than twenty years after the decree was actually rendered. It seems to have been held that the enrolment of any decree pronounced by the Court of Chancery is deemed as being, by legal relation, the act of the same day on which the decree was pronounced.

Then we have the *nunc pro tunc* clause added, in terms, to the decree, signed, filed, and entered the 5th February, 1858.

* 1 Brown's Parliamentary Cases, 453; Case No. 5 of Appeals.

In *Lee* v. *Tillotson*, supra, it is said such an order would have been a matter of course. The effect of the clause specially inserted is, of course, to make more specially the judgment relate back to the time when the decree should have been entered.

This appeal, therefore, not having been in time, the decree of the District Court must stand. The order of 21st March, 1861—an order made near four years after the date when that which we assert was the decree was rendered—is a nullity; for, as this court has declared,* "no principle is better settled, or of more universal application, than that no court can reverse its own final decrees or judgments for errors of fact or of law, after the term in which they were rendered, unless for clerical mistakes, or reinstate a cause dismissed by mistake."

2. If the appeal had been taken in time it is a nullity, because no citation was taken or served. In *Hogan* v. *Ross*,† this court said, that where no citation had been issued or served, the cause must be dismissed. In *Villabolos* v. *United States*,‡ the court held that an entry of appeal in the clerk's office did not remove the cause; and that where an appeal was not taken in open court at the term at which the decree was rendered, in the absence of a citation signed by the judge allowing it, the appeal was a nullity. At the same term, in *United States* v. *Curry*,§ the rule was iterated.

3. The district attorney has not certified the *whole* record. He certifies that the one hundred and twenty-seven pages are "a full, true, and correct copy of all the proceedings, entries, and files in the District Court for the Southern District of California, *except* the transcript sent up from the late Board of Land Commissioners." This transcript he does not vouch for as a copy of that on the files. Hence the exemplification cannot be relied on. How much may have been omitted, how much added, cannot be ascertained. It must accordingly be rejected *in toto*.

* Ex parte Sibbald *v.* United States, 12 Peters, 488.
† 9 Howard, 602. ‡ 6 Id., 81. § Id., 106.

Messrs. Bates, A. G., and Black, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

This was a petition for the confirmation of a land claim under the act of the third of March, 1851, and the case comes before the court upon the motion of the appellee to dismiss the appeal. Appellee in his petition to the commissioners appointed under that act, asked for the confirmation of a claim to a tract of land, called *Panoche Grande*, of the extent of four square leagues, and alleged as the foundation of the claim that the tract was granted to him in the year 1844, by Governor Manuel Micheltorena. Eighth section of the act requires the claimant to file the documentary evidence of his title with his petition, but the claimant in this case did not comply with that requirement, because, as he alleged, his title-papers were lost, and he gives in detail the circumstances of their loss about the time the military and naval forces of the United States took possession of Monterey. Unable to exhibit his title-papers, he relied upon parol proof to show their existence, loss, and contents. Commissioners rejected the claim, and the claimant appealed to the District Court for the Southern District of California. Cause came on to be heard on the fifth day of June, 1857, and the record states that after argument of counsel the same was submitted to the court for final adjudication. Whereupon, as the record further states, the court being fully advised in the premises, delivered its opinion, confirming the claim to the appellant to the extent called for in the transcript, to wit, three leagues or sitios de ganado mayor, and a decree was ordered to be entered up in conformity to said opinion.

Dismissal of the appeal is claimed upon three principal grounds. First, because more than five years elapsed after the decree was entered before the appeal was claimed and allowed. Secondly, because there is not any citation to the opposite party. Thirdly, because the transcript of the record is incomplete and not duly certified.

I. Appeal to this court was allowed on the twenty-fifth day of August, 1862. Opinion of the court confirming the claim

was delivered on the fifth day of June, 1857, more than five years before the appeal was taken. Claimant assumes that the entry made in the minutes on that day is the final decree, and consequently that the appeal was too late. But the proposition cannot be sustained, as is evident from a moment's inspection of the record. Entry is that a decree was ordered to be entered up in conformity to such opinion. No decree of any kind, however, was drawn up, entered, or filed on that day. On the contrary, the record shows that on the seventh day of January, 1858, a decree was filed in the case, and the decree itself, after referring to the fact that the claim had been confirmed on the fifth day of June, 1857, states, that "having been omitted to sign and enter a decree therefor at the date last aforesaid, it is ordered that the same be done now for then." Decree, as thus filed, was for three square leagues of land, more or less, situated in the county of Monterey, State of California, and bounded on the north by lands of Julian Ursura, on the south by the hills, on the east by the valley of Tulares, and on the west by lands of Francisco Arias. Donee was not satisfied with the decree, and on the fourth day of February, 1858, obtained leave to amend the same by substituting another in its stead. Pursuant to that leave, on the following day he filed a new decree, enlarging the description of the tract to four square leagues, and the same was entered and signed by the district judge. Argument can add nothing to the force of this statement, as drawn from the record. Plainly there was no decree of any kind in the case until the seventh of January, 1858, and as that was ordered to be amended by substituting another in its stead, the final decree in the case was that of the fifth of February following. Five years, therefore, had not elapsed after the decree was entered before the appeal was taken, and consequently the first ground assumed in the motion cannot be sustained.

II. Want of citation is the second ground of the motion, and on this point also it becomes necessary to examine the record. Final decree was rendered on the fifth day of February, 1858, but on the twenty-first day of March, 1861, the

court entered a decree in the cause that all the proceedings heretofore had in said cause be set aside, and that the cause be put on the calendar and set for trial, *de novo*, according to law. Transcript shows that the order vacating the decree was passed upon the ground that the decree had been fraudulently obtained, it appearing to the satisfaction of the court from the testimony in the case that the district attorney was, at the time of making the decree, interested in the land claimed in the cause adversely to the United States.

Statement of the court also shows that the district attorney represented to the court that there was no objection to the confirmation of the claim, and that a decree was consequently entered without an examination of the merits of the claim, and the charge is that the district attorney deceived the court and obtained a decree in his own favor under the false pretence of representing the interests of the United States. Testimony was taken upon the subject, and the charge as stated was fully proved. Whereupon the court vacated the decree, and ordered the cause to stand for trial. Proceedings in the cause in the meantime took place, in this court, as more fully appears in the case *United States* v. *Gomez*, 23 How., 326, to which particular reference is made for the character of those proceedings. Delay ensued, and in the meantime a new appointment of district judge was made. Application was then made by the claimant to set aside the order vacating the original decree, and at the June Term, 1862, held on the fourth of August, of the same year, the court ordered that the previous order, made and entered on the twenty-first day of March, 1861, setting aside all proceedings had in the cause, and placing the same on the calendar for trial, *de novo*, be and the same is hereby vacated and set aside. United States, on the twenty-fifth day of August, in the same year, took the appeal which is under consideration. Appeal was taken in open court, and at the same term in which the order was passed restoring the original decree, or rather vacating the order of the twenty-first of March, 1861, setting it aside and placing the cause on the calendar for trial. Appeal, it is true, purports to be from the decision and decree of the

court confirming the claim, but it was taken from that decree not only after it had been vacated, but after the decree directing it to be vacated had itself been stricken out, and the original decree had been restored. Admitting that the order restoring the original decree was one of any validity, then indeed no citation was necessary, because the appeal was taken in open court, and might well be regarded as taken at the same term in which the decree was entered. But it is unnecessary to place the decision entirely upon that ground. Granting that the appeal is from the original decree, and that the question is wholly unaffected by the subsequent orders, still it is quite clear that no citation was necessary in this case. Claimant at once signified his intention to move the court to set aside the order granting the appeal, and thereupon it was stipulated and agreed between the parties that all further proceedings should be stayed until the next term of the court. Notice in writing was accordingly given by the claimant that he would submit such a motion at the next term at the opening of the court. He did submit it, and the parties were heard, and the court gave an opinion sustaining the motion. Petition for an injunction was afterwards filed to prevent the appeal, and the parties were heard upon that subject, but the injunction was denied. Object of the citation is notice, and under the circumstances of this case that purpose seems to have been fully answered, and the objection is accordingly overruled.

III. Third ground of the motion is that the transcript is incomplete, and that the same is not duly certified. Second section of the act of the sixth of August, 1861, provides that the District Attorney of the United States of any district in California, may transcribe and certify to the Supreme Court of the United States the records of the District Court of his proper district, in all land cases wherein the United States is a party, upon which appeals have been or may be taken. 12 Stat. at Large, p. 320.

Certificate in this case is certainly made by an officer authorized by law to make it, and we are not able to perceive that it is defective. Remedy of appellee, if the transcript is

incomplete, is a plain one and one of daily use. He should suggest diminution, and ask for a *certiorari*, which is readily granted when applied for in season.

In view of the whole case, our conclusion is that the motion to dismiss the appeal must be overruled. Effect of the motion, if granted, would be to leave the decree below in full force and unreversed, which is a result that at present we are not prepared to sanction. When the cause comes up upon the merits, we shall desire to hear the counsel upon the question whether there is any valid decree in the case, and if not, as to what will be the proper directions to be given in the cause. Those questions are not involved in the motion to dismiss, but they will arise when the merits of the case are examined, and will deserve very careful consideration.

MOTION REFUSED.

HOUGHTON *v.* JONES.

1. This court will refuse to consider objections to the documentary evidence of title produced on the trial of an action of ejectment, unless they are presented in the first instance to the court below, if they are of a kind which might have been there obviated.
2. By the law of California, deeds conveying real property may be read in evidence in any action when verified by certificates of acknowledgment, or proof of their execution by the grantors before a *notary public*.
3. The right to cross-examine a witness is limited to matters stated in his direct examination.

THIS was a writ of error to the Northern District of California; the case being thus:

By the act of Congress of March 3, 1851, "to ascertain and settle the private land claims in the State of California," it is provided, "that each and every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the commissioners," &c., who are directed to examine into and "*decide upon the validity of the said claim.*" And it is further declared that "all lands, the claims to which shall

not have been presented to the said commissioners within two years after the date of the act, shall be deemed, held and considered as part of the public domain of the United States."

With this act in force, Mrs. Jones brought ejectment, in 1860, against Houghton and another, for land in Contra Costa County, in the State of California. She deraigned title from the Mexican government, through a grant issued in August, 1841, by Juan B. Alvarado, then Governor of the Department of California, and by sundry mesne conveyances from the grantees. It did not appear on the trial below that the grant had ever been laid before the Board of Commissioners, as required by the act above quoted, or in any way passed on by it. But no objection was made *on the trial* to the grant from this want of presentation to the board, or consideration by it.

One of the conveyances through which the plaintiff, Mrs. Jones, claimed was read in evidence, on proof of its execution, certified by a *notary public*. It is necessary, in that connection, to mention that a statute of California, "concerning conveyances," approved April 16th, 1850, contains the following enactments:*

"SECTION 4. The proof or acknowledgment of every conveyance affecting any real estate shall be taken by some one of the following officers: 1. If acknowledged or proved within this State, by some judge or clerk of a court having a seal, or *some notary public* or justice of the peace of the proper county. . . . .

"SECTION 29. Every conveyance, or other instrument conveying or affecting real estate, which shall be acknowledged, or proved and certified, as herein† prescribed, may, together with the certificate of acknowledgment or proof, be *read in evidence without further proof.*"

* First subdivision of §§ 4 and 29.

† The word in the statute as *printed* is "hereinafter;" but that word makes no proper sense in connection with the subsequent parts of the law; and the Supreme Court of California has declared that thus printed it is either an error of the press or a copy of an erroneous enrolment; that the word should be "*herein*," as I have given it in the text. Mott *v.* Smith (16 California, 522).—REP.

The subscribing witness to the deed thus read was in court, and had been examined by the plaintiff about certain matters, but not about the execution of the deed. The defendant proposed to cross-examine him upon such execution, which the court would not allow him to do; deciding that if he wished to examine the witness at all upon a point not raised in the examination-in-chief, he must call him anew, and so make him his own witness.

The plaintiff having had judgment, and the defendant having sued out a writ of error, three questions were now here made; the first question having been raised on the argument in *this* court *for the first time in the case.*

1. Whether this want of presentation of the grant at any time to the Board of Commissioners was fatal to it?

2. Whether the deed was properly acknowledged by the laws of California.

3. Whether the court rightly refused to let the defendant cross-examine the witness in the circumstances stated.

Mr. Carlisle, for plaintiff in error:

I. The language of the statute of March 3, 1851, being express, it is indispensable that the grant should have been presented within two years after the date of the act. More than two years had passed before this suit was brought. No averment of any presentation is made. No presumptions can be made to supply that which is a prerequisite of the case, an indispensable link in the title. The land is, of course, part of the public domain.

II. The statute does not dispense with calling the subscribing witness. The point has not yet been decided. Its language is perhaps not entirely plain.

III. The rule is not universally adopted that a right to cross-examine is limited to matters comprised in the examination-in-chief. In some States it prevails; in some it does not. The rule has not been so settled for California.

Mr. Hepburn, contra.

Opinion of the court.

Mr. Justice FIELD delivered the opinion of the court.

This is an action of ejectment to recover the possession of certain real property situated in the County of Contra Costa, in the State of California. The plaintiff below, the defendant in error in this court, deraigned her title from the Mexican government, through a grant issued in August, 1841, by Juan B. Alvarado, then Governor of the Department of California, and sundry mesne conveyances from the grantees. It does not appear from the record that the grant was ever confirmed by the Board of Land Commissioners appointed under the act of March 3d, 1851, for the investigation of titles to land in California derived from the Spanish and Mexican governments, or was ever presented to the board for its consideration; and it is the absence of any averment in these particulars which constitutes the first ground urged by the counsel of the plaintiffs in error for a reversal of the judgment. His position is, that under the act of March 3d, 1851, if the grant were not presented within the period there designated, which period had expired when this action was commenced, the land was to be deemed a part of the public domain, and that no presumption is to be indulged in respect to such presentation in the absence of any averment on the subject. It is a sufficient answer to this position, that it does not appear from the record to have been urged in the court below. It may be that the objection was not taken from the knowledge of the parties that the grant had been confirmed, and that proof of the fact could be readily produced. Objections of this kind cannot be heard for the first time in the appellate court. To entitle objections to consideration here, they must be presented to the court below in the first instance, at least if they are of a kind which might have been there obviated.

Of the intermediate conveyances from the grantees, through which the plaintiff below traced her title, one was produced and read in evidence, upon proof of its execution by one of the grantors, furnished by the certificate of a notary public. Objection was taken to the sufficiency of this proof, counsel contending that the execution should have been proved by

calling the subscribing witness. The objection is answered by the statute of California, which expressly provides for the admission in evidence of conveyances of real property when verified by certificates of acknowledgment or proof of the execution by the grantors before certain officers.*

It appears that the subscribing witness to the deed introduced was present in court during the trial, and was examined with reference to certain matters, but not touching the execution of the deed. The defendant thereupon claimed the right to cross-examine him with reference to such execution. The court held that the defendant must, for that purpose, call the witness, and could not properly make the inquiry upon the cross-examination. In this particular the ruling of the court below was correct. The rule has been long settled, that the cross-examination of a witness must be limited to the matters stated in his direct examination. If the adverse party desires to examine him as to other matters, he must do so by calling the witness to the stand in the subsequent progress of the cause.†

JUDGMENT AFFIRMED.

UNITED STATES *v.* MORILLO.

1. When the government does not claim land in California as public land, this court will not entertain jurisdiction of an appeal by the United States from a District Court there under the act of 3d March, 1851, for the settlement of private land claims: it has no jurisdiction under that act—nor has the District Court—when the controversy is between individuals wholly.
2. In an appeal by the United States from a decree of one of those courts, where the proceeding below was to have a land title confirmed under this act of March 3, 1851, an assertion by the counsel of the United States that the controversy is between individuals wholly, and that the United States have no interest in the case, is sufficient to satisfy the court of that fact so far as respects the United States itself. But it is

* Act of California concerning conveyances, of April 16, 1850, §§ 4 and 29.

† Philadelphia and Trenton Railroad *v.* Stimpson, 14 Peters, 461; 1 Greenleaf on Evidence, 445.

not sufficient, the record itself not showing the fact, to satisfy the court as respects the opposing party. Hence, although, if this court have no jurisdiction because the controversy is between private individuals wholly, the court below had none either, yet where the fact of such individual interest in the suit rests wholly on the admission of the United States here, and the opposing party is not represented here by counsel, this court will not reverse the decree below, but will only dismiss the case.

APPEAL by the United States from the decree of the District Court for the Southern District of California, confirming a claim to land under the act of 3d March, 1851, entitled "An act to ascertain and settle the private land claims in the State of California."* The act having, by a previous section, enacted that "each and every person" claiming lands in California under title derived from the Spanish or Mexican government, should present them with evidence to a Board of Commissioners appointed by the act, who should examine the same "upon such evidence, and upon the evidence produced by *the United States*," and should decide on it, in its 13th and 15th sections provides as follows:

"SECTION 13. All lands, the claims to which have been finally rejected by the commissioners, &c., or which shall be finally decided to be invalid by the District or Supreme Court; and all lands, the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held and considered as part of the public domain of the United States. *Provided*, &c.

"SECTION 15. The final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between *the United States and the said claimants only*, and shall not affect the interests of third persons."

It was part of the case in this court, *made so by the assertion of the United States*, that the land in controversy had been confirmed to a person other than the claimant appellee, to wit, had been confirmed to one Ramon Yorba. *But this fact did not appear in the record;* nor was there evidence of any

* 9 Stat. at Large, 631.

kind as to the date of this alleged decree; that is to say, whether it was prior or subsequent to the one from which the present appeal was taken. In this state of facts, the question upon this assertion by the Attorney-General of the United States, or his deputy, that the government had no further interest in the case, was, what form of order or decree should be made in this court; whether a decree of *reversal*, with direction to the court below to dismiss as wanting jurisdiction, or a decree here of dismissal simply?

Messrs. Bates, A. G., and Wills, for the United States: The act of March 3, 1851, gives jurisdiction to the District Courts of California and to this court on appeal, only in controversies between the *government* and individuals. This is to be inferred from the sections of the act as quoted. The purpose of the act was to provide the means of separating the national domain from the possessions of private individuals. If the controversy is between private individuals only, neither this court *nor the court below* has jurisdiction. Now the admission by the government that it has no interest in the land, is necessarily sufficient to satisfy the court of *that* fact; for it is an admission against its own interest. This court cannot entertain jurisdiction in the face of an acknowledgment by the United States that the contest is wholly between private claimants. But if this court has no jurisdiction, neither had the court below; and, whatever is sufficient to induce this court to decline jurisdiction, must of course be sufficient to induce it to reverse. If it declines jurisdiction, it does so only because satisfied that the claim is between private parties; and, when satisfied of *that*, it is satisfied also that the court below had no jurisdiction. Satisfied of that second fact it necessarily reverses. It matters not *how* it may be satisfied; whether by the record, or by admission of the party made here. If satisfied in any way, it is enough. The court cannot decline cognizance at all therefore for itself, on the ground alleged, and not go so far as to reverse the decree below with directions to dismiss.

The claimant, Morillo, was not represented here, either by counsel or by brief.

Opinion of the court.

Mr. Justice MILLER delivered the opinion of the court.

On the part of the appellant the point principally relied on is, that this court has no jurisdiction of the case, and the ground on which this point is based is the fact that the District Court has already confirmed the claim of another party, which covers the land now claimed by the appellees in this case. It is, therefore, say the counsel, a mere contest between individuals as to who is the real owner of the land, in which the government has no interest, and its decision is not necessary to separate the lands of the United States from those held by private parties.

We concur entirely with counsel, both in the reasoning and in the conclusion above stated; and as to the United States, who by her counsel asserts it, we assume that the fact on which the reasoning rests is correctly stated, to wit, that the land has been confirmed to another person.

The act of March 3, 1851, under which these proceedings were had, contemplated primarily nothing more than the separation of the lands which were owned by individuals from the public domain. This is clearly expressed in the 13th section of that act. The 15th section declares that the final decrees rendered in these proceedings, and the patents issued under them, shall be conclusive between the United States and said claimants *only*, and shall not affect the interest of third parties.

We therefore agree with counsel for the appellant that when the government no longer claims that the land is public land, the right of the United States to contest the case further ceases, and this court will not entertain jurisdiction to determine to which of two private claimants it may belong. It results from these considerations that the appeal in this case should be dismissed.

It is urged against this action of the court, that the same fact which shows that this court has no jurisdiction of the appeal, shows that the District Court was also without jurisdiction, and that its decree should be reversed, with instructions to dismiss the case.

The reply to this is, that it nowhere appears in the record

of this case that the land claimed by appellees *has* been confirmed to any other person. The appellees are not represented here by counsel, to affirm or deny that fact stated by the counsel of the government. When the appellant appears by counsel, and makes the point that this court has no jurisdiction of the case, and supports that argument by the statement of a fact which sustains the point, we are certainly at liberty to assume that fact to be true as against the appellant, and dismiss his appeal. But when he asks us to go a step further, and adjudicate on the rights of the appellee, by reversing a decree in his favor, we must have some other evidence of that fact than the statement of the appellant's counsel.

But conceding it to be true for all purposes that the land in question has been confirmed by a decree of the District Court to another party, there is nothing to show whether that decree is prior or subsequent in date to the one now before us; or which claim was first presented to the Board of Commissioners for its action. We might, therefore, be doing the present claimant great injustice in reversing his decree and leaving another claim for the same land to stand affirmed in favor of some other person, while we can by no possibility injure the United States by dismissing an appeal in a case where it is evident that the government has no interest, and which can only be protracting the litigation for the benefit of one individual in his contest with another.

APPEAL DISMISSED.

UNITED STATES *v.* ESTUDILLO.

1. An appeal of a case originating below under the statute of June 14, 1860, relating to surveys of Mexican grants in California, and in which the appellants appear on the record as *The United States*, simply (no intervenors being named), remains within the control of the attorney-general; and a dismissal of the case under the 29th rule of this court is not subject to be vacated on the application of parties whose names do not actually appear in the record as having an interest in the case, even although it is obvious that below there were some private owners

contesting the case under cover of the government name, and that some such were represented by the same counsel who now profess to represent them here. SWAYNE and DAVIS, JJ., dissenting. TANEY, C. J., and GRIER, J., absent.

2. Where parties are permitted by the District Court under this act to appear and contest the survey and location, the order of the court permitting such appearance and contest should be set forth in the record. Only those persons who, by such order, are made parties contestant, will be heard on appeal. MILLER, SWAYNE, and DAVIS, JJ., dissenting. TANEY, C. J., and GRIER, J., absent.

3. Where, under this act, notice has been given to all parties having or claiming to have any interest in the survey and location of the claim, to appear by a day designated, and intervene for the protection of their interest, and upon the day designated certain parties appeared, and the default of all other parties was entered; the opening of such default with respect to any party subsequently applying for leave to appear and intervene, is a matter resting in the discretion of the District Court, and its action on the subject is not open to revision on appeal.

AN act of Congress of June 14th, 1860,* authorizes the District Courts of California, on the application of any party interested, to make an order requiring the survey of any private land claims to be returned into court. The order is to be granted on the application of "*any* party" whom the court "shall deem to have such an interest in the survey and location . . . . as to make it just and proper that he should be allowed to take testimony, and to intervene for his interest therein." If the objection to the survey and location is made on the part of the United States, the order to return the survey into court is to be on the motion of the district attorney, founded on sufficient affidavits. "And if the application for such order is made by other parties claiming to be interested in, or that their rights are affected by such survey and location, the court, or the judge, in vacation, shall proceed summarily, on affidavits or otherwise, to inquire into the fact of such interest, and shall, in its discretion, determine whether the applicant has such an interest therein as, under the circumstances of the case, to make it proper that he should be heard in opposition to the survey, and shall grant or refuse the order."

* 10 Stat. at Large, 33.

But the act provides also, "that all the parties claiming interest, &c., derived from the United States, shall *not be permitted to intervene separately;* but the rights and interests of said parties shall be represented by the District Attorney of the United States, intervening *in the name* of the United States; aided by counsel acting for said parties jointly, if they think proper to employ such counsel." The act also provides that before proceeding to determine the validity of any objection to the location made by the surveyor-general, notice by newspaper publication shall be given to all parties in interest, that objection has been made, and admonishing them to intervene for the protection of their interest.

The present case—another case (*United States* v. *Nunez*), being just like it, and depending upon it—was one of these surveys and locations which had been certified into the District Court for the Northern District of California. The record—a confused sort of document—showed that on the 3d of October, 1860, "the United States Attorney, E. W. Sloan, and *J. B. Williams* appeared for the *United States*," other counsel for the claimant, Estudillo, and R. Simson for a certain Castro, "and on motion, it was ordered that he be allowed five days to make showing of his right to intervene herein, and *no other party appearing*, whereupon it is ordered that *the default of all parties not appearing as aforesaid be and the same is hereby entered.*" Subsequently, to wit, October 31st, 1860, "come the *United States* by *their* attorney, and except to the official survey." Subsequently to this "the petition of Thomas W. Mulford, by *his* attorneys, E. W. Sloan and *J. B. Williams*," set forth that he had an interest in the land claimed, and prayed the court to open the default entered on the preceding 3d, which motion the court, on the 20th of February, 1861, "denied." The case being here by appeal, as the *United States*, *appellant*, and J. J. Estudillo, appellee, Mr. Bates, A. G., in behalf of the United States, and Mr. Laitham for J. B. Estudillo, appellee, signed an agreement at the last vacation that the appeal should be dismissed; and the case was dismissed by the clerk accordingly; this agreement and dismissal purporting to be made under the

29th rule of this court, which provides that when the appellant and appellee in any appeal may, in vacation, by *their* respective attorneys, *who are entered as such upon the record*, sign and file with the clerk an agreement in writing, directing the case to be dismissed, it shall be the duty of the clerk to enter the case dismissed.

Mr. J. B. Williams, of California, he being the same Mr. "J. B. Williams" already mentioned as appearing in the District Court there, now came into court (Mr. Carlisle being of counsel), and presenting himself as attorney of "Thomas W. Mulford and *others*," moved the court "to vacate the stipulation, made under the 29th rule of this court, dismissing the appeal of the United States herein (which stipulation," the motion ran, "was made without their consent, or the consent of their attorney, or the consent of the District Attorney of the United States for the Northern District of California, and was made to their great prejudice and injury as settlers upon the public land of the United States); and that no mandate may issue upon said stipulation, but that the cause may stand to be heard in its order or otherwise as this court may direct; and that the attorney for Mulford and others be allowed to enter his appearance in this court, and be heard in their behalf, in the manner provided by the third section of said act of June 14, 1860."

Mr. J. B. Williams and Mr. Carlisle, in support of the motion: The act of June 14th, 1860, subjects the work of the surveyor-general to the revision of the District Courts, and enables all contestants to file objections, and have the survey examined and corrected if found to be erroneous. By obliging the surveyor-general to give notice, by publication, whenever he has made a survey of any private land claim, and by requiring all parties in interest to appear and intervene, a survey when finally approved is not only conclusive between the United States and the claimant, but is conclusive as to third parties, and the patentee can rely upon his legal title against all the world.

It is clear, from the provisions of the act, that Congress

did not intend to allow each settler the privilege to intervene in his own name, with a separate right of appeal; its intention was to give them those rights *jointly*, and the use of the *name* of the United States. And if they can be heard jointly by their own counsel in the court below, *why not in this court on appeal?* Where does the Attorney-General of the United States find his authority for dismissing an appeal taken by the district attorney in behalf of the settlers? The 29th rule of this court applies only to the appellant and appellee by their attorneys. The attorney-general is *not* the attorney of those claiming under the laws of the United States. He is the attorney of the *United States*—not of the settlers. The appeal was taken *in the name* of the United States, but it was taken in behalf of Mulford and others, appearing jointly, and represented by their counsel. The attorney-general might well refuse to *appear* for the settlers, but he can have no right to dismiss their appeal when they stand ready to prosecute it by their counsel.

Mulford and other settlers on the lands under the laws of the United States, claim that if the confirmed tract be *properly* surveyed and located, they will be gainers. The District Court decided against them. They ask to be heard here by their counsel. If the decision of the District Court had been in their favor, and the claimant had appealed, they would have been compelled to defend themselves as appellees. The attorney-general would not have appeared in their behalf, for his action in dismissing the appeal shows that he would have considered a decision against the survey as unjust. They do not ask the attorney-general now to appear in their behalf, but to let them appear and be heard *by their own counsel*, leaving him to express the views of the United States, as proprietors of *vacant* public land, if he thinks proper.

The right of the attorney-general to dismiss appeals in general, where the United States is the appellant, is not questioned. Where the suit is strictly one between the United States and the claimant, in which neither the alienees of the claimant, nor those claiming under the United States,

nor adjoining proprietors, *can* intervene, the right and duty of the attorney-general to desist from the prosecution of an appeal which only works ruin to the claimant under a genuine and valid title, is clear. But the location and survey of a confirmed claim almost always involves the interests of parties with whom the government has no concern. Here they are *made* to intervene. Does any one doubt if this case stays dismissed, and Mulford were hereafter to bring ejectment, that the record of this case would be used against him?

The right of special counsel—counsel acting for the individual claimants, though appearing to act for the United States—has never been questioned below; where the case is managed almost wholly by them, and where the question whether appeal shall or shall not be taken is left to *their* view of what their interests may suggest. There should be no different rule here, after the parties are brought, at an immense expense, a distance of six thousand miles.

Messrs. Bates, A. G., Black, and Johnson, contra.

Mr. Justice FIELD delivered the opinion of the court.

The appeal in this case was dismissed during the last vacation, by stipulation of the parties, under the twenty-ninth rule. A motion is now made on behalf of one Thomas W. Mulford *and others*, that the stipulation be vacated, the mandate of the court be withheld, and their attorney be allowed to enter his appearance and be heard on their behalf.

The case was brought before the court on appeal from the decree of the District Court of the Northern District of California, approving a survey of a confirmed private land claim, under the act of June 14th, 1860. After the survey was returned into the District Court, a monition was issued to the marshal requiring him to notify all parties having, or claiming to have, any interest in the survey and location of the claim, to appear on a day designated and intervene for the protection of their interests. The only parties who

appeared in pursuance of the notice given by the marshal were the United States, the claimant, and one Castro; and the court ordered the default of all other parties to be entered. Subsequently, Mulford, who now appears in the motion before us, applied to the court to open the default and to allow him to intervene, alleging an interest in a portion of the land embraced by the survey under a patent from the State of California; but his application was denied. The action of the court in this respect is not subject to revision, the opening of the default being a matter resting in its discretion.

The motion is on behalf of Mulford *and others*, but who are included by the term "others" we are not informed by the record. Their names are not given, nor is their interest stated, except in the very general and loose terms with which it is designated in the argument of counsel as that of settlers on the land under the laws of the United States.

The act of 1860 is liberal in the permission it gives for interposing objections to the surveys of confirmed claims made by the Surveyor-General of California; but at the same time it limits with special care the permission to those who are in fact interested in making a contest. It authorizes the return of surveys for examination and adjudication only upon the application of parties who, in the judgment of the court or district judge, have such interest as to make it proper for them to intervene for its protection. It provides that when objections are interposed by the United States, the application shall be made by the district attorney, and be founded on "sufficient affidavits;" and that when application is made by "other parties claiming to be interested in, or that their rights are affected by," the survey and location, there shall be a preliminary examination into the fact of such alleged interest. "The court, or the judge in vacation," says the statute, "shall proceed summarily on affidavits or otherwise to inquire into the fact of such interest, and shall in its discretion determine whether the applicant has such an interest therein as, under the circumstances of the case, to make it proper that he should be heard in opposition to the

survey, and shall grant or refuse the order to return the survey and location as shall be just."

The proceedings upon this examination, or at least the order of the court or judge thereon, should appear in the record; for we can only know by the order whether the parties have been permitted to contest the survey before the court. When the interest of parties applying is shown and the order is made, those who claim under the United States by "pre-emption, settlement, or other right or title," must intervene, not separately, but collectively, in the name of the United States, and be represented by the district attorney, and any counsel employed by them co-operating with him.

In the present case, it does not appear that any of the precautionary steps required by the act in question were pursued by the nameless "*others*" for whom the present motion is made. No presentation, so far as the record discloses, was made of the interest of any persons against the survey besides those we have named. And it is not permissible for parties to appear in this court and be heard in opposition to the survey approved, who have never participated, or asked to participate, in the proceedings upon the survey in the court below.

These views also dispose of the motion to set aside the dismissal of the appeal in the case of *United States* v. *Nunez*.

The motion in both cases is

DENIED.

Messrs. Justices SWAYNE and DAVIS dissented.

Mr. Justice MILLER.

I concur in the judgment of the court, overruling the motion to set aside the agreement between the attorney-general and the counsel of the claimant, by which it is agreed that this appeal shall be dismissed. But I do not agree to the ground upon which the judgment of the court is based; and as the matter involves the construction of an important provision of the act of June 14, 1860, concerning surveys of Mexican grants in California, I think it of sufficient consequence to justify a statement of my views separately.

That act provides, in its third section, that any party whom the district judge "shall deem to have sufficient interest in the survey and location of a land claim," "shall be allowed to intervene for his interest therein," and that the court, or judge in vacation, shall proceed summarily to determine, in his discretion, whether the applicant has such an interest as entitles him to be heard in opposition to the survey which has been made and reported to the court. The statute then proceeds in the following language: "*Provided, however*, that all parties claiming interests under pre-emption, settlement, or other right or title derived from the United States, shall not be permitted to intervene separately, but the rights and interests of said parties shall be represented by the District Attorney of the United States, intervening in the name of the United States, aided by counsel acting for said parties jointly, if they think proper to employ such counsel."

The motion in this case is made in behalf of persons belonging to the class mentioned in this proviso, who allege that their rights have been sacrificed by the attorney-general in making the agreement to dismiss the appeal. It is overruled on the ground that their names do not appear in the record as having any interest in the case, or as having been represented by the district attorney in the name of the United States, in the proceedings in the District Court. The statute says that persons in their condition must appear by the district attorney, in the name of the United States. They can contest the matter in no other way, and through no other attorney. Yet because they did not appear in their own name, in violation of the statute, it is said they have lost a right, which they would have had, if they could in some way have procured their names to be placed on the record as contestants. When the act says that they can only appear in the name of the United States, I cannot conceive that this court, or the District Court, should hold them to have been guilty of laches, because they did not in some manner evade both the letter and spirit of the law, by procuring their own names to be inserted in the record.

The language of the statute is, that "the rights and in-

terests of said parties shall be represented by the district attorney." It is true he may be *aided* by other counsel, if the parties choose to employ them, but they are *represented* by the district attorney. He is their attorney of record, and they cannot discharge him, or compel him to adopt any other mode of proceeding than what he deems best. He, adhering to the statute, makes his objections to the survey in the name of the United States, and when one of these parties requests him to insert *his* name in the proceedings, the attorney refuses. Has such party any remedy? The law says he *must* be represented by the district attorney, and he has no right to displace him and substitute another. But because he cannot do this, he is deprived of the right to be heard here, or in the court below, according to the opinion of the court in this case.

For myself, if I believed the parties making this motion had any such right, and were really among the persons represented by the district attorney in the court below, I would permit that fact to be shown here by affidavit, or in any other mode which would satisfy the court that it was so. And I think the contrary rule operates as a trap and delusion, by holding that they have an interest, which gives them a right of appeal, but affords them no means of rendering that right effectual.

But I do not believe that persons included in the proviso already quoted have any right of appeal, or any other right of contesting the survey, except as it may be exercised through the law officers of the government, subject to their judgment of what may be their official duty in the premises.

The act divides those who may contest the survey into two classes: those who claim through or under the United States, and those who do not. All who claim through the United States, whether by "*pre-emption*, *settlement*, or any other *right* or *title*," constitute one class, who must appear by her attorney and in her name. The words above italicized, expressive of the nature of the interest derived from the United States, are not mere synonymes, but are cumulative; and when, in addition to the several inchoate rights of set-

tlement and pre-emption, the word title is used, it must mean a patent, or some other legal title, emanating from the United States.

Who constitute the other class? They must be those who claim under rights or grants, more or less perfect, derived from the Mexican government. This class consists of persons having claims, confirmed or otherwise, the location of which would interfere with the survey, which is the subject of contestation.

As to this class of persons, the government has, by its solemn treaty, bound itself to protect their rights. It is therefore eminently proper that they should be permitted to assert their rights in their own name, and by such counsel as they may choose to employ. The statute gives them this privilege, and if the court below has found that such persons had an interest in the contest there, it gives them the additional right of an appeal to this court. But as to the other class, who claim through the United States, it is clear that any right or title which they may have, must have been acquired subject to the final determination and location of the Mexican claims existing when this government became lord of the soil. The government may therefore very well say to them, "You knew when you settled, or made pre-emption, or took a patent, that all just Mexican claims must be first satisfied, and you have made your location subject to this risk. The honor of the United States is concerned to see that no unjust obstacle shall be interposed by her, or those to whom she has made concessions, to the proper settlement and location of those claims. If you choose therefore to appear in the name of the United States, and by her attorney, and make such objections to these surveys as her officers, uninfluenced by personal motives, may deem just and proper under the circumstances, you have that privilege; but you can do it in no other manner, and the right to contest the proceeding and cease from the contest at any stage of it must remain to the government, and to this end it shall be conducted in her name and controlled by her officers."

I think this is the true construction of the statute. I see

no other reason for requiring this class of persons to appear in the name of the United States, and by her attorney, while persons of the other class are at liberty to select their own attorney and appear in their own name.

Besides, it is evident that the framers of the statute did not regard this right of contesting the survey as one so very sacred, since the judge of the District Court can decide on the right in his discretion, in court, or in vacation, summarily, and without appeal.

It is therefore my opinion that it was entirely within the discretion of the attorney-general to dismiss this appeal, if he thought it right to do so, and that this court cannot interfere in his exercise of that discretion; and upon this ground alone I place my concurrence in the action of the court.

ROMERO *v.* UNITED STATES.

1. The Mexican record-books, called "The Toma de Razon," and the "Index of Jimeno," are public records, which this court may consult, though not put in evidence below.
2. Where there is no record evidence of the actual grant under a Mexican title a claim will not be confirmed, even though the parol evidence of a grant is so strong that, independently of the fact that the archives show no grant, the conclusion might be that a grant had issued.

THIS was an appeal from the District Court for the Northern District of California; the case being thus:

On the 28th February, 1853, three brothers, Innocencio, José, and Mariano Romero, presented their petition to the Board of Commissioners, established by the act of Congress of March 3d, 1851, for the settlement of private land claims in California, asking a confirmation of a land title. Their petition averred that Governor Micheltorena, in the year 1844 (no day being mentioned), granted them in full property a rancho in the neighborhood of the rancho of the Señors Moraga, Pacheco, and Will, being a remainder over and above what belongs to those ranchos—the said land being in

the County of Contra Costa—and referred for a fuller description of the lands to papers and maps relating to the grant; "copies of some of said papers being herewith filed, and the originals to be produced and proved." The petition said nothing specially about the grant. There was no averment of its loss, and no profert of it as an existing paper; nor did it describe the land otherwise than above, nor mention the quantity. The commissioners entered a decree against the petition, declaring that "it does not appear that any grant was ever issued, ... and no equitable right appears." On appeal to the District Court, new evidence being allowed to be introduced there, the decree of the commissioners was affirmed. A motion was then made and granted to open the case, and allow the claimants to produce further evidence. The decree was accordingly stricken out and the additional evidence heard; after which the court (McAllister and Hoffman, JJ.), affirmed the decision of the commissioners, and adjudged the claim invalid, and rejected it. It was from this decree that the case was now here. The title, as disclosed to this court, was partly documentary and partly that of witnesses.

THE FIRST parcel of documentary evidence was thus:

1. A petition by the brothers Romero, claimants, dated January 18th, 1844, soliciting a tract described as a surplus of the ranchos Moraga, Pacheco, and Will.

2. A marginal order of the same date, that the secretary of state report, "having first taken such steps as he may deem necessary."

3. A decree of the governor that the first alcalde of San José report, summoning Moraga, Pacheco, and Will, occupants of the adjoining ranchos, as above said.

4. Report, February 11, 1844, by the alcalde, that he had confronted the claimants with the owners of the adjoining lands, and they had no objections to the grant; that the tract was claimed by one Francisco Soto six or seven years before, but that he had not cultivated it in any way to gain a right thereto.

5. An unsigned certificate, February 4th, 1844, that it would seem, according to the report just referred to, "that there is no

obstacle to making the grant . . . . if your excellency approves of it."

6. A direction from the governor, without date, but "filed in office February 28th, 1853," that "the judge of the proper district take measurement of the unoccupied land that is claimed, in the presence of the neighbors, and certify the result, so that it be granted to the petitioners."

7. Petition of Romero and the others to the governor, 21st March, 1854, that the governor grant them the land, either provisionally or as he deems best. [The petition stated that the judge had been unable to execute the order for a measurement, for the reason that the owners of the neighboring lands were absent or engaged, and that they inclose the former petition with report of the secretary of state.]

8. Report from Jimeno, 23d March, 1844, thus: "I think that your excellency's order should be carried into effect in regard to the measuring of the land that is claimed; and, as soon as this is accomplished with the least practicable delay, Señor Romero can present himself joined with Señor Soto, who says that he has a right to the same tract. Your excellency's superior discernment will determine what is best."

9. Final decree of the governor, "Let everything be done agreeably to the foregoing report."

A SECOND parcel of documentary evidence followed; the year of the date to papers in this parcel being three years posterior to the year 1844, in which all those just given were dated, and about a year after the conquest of California.

1. A marginal order, 9th April, 1847, from the American alcalde of San José (Burton), ordering that the "interested parties will proceed to take possession of the *mentioned* lands, according to the order of government; and I further order that, in case any bordering land-owner demanding it, a mensuration of his lands be ordered." [N. B. This order was entered on the margin of an old order by Jimeno, secretary of state, dated 23d March, 1844, which the American alcalde *found in the office* after the conquest, directing a survey of the land solicited by Romero. This old order was addressed to the former alcalde.]

2. Petition, May 28th, 1847, from Romero to the same alcalde of San José as follows: "As early as the year 1844 there was

sent an order from the former government to this justice's court, that there should be made a mensuration of the land called Juntas, which we asked for. I, together with my brother, Innocencio Romero, after a previous summons of the bordering landowners, which up to the present time has not been carried out. What we now beg of you is, that you will please, as first magistrate of this justice's court, to make out a report that we be given a testimonial of the reports which in the year '44 were sent to the government, so that *we can be granted* said lands." [N. B. The original of the English words here italicized, "*se nos podra agraciar*," it was testified by an interpreter, did not mean that the land might at that time (1847) be granted, but referred to the past, and meant "*should* be granted to us;" so referring to the contents of the papers made by the alcalde in 1844, and being words descriptive of *those* orders.]

3. Marginal order, same day, that the measurement be proceeded in according to the original direction.

4. Certificate, May 29th, 1847, by the American alcalde, that Pico, the alcalde under the former government, being sworn and questioned on the subject of Romero, regarding the bordering landmarks, declared that Moraga and Pacheco declared that the surplus which does not belong to them might be granted to Romero.

THE PAROL TESTIMONY, which related to a term between the dates—1844 and 1847—of the two classes of documentary evidence (the former date relating to the Mexican rule in California, and the latter that of the United States), consisted, in part, of that of witnesses, who testified to the fact of granting, and in part of others who stated that they had seen the grant: the most important witnesses to this last fact being three professional gentlemen in California.

1. *As to the making and delivery of the grant.*

Innocencio Romero, now having no interest, as he said, and who was twice examined, swore that he received the original title-papers, including the grant, from the governor.

Arce, another witness and principal clerk under the secretary of the government, who drew up Romero's petition for the grant, swore that the governor ordered the title to be made out; that this was done by one of the two clerks, though

he did not remember by which; that it was signed by Governor Micheltorena and Secretary Jimeno in 1844; though whether in spring, summer, autumn, or winter of that year he did not remember; that he saw both of them sign it, and that it was then delivered to Innocencio Romero, one of the grantees, and was "a complete concession in good and legal terms."

Vincente Gomez, a clerk in the government office at the time, swore that he knew of the application, and though he did not see the grant, he "*knew* afterwards that it was issued." When asked to state the means of his knowledge, he replied, "Because I used to take a note of the title in the '*Toma de Razon.*'" When asked again, "Did you take a note of *this* title?" his reply was, "I do not remember distinctly, but I *ought* to have taken it."

Chavis, that he aided Romero in obtaining the grant, introduced him to Arce, went with him to the government office to urge his application, and after it was obtained, saw and looked over the grant, and told the grantee that it was perfectly good,—that it was an absolute grant of land, under the genuine signatures of Micheltorena and Jimeno.

2. *As to the subsequent existence of the title-paper.*

Ramon Briones swore that he saw the title in 1845; that it was produced by Romero in order to convince a neighbor that he had a title; that it was read aloud and had to it the genuine signature of Micheltorena.

Innocencio Romero stated that he being unwell and unable to go himself, he sent the papers to Mr. G. B. Tingley, an attorney at law, in San Francisco, for the purpose of having them submitted to the Land Commission.

Mr. Tingley was himself examined twice. On the first occasion he said in substance as follows:

"In 1850, there was a suit between Peralta, plaintiff, and I. Romero and Garcia, defendants, and on the trial there was read as evidence on the part of defendants a grant from Governor Micheltorena to the three brothers Romero for a tract of land, &c. The grant was on Spanish paper, and was signed by Micheltorena as governor. The signature was genuine as I believe from having

seen his signature many times. The last I saw of the title-papers they were in possession of a lawyer, by name Sanford, partly deranged, and now dead. No paper was safe in his hands. I have never heard of the grant since. I know Sanford had them at the conclusion of the trial. I have had repeated occasions to search for his business papers, and have never been able to find them."

Examined a second time, Mr. Tingley testified in substance, thus:

"I stated in my former examination, and I now say, that I carefully examined the original title-papers in said cause; that the same were a bundle of papers commencing with the original petition, the informe, &c., and ending with an absolute grant of the land. I have recently examined the Spanish documents, being seven in number [the papers in this case], and I say they are not the same papers. I was, at the time of the trial, perfectly familiar with Spanish grants; a large portion of my business was connected with the examination of Spanish titles. I was sufficiently familiar with the Spanish language at that time to read and understand titles to land, and I know that the title of the Romeros was a concession in fee for the sobrante. I examined the papers in the trial in the District Court of Santa Clara County, between Peralta, Garcia, and I. Romero, I being at the time one of the counsel for one of the parties, and also examined the papers at the instance of one Attoza; also for a person, by the name of J. M. Jones. During the trial the title-papers, or what purported to be such, were in court during the whole time, four or five days. During the trial I had them in my hands at least forty times. It was conceded on the trial, by Mr. Sanford and his associate counsel, that the land had been granted to the Romeros, but it was said that the grant was not valid, because the land had been previously granted to Peralta. The genuineness of the titles on both sides was not controverted by either party. Both were admitted to be genuine. The dispute was about the boundaries."

The Hon. J. W. Redmond, an attorney at law, and in 1850–3, county judge of Santa Clara County, after confirming positively the statement of the last witness as to the use of the papers as genuine on the trial, testified as follows:

Statement of the case.

"That he had seen many of the acknowledged signatures of Micheltorena, and was familiar with his handwriting from comparison; that his own principal business was the examination and investigation of Spanish titles; that he was employed in almost every case pertaining to Spanish titles in San José; that he was engaged on one side or the other in nearly every case, except in his own court, where there were lawsuits about Spanish titles; says further, that in 1850, he was employed by one Attoza to search the title of the Romeros to the tract of land which is the subject of this suit; that said Attoza was about to purchase a portion; that he, the deponent, had all the original title-papers of the Romeros in his hands at that time for two weeks, and carefully examined them; that the signature of Micheltorena to said documents was genuine, as the deponent believes from his familiarity with his said signature; that the grant was a grant in fee, in the usual form of Spanish concessions made by Micheltorena, and was on stamped paper; that deponent was perfectly familiar at that time with such Spanish documents; that he had examined very many Spanish titles at Monterey, Santa Cruz, San José, and Martinez, in all of which towns deponent practised.

"The deponent further says that the title constituted a bundle of papers, sewed together, containing a petition by the three brothers Romero for the land, the reports of the alcalde Pico, also by Jimeno; also a diseño or map of the land, and a final concession by Micheltorena, in full and absolute property of the land solicited; that the title was full and complete, with the exception that it lacked the approval of the Departmental Assembly; that the description of the ranch was the sobrante, or all the land lying between the ranches of Welsh, Moraga, and Pacheco, and the surrounding neighbors, and had a Spanish name, which deponent has now forgotten; but deponent says he was upon the land either in the latter part of 1850, or early in 1851; that he had his notes of the grant with him, or the grant itself, at the time he was on the ranch, and knew the land; that it was situated in Contra Costa County, and Garcia was living on the land at that time; and deponent stopped two nights and three days with him at his house.

"The deponent further says that he examined the title in connection with G. B. Tingley, Esq., and the Honorable J. M. Jones, now deceased, who was judge of the District Court of the South-

ern District of California, and who was an excellent Spanish scholar; that all three pronounced the said title to be as valid and genuine a title as any in California, with the exception that it had not been approved by the Departmental Assembly; that it was a full and absolute concession of the land, and that upon the examination he advised Attoza that it was safe to purchase."

Mr. C. B. Strode, whose "principal business, since November, 1850, had been the prosecution of Mexican and Spanish land claims before the United States Land Commission, and in some cases before the United States courts," testified thus:

"In 1850, Mr. Sanford told me he had the Romero grant in his possession. I know the situation of the land by general description and by having been often on it. He showed me a paper for a grant of a sobrante. I was the lawyer of several of the adjoining settlers, and expected to be that of others, which made me feel an interest in the examination of this paper. I had become very familiar with the appearance of Spanish and Mexican grants, and knew, as far as I could know by comparison with others, the handwriting of Jimeno and Micheltorena, and could not, I think, have been deceived as to the genuineness of their signatures, although I never saw either of them write. I know that the signature of Mitcheltorena was to the papers, and I believe also that of Jimeno. I have examined the papers in this case. They are not the papers shown me by Mr. Sanford. My interpreter read the papers carefully to me. They consisted of a good many papers sewn together on the back, and purported to be a full grant for land lying, &c.,—a sobrante described to be of four or five leagues; I believe five."

Due proof was made of search among Sanford's papers in vain for those described by these gentlemen.

With regard to the possession, it appeared that one or other of the Romeros—Innocencio being the chief actor in all parts of the business—went on the property in 1843 or 4, and had occupied it continuously afterwards, building upon and cultivating it.

On the other hand, confessedly no actual grant was produced; the whole case resting upon the documents above-

mentioned, produced, some of them, from the alcalde's office, and some from the claimant's private possession; upon the parol proof of the former existence and later loss of the grant not produced, and upon the possession. The *Toma de Razon*, at one time supposed to be lost, was produced on the hearing in this court, and it showed that there was no record in it of the alleged grant; nor did it appear in the Index of Jimeno. So, Innocencio Romero, though he swore positively, on his first examination, that "the tract was granted to me and my brothers by Governor Micheltorena," and that the "grant" was among the papers sent to counsel in San Francisco, yet on a second examination swore less specifically. On this second examination he said: "These papers consisted of *the title-papers* given to me by the governor. . . . . The papers were loose, without being sewn together. I do not know whether the lawyer sewed the paper together or not." The following were questions and answers in his deposition:

"*Question.* What did the title-papers, so handed to Tingley, consist of?

"*Answer.* The title-papers *pertaining* to the grant given to me by the governor.

"*Question.* What title-papers were given to you by the governor?

"*Answer.* *The title-papers*, with all the different papers usually issued at the government office. I cannot describe the number.

"*Question.* Were there several papers; if so, how many?

"*Answer.* There were several papers, such as the *map*, *petition*, *informe*, and *decrees*.

"*Question.* In what month was it that you say you obtained the grant?

"*Answer.* I cannot say exactly, but I think it was March.

"*Question.* Do you recollect of Soto petitioning for the same land as yourself; if so, was the difference between you and him settled before you obtained your grant, and how was it settled?

"*Answer.* Soto made a petition for the same land I did. The difference was settled before I obtained my grant. Soto and myself were called in the presence of Micheltorena, and as Soto

was already in possession of the rancho San Lorenzo, and as he had petitioned also for the Juntas, Micheltorena told him that he should have the San Lorenzo, and in that case he *would* grant the Juntas to the Romeros; and this was the way the difference was settled, both being satisfied with the governor's decision."

It appeared, also, that on the 15th January, 1847, more than four months before the date of the last certificate, *José* Romero, one of the three brothers, and one Garcia, had appeared before the same American alcalde and certain witnesses, and that Romero conveyed one-half the land to Garcia. "*Que dando hambor sujetos á que si el gobierno lo consede en propiedad y de lo contrario perdera gracia lo mismo q. Romero sin tener accion de clamar el dinero dado;*" or, as translated in the record, "both parties remaining subject to that, *if the government grant it in ownership;* and in a *contrary case*, Garcia will lose equally with Romero without having cause of action to reclaim the money given."

So that same *José* Romero, when now examined, though he swore to having seen the petition, and that a decree to *measure* was obtained, swore also that *he* had not obtained a *grant* of it, "no title at all."

On the other hand again, the same witness testified that he could neither read nor write; that his brother Innocencio had the charge of all the business; that he did not know whether his brother had built a house on the tract or not; that two or three years would pass without his seeing him; that he "heard that a title had issued," but felt no interest in it, because he had sold whatever right he had; and that he knew his brother had not a title, "because I have not seen it."

Mr. Carlisle, for the appellants:

1. The facts establish an equity in the claimants, which ought to be perfected into a legal title. Their petition was received with favor by the governor. The alcalde reported that the adjoining proprietors, the surplus of whose lands was solicited by the Romeros, not only did not object, but were willing that the grant should be made. The secretary

of state concurred in the recommendation, and advised that the lands be measured, in order to ascertain the surplus. The governor assented, and ordered the surplus to be ascertained, "so that it may be granted to the petitioners." An order was then issued to the alcalde to make the measurement. Up to this point in the proceeding it is evident the governor had acceded to the petition. He was willing they should have the land, and delayed the formal concession. What if there were no grant passed in form. The technical rules which we apply in administering law in States upon the eastern part of this continent, and where the English common law prevails, ought not to govern in regard to Mexican titles. Our system has always been administered by intelligent agents, under strict rules of proceeding, and their acts are interpreted by laws abounding in nice distinctions and subtle technicalities. The Mexican system was plain, simple, and well adapted to the habits of the people.

It further appears, that immediately after the 23d of March, 1844, the Romeros, with the authority of the alcalde, entered into possession, and they and their vendees have ever since resided on the land. Their right to the possession was not questioned whilst Mexico continued to exercise dominion; on the contrary, the possession was open, notorious, and evidently *bonâ fide*, under a claim of title which was recognized by all the neighbors or "colindantes," and which neither the rival claimant, Soto, nor the Mexican government, ever attempted to disturb. The expediente, as shown by the proof, consisted of several documents, not fastened together. It may have happened that other documents pertaining to it were lost or destroyed, during the rough usage to which the archives were exposed at the conquest of California.

2. We do not, however, rest on the expediente alone. The proof establishes, beyond a reasonable doubt, the fact that a final grant was issued. It is true, the archives, as now found in the surveyor-general's office, do not show this fact; and we admit that, in the absence of such proof, nothing short of the most satisfactory and convincing evidence should

be deemed sufficient to establish the existence and loss of the paper. But if the most convincing verbal proof can, in *any* case, overcome the presumption against the existence of a grant, arising from the want of archive evidence of it, then we think it may be confidently assumed, that it has been done in this case.

Without speaking of the testimony of Innocencio Romero himself, of Gomez, Arce, Chavis, Briones, and others, we refer specially to that of Mr. Tingley, Mr. Strode, and Judge Raymond. The scrutiny with which these title-papers were examined by these gentlemen, and the character of the examiners themselves, forbid the idea of deception, error, or mistake. They are American witnesses. No individuals in California were more familiar with the form, appearance, and legal effect of California grants than the eminent professional persons above mentioned. Their examinations were not hasty, cursory, or without an object; but deliberate, repeated, and with a serious intent. They had no doubt then, and have not now, of the genuineness of these papers, nor that they constituted as perfect a title to the land as was given by any grant in the department, not approved by the Assembly. More than this, the genuineness of the paper asserted to be a grant was conceded by opposing counsel, in a lawsuit where it was the interest of such counsel to search for and prove a forgery; where a forgery was sure to be detected, and where of course it would have disposed of the whole question at issue. This amounts almost to a judgment in favor of the point here controverted against us.

It is admitted that regularly the records should show that the concession had been made; and absence of such proof unexplained is presumptive evidence against the validity of a claim. But in the most perfect record of titles in the California archives, there would be found but two kinds of evidence of the issuing of a title beyond the point where this expediente terminates: first, a copy of the title attached to the end of the expediente, and secondly, a memorandum of the issuing of the grant in the *Toma de Razon*. It is by no means a universal thing, however—nor indeed a general

thing—in these archives, to find a copy of the grant attached to the expediente, even in the undoubted cases. The proof shows that the expediente in this case consists of loose leaves never to this day even attached together. Would it be astonishing if one of the leaves originally there is lost? In the best-regulated public office it would be strange, if such leaves should, at the end of twenty years, all be found in their place. So, with regard to an entry in the *Toma de Razon.* In some cases, as where a party rests on a legal title only, the want of such entry may be fatal. Decisions are numerous on this point, but it has not been decided that under no conceivable circumstances, can a title be good unless the entry of it be thus made. On the contrary, where equity exists, this want is not important.*

We readily admit that under decisions of this court, a great amount of parol evidence is necessary to supply the place of record evidence of the grant. It will be observed, however, that there is maintained throughout these decisions, a distinction between equitable and legal titles, and the character of the evidence by which they are supported. Under the laws, regulations, and usages of the Mexican government, no record was ever preserved of an *unfinished* expediente. The course of proceedings in making these grants is familiar and easily stated. When the petition was presented, a marginal decree was indorsed upon it, by the governor, referring it to some officer for the proper information. The original paper, with the marginal decree, was usually delivered to the petitioner, that he might procure the proper reports. When the reports were made, all the papers were returned to the governor, who then made his decision. If he denied the application, the expediente, which consisted of the petition, marginal decree, reports, and the governor's final decree, was filed and remained in the secretary's office; but no record was made of the proceedings, and none was required by any law or usage. If the governor acceded to the petition, he usually made a decree of concession, com-

* United States *v.* Alviso, 23 Howard, 318.

mencing with the words, "*vista la peticion*," which was annexed to the expediente, but was not recorded, nor required to be, in any book. On the contrary, the whole expediente was frequently delivered to the claimant, to serve as evidence of his title, until it should be perfected. Usually, however, it remained in the secretary's office until the final grant issued; the issue of which was, generally, though by no means universally, noted briefly in a book called the "*Toma de Razon.*" The *original grant* on stamped paper was then delivered to the claimant, and sometimes a copy of it was annexed to the expediente, and remained in the archives. But an *unfinished* expediente was never made the subject of record. It is not required that the record of such proceedings should be established. That this court does not require it, is manifest from *United States* v. *Alviso*,* already cited by us. In that case there was not only no grant, or decree of concession, but the expediente was produced by the claimant, and was not found in the archives, nor was there any record or note of it in any book. But being satisfied that the petition, and the permission of the governor for the claimant to occupy the land provisionally, were genuine, and the possession having been uninterrupted for a series of years, the court held that these facts established in the claimant an *equitable* title. The case at bar has stronger equities. It is to another class of cases, where the title rested on an alleged *grant*, *not* accompanied with possession, and where neither the grant *nor any trace* of it was found in the archives, that the court has established a stringent rule. Applied as the court has applied it, the rule is proper. For, if the claimant rely on his *legal* title alone, and if his claim be devoid of the equities which arise from the usual preliminary steps to obtain the title, and particularly if it have no support from long possession, honestly acquired and maintained in good faith, then, in order to avoid the frauds which might be perpetrated by simulated and antedated grants, the court rule may well require proof that the grant was recorded according to the

* 23 Howard, 318.

usage of the Mexican government, or in other words, was noted in the "*Toma de Razon*," which was the only book of record. The failure to register is the only omission in the whole proceeding here; and the question is, whether this omission is, of itself, necessarily fatal to the grant, conceding it to have issued, or whether it raises so strong a presumption that the grant never issued, as that it cannot be overcome by parol proof; though we repeat that if there was no grant in form, the claimants have a valid equitable title, which ought to be confirmed.

3. One petition to the Alcalde Burton refers exclusively to the fact of the *measurement*, and is not inconsistent with the existence of a *grant* of the surplus. The grievance complained of by the Romeros, was the failure to measure the land and set apart the surplus. Until this was done, no *boundaries* could be fixed. The object in the petition was to procure this measurement, in order to ascertain the *quantity*, and to establish them. They refer the alcalde to his own records, for evidence of the fact that the governor had, some years before, ordered the measurement to be made, and they simply ask him to carry that order into effect; thus evincing that the petitioners considered themselves owners of the rancho, and entitled to demand the *measurement*.

But the alcalde was still tardy in making the survey; and on the 28th May following, José Romero presented another petition, in which he solicits the alcalde for a testimonial of the reports, which in the year 1844 were sent to the government, "so"—according to a wrong translation—"that we *can* be granted the said lands;" but according to the proper translation, "so that we *should* be granted the said lands," or, "that the said lands *might* be granted to us." The substance of this document is, that he desires from the alcalde copies, from the records in his office, of the reports made in 1844 by his predecessor, Alcalde Pico, to the government, touching the measurement of the land, with a view to the grant which they *then* solicited. At the date of this petition, the American forces were in the military occupation of California. Romero could not have needed the "testimonial"

he solicits, "so that the land *can* be granted to us," as the erroneous translation has it, because the Mexican government was no longer in authority in California, and there was no authority in the American military governor to grant lands. But with the correct translation the sentence is consistent and the meaning obvious.

Yet another document is relied on as decisive of the fact that no grant issued.

In January, 1847, it appears, José Romero, by his deed of that date, conveyed to Garcia one-half his interest in the land; in which deed is this clause: "both parties remaining subject to *that*, if the government grant it in ownership; and in a contrary case Garcia will lose equally with Romero, without having cause to reclaim the money given." But it will be here too remembered, this deed was made while the Americans were in the military occupation of the country, and after the conquest was complete. It was before the treaty of peace, and therefore the ignorant native population were wholly at a loss to decide what was to be the *status* of their titles under the new government. They were uncertain whether they would be recognized at all, and looked with distrust to the future. In selling lands at this period, it was very natural, in the uncertainty which prevailed, that they should stipulate in respect to the contingency of the recognition of the title by the new sovereign. This was manifestly what the parties meant when they inserted the words, "if the government grant it in ownership." They referred to the existing *American* government, and not to the extinguished one of Mexico.

As to the same *José* Romero, one of the original grantees, who testifies that "no grant" issued, and that they only procured the order for the measurement of the land, it is apparent that he is an ignorant and stupid person. He admits that he cannot read or write; that he had no agency whatever in procuring the title; that his brother Innocencio had the sole charge of the business; that he never saw any of the papers, except the order for measurement, and he saw that in the hands of the alcalde; that he lived at a distance

from the land, and but seldom saw his brother; and when asked how he knows the title did not issue, the only reason he gives is, that he had not seen it; but says that his brother ought to know more about it than he does. When analyzed, his testimony amounts to nothing.

Messrs. Bates, A. G., and Black, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

This was a petition for the confirmation of a land claim, under the act of the 3d of March, 1851.

Appellants presented their petition to the commissioners appointed under that act on the twenty-eighth day of February, 1853, claiming title to a certain rancho, situated in Contra Costa County, in that State, and also to certain unoccupied lands adjacent to the same, describing the tract as a sobrante, or overplus beyond what belonged to the neighboring rancheros.

Copies of some of the supposed title-papers were filed at the same time with the petition, and the petitioners stated in the petition that the originals would be produced and proved. Allegation of the petition is that the grant was made by Governor Micheltorena in the year 1844; but there is no profert of the grant in the petition as an existing document, nor does the petition contain any averment of its loss. Commissioners rejected the claim as invalid, upon the ground that no such grant was ever issued by the governor.

Claimants appealed from that decree, and the case was duly removed into the District Court. Further evidence was there introduced, and after a full hearing the decree of the commissioners was affirmed. Motion was then made by the petitioners to open the decree for a rehearing, and for leave to take further testimony, and both branches of the motion were granted by the court. Additional evidence was accordingly introduced, and the parties were again fully heard. Hearing on this last occasion was before the circuit and district judges, sitting in bank, under the sixth section of the act of the second of March, 1855; and after the hearing, the court reaffirmed the former decree rejecting the claim, and

declaring it invalid. Whereupon the petitioners appealed to this court, and now seek to reverse the decree upon the ground that the parol evidence proves the existence and authenticity of the grant, and that the finding of the court in that behalf was and is erroneous.

I. Evidence introduced by the appellants to prove their claim may properly be divided into three classes; and it is important to preserve that classification and keep it constantly in view, in order to appreciate its force and effect, and rightly apply it to the issues involved in the controversy.

First, it consists of certain documents bearing date during the Mexican rule, and which, if authentic, are properly denominated Mexican documents. Secondly, it consists of certain depositions introduced to prove the existence of the alleged grant and its subsequent loss, and that diligent search was made for it without success; and also to prove the contents of the lost document. Thirdly, it consists of certain documents bearing date during the military occupation of the department by the United States, and, of course, after the Mexican rule had ceased.

Appellees insist that no such grant was ever issued by the Governor of California, and the appellants do not pretend that the transcript furnishes any direct record evidence to establish the affirmative of that proposition. They set up no such pretence; but their theory is that the grant, when it was issued, was delivered to the party, and that it was subsequently lost, and they, as before remarked, rely chiefly upon the parol proofs in the case to establish those facts as a foundation to admit secondary evidence of the contents of the grant. But they also contend, in the same connection, that the documents introduced in evidence as Mexican documents, show that the original application for the grant was favorably received by the governor, and consequently that those documents tend strongly to confirm the parol proofs that the grant was actually issued. Counsel for the United States deny that proposition, and insist that the documents, as a whole, show conclusively that the governor never issued any such grant.

Consideration will first be given to the documents bearing date during the Mexican rule, because the title to the land, as claimed by the appellants, was derived from the Mexican government. They are as follows:

1. A petition signed by the claimants, and dated at Monterey, on the eighteenth day of January, 1844, wherein they solicit a grant of a certain tract of land described as the sobrante of three adjacent ranchos.

2. Connected with the petition is a marginal decree of the same date, directing the secretary to report upon the subject, "having first taken such steps as he may deem necessary."

3. Certificate of the secretary, also of the same date, that the governor directs the first alcalde of San José to summon the occupants of the adjacent ranchos and hear their allegation, and make report of his doings.

4. Report of the alcalde, under date of the first of February of the same year, to the effect that the rancheros mentioned and the petitioners had been confronted, and that the former made no objections to the application. But he also reported that it had come to his knowledge that one Francisco Soto, six or seven years before, had claimed the same tract.

5. Four days after that document was filed, the secretary reported to the governor that it would seem, according to that report, that there was no obstacle to the making of the grant.

6. On the twenty-eighth day of the same month, however, the governor entered a decree directing the judge of the proper district to take measurement of the land in presence of the adjacent proprietors, and that he "certify the result, so that it may be granted to the petitioners."

7. Second petition of the claimants, under date of the twenty-first of March, 1844, in which they stated that the judge of San José had never been able to execute the order of survey on account of the absence or engagements of the adjacent proprietors, and asked that the governor would grant the tract to them, provisionally, or in such manner as

he should deem fit. Prior documents, it seems, were in the possession of the claimants at the time of the second application, because they state that they are inclosed with the petition for the action of the governor.

8. Transcript contains no order of reference of the second petition, but the secretary, two days after its date, made a report to the governor expressing the opinion that the former order of survey ought first to be carried into effect, and when the survey should be made, his suggestion was that the prior claimant and the petitioners should be confronted, in order that the governor might be able to "determine what is best."

9. Final decree of the governor is in the words following, to wit: "Let everything be done agreeably to the foregoing report," which concludes the list of documents embraced in the first class. Argument is unnecessary to prove that those documents afford no evidence that a grant or concession of any kind was ever issued by the governor to these claimants. On the contrary, the documents, as a whole, fully show that up to the date of the last-named decree, no such grant had ever been issued. Survey of the tract was first to be made, and the parties supposed to be opposed in interest were then to be summoned and heard, as preliminary conditions to the hearing of the application. Record furnishes no evidence of a reliable character that either of those conditions was ever fulfilled. Evidence to show that the survey was made is entirely wanting. First-named claimant was examined as a witness, and he testified that the pretensions of the prior claimants were overruled and abandoned; but the explanations given by him, in view of the documents in the case, are not satisfactory.

II. Reliance, however, is more especially placed upon the parol proofs, which will next be considered, because they were introduced to prove the existence of a grant issued under the Mexican authority. Claimant's theory on this branch of the case is that the grant, notwithstanding what appears in the last-named decree, was actually issued by the governor in the year 1844, and was delivered to the first-

named petitioner, and that he retained it in his possession for a period of six years; that in 1850 the said petitioner was a party defendant to an ejectment suit then pending in the county court for the county where the land lies, which involved the title to a portion of the tract; that in defending the suit it became necessary to introduce these title-papers, and that being sick and unable to attend at the trial of the cause, he sent the title-papers, including the grant, to be used in that trial, to his attorney, and that the grant was never returned.

Such is the present theory of the claimant, but when the party who had possession of the papers was first examined he testified that he sent the papers to the attorney "for the purpose of having them submitted to the Land Commission," which would make the transaction bear date at a much later period. Deposition of the attorney was also taken, and his account of the matter sustains the present theory of the claimant. First deponent was then re-examined, and in his second deposition his recollection is substantially the same as that of his attorney, but he expressly states that the papers, when sent, were loose sheets, not sewn together, and his account of the transaction shows that he had no very definite idea what the package contained. He was asked what title-papers he sent to his attorney, and his answer was that he sent the title-papers pertaining to the grant given to him by the governor. Whereupon he was asked what title-papers were given to him by the governor, to which the witness replied, in effect, that he could not describe the number of the papers; that he made the petition and got the different papers usually issued at the government office, "such as the map, petition, informe, and decrees."

Responsive to a leading question, he stated that he obtained the grant in the month of March, 1844, but he gave no account of the attending circumstances, except that the pretensions of the prior claimant were settled and overruled by the governor. Another of the claimants was also examined as a witness, but he testified without any qualification that all they obtained from the governor was an order

of survey, that they did not obtain a grant, and that the land was never measured under the order of the survey. Two Mexican officials, Francisco Arce and Vicente P. Gomez, were also examined as witnesses. Arce was principal clerk under the secretary of the governor. He testified that an order was passed directing the grant to issue, and that it was written out by a clerk in the office and signed by the governor and secretary, and delivered to the party, but he could not state which of two persons named wrote it, nor when it was issued, whether in the spring, summer, fall, or winter of the year. No such order as that mentioned is produced, and there is nothing in the record to confirm the statement of witness that any such order was ever made. According to the testimony of the other witness, he also was a clerk in the office of the secretary. His statements are to the effect that he knew the claimants petitioned for the tract, but he admits that he did not see the grant, although he says he afterwards knew that it was issued.

When pressed to explain how he knew the grant was issued if he did not see it, his answer was that he thought he took the "*Toma de Razon*," which undoubtedly is an error, as there is no evidence in the case that the records for that year contain any such entry, or that there is any such entry in the Index of Jimeno. Absence of such proof goes very far to contradict the witness, as it may be presumed if such evidence existed it would have been produced. *United States* v. *Teschmaker*, 22 Howard, 405; *United States* v. *Neleigh*, 1 Black, 298.

Speaking for the whole court, Mr. Justice Nelson said, in the case first named, "The memorandum therefore, at the foot of the grant by Arce, the secretary, 'Note has been made of the 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 and found in the Mexican archives." "Those archives," say the court in that case, "are public documents which the court has a right to consult even if not made formal proof in the case."

Attorney of the claimant in the ejectment suit was also

examined, and testified that the grant was among the papers sent to him to be used in that trial, and that the signatures to the document were genuine. Witnesses were also examined who had seen the papers in the hands of the principal claimant, and heard him speak of them as the title-papers in this case, and another class who say they examined them, and still another class who say they read them or heard them read, and became convinced they were genuine. Papers were last seen in the hands of an attorney at law at San José, and the testimony of the claimants tends to show that he was insane. Such is the substance of the parol testimony, except what relates to the search for the document, which need not be more particularly noticed.

III. Congress recognized the existence of war between Mexico and the United States on the thirteenth of May, 1846, and this court has more than once decided that the official functions of the Mexican officers in California ceased as early as the seventh day of July of that year. *United States* v. *Castillero*, 2 Black, 149.

Civil officers in that department, after that date, were such as were appointed by our military commanders. Bearing these facts in mind, we will proceed to the examination of the other documents introduced in evidence.

1. Alcalde of San José, for the year 1847, found in his office an additional order of survey, signed by Jimeno, of the same date as the before-mentioned final order of the governor. Mistaking the nature of his authority, and thinking it to be the same as that of the former governor, the alcalde, on the ninth day of April of that year, passed an order authorizing the claimants to take possession of the land in controversy, premising that if any adjacent landowner demanded it, the tract must be measured.

2. On the twenty-eighth day of May, 1847, one of the claimants addressed a petition to the alcalde of San José, representing that as early as 1844, an order from the former government had been sent to that *Jusgado*, requiring a measurement of the land called *Juntas*, and that such measurement had not been made. Based upon those representations,

his request was that the claimants might be furnished with a testimonial of the report sent at that date to the government, "so that we can be granted said land," and the marginal order entered by the alcalde directs that the land shall be measured according to the original order of the former government. They asked a testimonial of the report sent to the former government, and measures were taken to comply with their request.

3. Former alcalde was designated to collect the information, and on the following day he reported to the alcalde that the adjacent proprietors declared that the surplus of the tract not belonging to them could be granted.

4. Case also shows that nearly four months prior to that report, one of the claimants and Maria Garcia, appeared before the same alcalde to execute a conveyance, in the presence of two assisting witnesses, to confirm a sale by the former to the latter of one-half of the tract, and stipulating in the conveyance that both parties should "remain subject to the final result, if the government grant it in ownership, and if the contrary should be the case, then the grantee should lose equally with the grantor without any right to reclaim the consideration paid."

Both the commissioners and the District Court were of the opinion that these documents establish beyond doubt that the action of the former government in this case terminated with the before-mentioned order of survey, and in that view of the subject we entirely concur. Taken separately, the parol evidence, if competent, might possibly justify a different conclusion, but it is clear that it must be weighed in connection with the documentary evidence, and when so considered the conclusion is irresistible that no grant was ever issued by the governor. Suppose it be conceded, however, that the probative force of the parol testimony is not overcome by the contrary tendency of the written evidence, the concession could not benefit the claimants, because the case is one where there is no record evidence of any kind to prove either the existence or authenticity of the grant. Assuming that state of the case, then, it falls directly within the

class of cases where confirmation has been refused, because there was no record evidence to support the claim. *United States* v. *Cambuston*, 20 How., 59; *United States* v. *Teschmaker*, 22 Id., 392; *Fuentes* v. *United States*, 22 Id., 443; *United States* v. *Osio*, 23 Id., 280; *United States* v. *Bolton*, 23 Id., 341; *Luco et al.* v. *United States*, 23 Id., 515; *Palmer et al.* v. *United States*, 24 Id., 126; *United States* v. *Castro*, 24 Id., 346; *United States* v. *Neleigh*, 1 Black, 298; *United States* v. *Knight*, 1 Id., 229; *United States* v. *Vallejo*, 1 Id., 541; *United States* v. *Galbraith*, 2 Id., 394.

But the present case, in one respect, is much stronger than any one of those which have preceded it. All of the preceding decisions rest upon the ground that there was an entire want of record evidence to support the claim, but in this case the record evidence itself, if there be any, shows that the supposed grant was never issued. Our conclusion, therefore, is, that the decree of the District Court is correct, and it is accordingly

AFFIRMED.

UNITED STATES *v.* WORKMAN ET AL.

The Governor of California had no power, on the 8th June, 1846, either under the colonization law of August 18, 1824, and the regulations of November 21, 1828, nor yet under the despatch of March 10, 1846, from Tornel, Minister of War, nor under the proclamation of Mariano Paredes y Arrilaga, President, *ad interim*, of the Mexican Republic, dated March 13, 1846—these two last made in anticipation of the invasion of California by the forces of the United States—nor under any other authority, to make a valid sale and grant of the mission of San Gabriel in California.

APPEAL by the United States from a decree of the District Court for the Southern District of California, confirming a decision of the Board of Commissioners appointed by the act of March 3, 1851, for the settlement of private land claims in the State just named, by which decision an estate known as the ex-mission of San Gabriel was confirmed to Workman

and Crosby, appellees in the case. The petition represented that "on the 8th day of June, 1846, Pio Pico, then Governor of California, in the name of the Mexican nation, by virtue of authority in him vested by the laws of Mexico, the authority given him by the *Departmental Assembly* for the alienation of the missions, and the instructions and authority conferred upon him by the Supreme Government, as well as the laws and customs of the country, and also to pay debts of the government, sold and conveyed unto the said Workman and one Perfecto Hugo Reid the said ex-mission, with the appurtenances which at that time were considered as appertaining to the same, whether of lands, improvements, real estate, or cattle; that juridical possession was duly given to said Reid and Workman, and that they remained in peaceable possession until they were forcibly ejected by soldiers under command of officers of the government of the United States; that at the time of the grant, the said Reid and Workman were large creditors of the Mexican government, and that the sale of the mission to them was in all respects fair and for its full value, at that time honestly paid by them." The appellant Crosby claimed by transfer from Reid.

The alleged grant as translated was substantially in these words, and, as presented below, had written upon it an undated proclamation; all as here printed.

"PIO PICO, CONSTITUTIONAL GOVERNOR, &c.

"Having been first authorized by *the most excellent the Departmental Assembly*, for the alienation of the missions, as well as for paying their debts, and avoiding the total ruin of the same, and to *provide resources* that *may assist in case of foreign invasion*, which according to self-evident data is very near happening, *in which case the government of the department has received ample powers from the supreme one of the nation;* considering that the Señores Reid and Workman have rendered valuable services to the government, and furnished eminent aid for the better protection and security of the department under the guarantee of a just indemnification when the general treasury should be unembarrassed, and whereas those Señores have solicited for their personal benefit,

and that of their families, the mission of San Gabriel, with all its lands, improvements of town and country, in payment of the sums which at different periods they have advanced to the departmental government, binding themselves to satisfy the debts against said mission, &c., as also to assign a proportional part or sum for the maintenance of the ministering fathers, who may live there, and for the preservation of the divine worship: Having seen and considered all that it behooves to see and consider: *In the exercise of the powers wherewith I find myself invested*, I make a real sale and perpetual alienation forevermore to the Señores, &c., of the mission of San Gabriel, with all the appurtenances, recognized as thereunto belonging, consisting of lands, improvements, real estate, or self-moving property.

"The following conditions are imposed:

"1st. They will pay to the creditors of the mission the sums which may be proved at the farthest in the term of two years at most.

"2d. They will advance on their own account the necessaries for the subsistence of the father minister, who at any time may live there, as also for the preservation of divine worship.

"In consequence by these present titles, that the above-named are legitimate owners of the said mission of San Gabriel jointly, on the terms, and under the conditions above stated.

"By virtue whereof they may take possession of the same from this moment; and for due testimony in all times, I give this instrument as a deed in due form, &c., on the eighth day of June, eighteen hundred and forty-six.

"PIO PICO.

"JOSE MATIAS MORENO,
Secretary ad interim.

"This patent is entered on the respective book.

"MORENO."

The proclamation annexed was as follows, viz.:

"PROCLAMATION.

"PIO PICO, CONSTITUTIONAL GOVERNOR OF THE DEPARTMENT OF CALIFORNIA, TO ITS INHABITANTS:

"Know ye that the country being menaced by the sea and land forces of the United States of America, *which already occupy the towns of Monterey, Sonoma, San Francisco, and other frontier*

places north of this department, where already waves the flag of the stars, threatening to occupy the other ports and towns, and subject the same to their laws; and this government being firmly resolved to make all possible efforts to repel the most unjust of aggressions which the latter centuries have beheld made by a nation inspired by the most unheard of ambition."

The authenticity of the grant was proved by a certain Nicholas A. Den, who testified that he knew the handwriting of both Pico and Moreno, having frequently seen them both write, and that the signatures to the grant were genuine. Moreno, who was secretary of state while Pico was governor, testified that a bargain was made between Pico on the one part and Reid and Workman on the other, for the mission in question, and that a written document was given to them in the form of a title; though he did not recollect the date, but thought it was in May or June, 1846.

As respected the power of the governor to grant mission lands, there was no doubt that under what is known as the colonization law of August 18, 1824, and certain regulations of 21st November, 1828, the governor had power to grant *vacant* lands belonging to the Supreme Government. But whether under those laws he could grant lands like these missions, was one of the questions in the suit. [The reporter not having heard this case, which was decided before his appointment, and not finding a reference on his brief to the place where the important language is, is unable here to set it forth.]

The power, though claimed in part as coming under those laws, was placed more particularly upon other grounds, grounds arising from acts relating specially to the missions, or from supreme powers given to the governors about the time of the invasion of the country by the United States, and in order to enable the governors to repel it. On the 17th August, 1833, the Supreme Government passed a decree to secularize the missions of California.

It declared, among other things:

"ART. 1. The government will proceed to secularize the missions.

"ART. 2. In each shall be established a parish, served by a secular clergyman, with a stipend, as the government shall decide.

"ART. 3. These parochial curates shall not recover or receive any fees for marriages, baptisms, or under any other name.

"ART. 7. Of the houses belonging to each mission, the most suitable shall be selected as the residence of the curate; the land appropriated to him not to exceed two hundred yards square, and the rest shall be specially devoted to a *town-house, primary school, and public establishments and offices.*"

On the 3d November, 1833, the Mexican Congress passed an act authorizing the executive to adopt the measures necessary for their colonization, and with this view to use the property granted to pious uses, in order to facilitate the operations of the commissions and the transportations of families. On the 16th April, 1834, another law was passed, declaring that "all the missions of the republic shall be secularized." They "shall be converted into curacies, the limits of which shall be designated by the governors of the States where the said missions are." On the 9th August, 1834, certain rules, "agreeably to the spirit" of previous laws and instructions, were accordingly issued for the secularization of the missions, the rules, however, being provisional, and it being declared that "the Supreme Government will, by the quickest route, be requested to approve of them." On the 3d November, 1834, a decree of the Departmental Assembly provided for the colonization of the lands which had been secularized. On the 7th November, 1835, however, a law was passed by the Mexican Congress, enacting that until the curates should take possession, under the second article of one of the previous laws, "the government shall suspend the execution of the remaining articles, and keep matters in the condition in which they were before the passage of the said law." On the 17th November, 1840, Franco, Bishop of the Californias, addressed the Supreme Government on the subject of these missions. His letter, imperfectly translated, contains passages like these:

"From the time that the temporalities, which they created

and augmented with their personal labor and their stipends, were taken away from the missionaries, and that the seculars and their attendants (among whom are some I am acquainted with), and to whom no one would trust anything, entered into the possession of the property of the missions, their destruction was already doomed. In 1836, I notified to the Supreme Government the evils which the missionaries have to contend with, and not the least among these, that the administrators of them took possession of the houses in which the fathers were living,—houses built by the *religiosi*, and in the construction of which they had invested the stipends they were receiving, and the labor of their hands. The fathers have been compelled, as I myself can bear witness, to live there as so many bankrupts, and with great inconvenience. The administrators keep in the habitations certain people who disturb all rest at nights, by their intoxication, gambling, and dancing, which the converts witness with shame. How insupportable is this! And what a miserable life for a few devoted *religiosi!* So much so is it, indeed, that many of them contemplate the abandonment of the missions, and to seek peace and tranquillity of mind in retirement. A tormenting life, indeed, and one which has dissuaded many persons from going to the missions, because they would not expose themselves to such suffering and to such disregard for their character. I well know, and have already communicated it to the government, that within a short time there will be nothing of the property of those opulent missions, which the administrators received when the fathers delivered them over. What missionary father is there who will be willing to labor to increase the property of the unhappy Indians, if experience teaches him that the fruit of his labor is to be taken away from the legitimate owners, and delivered to others, whom it has cost no anxiety or labor, to enjoy? Who is the *religioso* that would desire to build a house or plant an orchard for his recreation and comfort, if he sees that they are to be taken away from him, and to be possessed by the men who before have been supported by alms, the gift of these very missionaries, and that the unhappy fathers have to live at their own expense? What I insist on, and will always insist on, is that the houses and orchards which they or their predecessors have made, and which are contiguous to and in immediate communication with the churches, remain to the benefit and use of the missionaries. The administrators, as they

have at their disposition the Indians and property of the missions, can build a house for them, and leave the fathers in peace and quietude. I deem this measure of so great necessity, that if it is not adopted, there will not be any one who will desire to go to serve the missions at all."

To this letter were appended eight different requests, the purpose of which was to give effect to the wishes precedentedly expressed. And on the day of its date, an order issued from the Ministry of the Interior, reciting that his excellency the President had been pleased "to decree in conformity with everything asked in it;" and stating that an order was issued from the said ministry to the Governor of California, "to restore without delay to the missionary fathers the possessions and property which were under their administration for the conversion of the heathen."

In the year 1843 (June 12th), the Mexican government adopted a new constitution,—*Bases Organica.* Its seventh chapter is entitled, *Gobierno de los Departementos*, and relates, as its name implies, to the government of the departments. Among the powers given to the Departmental Assembly are these:

"1. To establish the means of meeting their ordinary expenditures, *or of making those that are extraordinary*, which they may direct according to their powers with the approbation of the Congress.

"2. To decree what may be proper respecting the acquisition, *alienations*, and exchanges of the property that may belong to the community of the department. *With regard to the alienation of lands, they shall observe the existing laws, and whatever is decreed by the laws of colonization.*"

On the subject of these missions, it appeared that on the 21st April, 1845, Pio Pico being then governor, the Assembly decreed thus:

"The government will demand information of all the persons having charge of the missions, in order that they may give it truthfully, of active and passive debts, showing the resources they have to pay the passive ones.

"The government, from the publication of the present decree, will *suspend*, until a convenient time, the *granting of the lands immediately contiguous to the missions*, considering that some of them are indispensable, or reserved and appropriated under the class of common lands."

On the 28th May, 1845, it made this decree:

"The departmental government shall call together the Indians of the missions of San Rafael, Dolores, Soledad, San Miguel, and La Purisima [San Gabriel, it will be observed, is not mentioned], which are abandoned by them, by means of a proclamation, which it will publish, allowing them the term of one month from the day of its publication in their respective missions, or in those nearest to them, for them to reunite for the purpose of occupying and cultivating them; and they are informed that, if they fail to do so, said missions will be declared to be without owners, and the Assembly and departmental government *will dispose of them as may best suit the general good of the department.*"

On the 28th October, 1845, it decreed thus:

"There will be *sold* in this capital, to the highest bidder, the missions of San Rafael, Dolores, Soledad, San Miguel, and La Purisima, which are abandoned by their neophytes. The missions of San Fernando, San Buenaventura, Santa Barbara, and Santa Ynez, shall be *rented* out to the highest bidder for the term of nine years." [Bonds, &c., to be given.]

It will be observed that the mission in question in this suit is not mentioned as among either those to be sold or those to be rented.

On the 30th March, 1846, another decree was passed:

"The government is authorized to carry into effect the object of the decree of the 28th of May last respecting missions; to which end the departmental government will act in the manner which may appear most conducive to obviate the total ruin of the missions of *San Gabriel*, San Luis Rey, San Diego, and the remainder which are in similar circumstances.

"As most of these establishments are owing large amounts, if the property on hand should not be sufficient to satisfy their acknowledged debts, *attention shall be had to what the laws determine respecting bankruptcies, and steps shall be taken accordingly.*

"Should government, by virtue of this authority, find that in order to prevent the total ruin which threatens said missions, it will be necessary to *sell them to private persons, this shall be done* at public auction, the customary notice being previously given."

This decree was soon followed by a letter from the

"MINISTRY OF INDUSTRY AND PUBLIC INSTRUCTION.

"MOST EXCELLENT SIR:

"His Excellency, the President, has received information that the government of that department has ordered that the property belonging to the missions thereof be put up for sale at public auction, which your Excellency's predecessor had ordered to be returned to the respective missionaries for the direction and administration of their temporalities; therefore he has deemed proper for me to say that the said government will please to report upon these particulars, *suspending immediately all proceedings respecting the alienation of the aforesaid property till the determination of the Supreme Government.* I have the honor, &c.

"GOD AND LIBERTY.

"MONTESDEOCA.

"MEXICO, Nov. 14, 1845.

"To his Excellency the Governor of the Department of the Californias."

On the other hand, reliance was had, among other things, on a circular public letter, or authority, as follows:

"MINISTRY OF WAR AND MARINE.

"TO THE GENERAL COMMANDER OF CALIFORNIA:

"The preparations which the United States are making, and the approach of the naval forces towards our ports, leave no doubt that war with that power is about breaking out, and as his Excellency the President *pro tem.* is resolved to sustain the rights of the nation, he wishes that in all the ports of the republic where the enemy may present itself a rigorous defence be made, capable of giving honor and glory to the national flag. For that object, and until the Supreme Government appropriates and sends you the necessary means, it relies upon *your* patriotism and fidelity to dictate the measures which you may judge necessary for the defence of that department, for which purpose you and his Excellency '*are invested with full powers.*' And I

have the honor to transcribe the same to you for your cognizance, hoping that you on your part will leave *no* efforts to preserve entire the rights of the nation.

"GOD AND LIBERTY.

"TORNEL.

"MEXICO, March 10, 1846."

And also a proclamation of President Paredes y Arillaga, of which the important part was:

"MARIANO PAREDES Y ARILLAGA, GENERAL OF DIVISION AND PRESIDENT AD INTERIM OF THE MEXICAN REPUBLIC.

"TO THE INHABITANTS THEREOF. KNOW YE:

"That, on account of the actual state of the country, threatened with a foreign war, and a large and important part of its territory invaded, considering that the time has arrived to act with the greatest activity and energy, to repel the most unjust aggressions, to recover the usurped territory, and to preserve the glory and honor of the nation; and convinced that, for the accomplishment of objects so grand, it is necessary to secure order and peace within; in the exercise of the powers vested in me, &c., I have thought proper to decree the following:

"The attention of the governors of the departments is called to the circular of the 24th December of last year past for the punctual observance thereof, wherein is conferred upon them *the extension of the powers* granted to the Executive by the decree of Congress, dated the 21st of the same month, in conformity with the 198th article of the organic law.

"The governors of the departments are authorized to act *expeditiously in extraordinary cases*, and with due justification to preserve the great interests of the independence and the integrity of the national domain, and to secure tranquillity and public order, without which these inestimable blessings cannot be sustained.

"MARIANO PAREDES Y ARILLAGA.

"NATIONAL PALACE, MEXICO,
March 13, 1846.

"To Don Joaquin Maria Castillo y Lanzas."

Messrs. Bates, A. G., and Wills, for the United States:

1. The deed is *not genuine*, but has been fabricated, and this after the date at which it purports to have been exe-

cuted. It purports to have been made *June* 8, 1846. The governor's proclamation, which forms part of the expediente, and must have been contemporaneous with the grant (else why should it be connected with it?) recites the capture and "occupancy of the towns of Monterey, Sonoma, San Francisco, and other frontier places north of this department, where already waves the flag of the stars." These events we know, historically, occurred after *July* 7, 1846. The proclamation was added to the expediente in order to furnish evidence of the public exigency under which the grant was made,—a sale made, as it was pretended, to raise money for the public defences. But the appended proclamation proves the very fraud which it was invented to conceal.

2. Supposing the deed genuine, it is not formally proved. No evidence of the authenticity of the grant has been offered, but secondary evidence of the handwriting of the governor and secretary, no legal basis having been laid for its introduction. Moreno, the secretary, did not testify to the genuineness of *this* grant or of his signature, but spoke of "*a* bargain" and "*a* title."

3. There is no evidence of the performance of the conditions of sale. In *United States* v. *Bolton*,* where the Mission Dolores had been sold on condition of paying its debts, evidence of this kind was held to be necessary, and its absence regarded as evidence of the fraudulent character of the grant.

4. The power to grant lands under the *colonization* law of August 18, 1824, and the regulation of November 21, 1828, has always been considered to apply to vacant lands; and the lands which came within the scope of these provisions were not the subject of *sale*, but of colonization. Under those provisions the sale cannot be sustained. Neither is there anything in any of the decrees, &c., which gives such power as Pio Pico, supposing his grant genuine, has attempted to exercise. The sale of the missions was extremely odious to the Catholic clergy, as the letter of the Bishop of California shows; and the *project was arrested*, as the letter

* 23 Howard, 353.

of Montesdeoca also shows. To assert that under the loose powers given by Secretary Tornel's circular of March 10, 1846, the governor was vested with absolute ownership of all lands in Mexico, as well those which had been scrupulously withheld from sale as those that had been granted, claims too much for it, and the case is not aided by the subsequent proclamation of Paredes. Abundant effects can be given to both papers to answer every requisition of their language without giving the immense, despotic, and unjust power here asked for by the counsel of the claimants.

Messrs. Butterworth and Walker, contra:

1. The fact that on the back of the office copy of the grant there is found a rough draft of an official proclamation, which, from its terms, appears to have been written after the 7th of July, is an evidence of the integrity of the grant. It makes the fact clear that the document *was at that time remaining in the secretary's office.* It is known and proved that the government was then destitute of funds and of all necessaries. This writing upon the back of the grant may have been from accident or want of paper.

2. The proof of handwriting is not secondary evidence. Precedent establishes this. The objection will not be made, it is to be hoped, after this term.*

3. The payment of the debts of the missions was but a charge upon the estate, which the creditors may enforce at any time, if they have not already done so.† If a condition, it was a condition subsequent, and no law of denunciation exists to forfeit the estate.‡

Although the grant of the mission was made on sale, it is nevertheless a colonization grant. Sales were one of the most effective means of colonization. It cannot be pretended that, if in addition to settlement, the governor had received money from the grantee, that that fact would avoid the grant. Even if the officer had exacted it illegally and wrongfully,

* See United States *v.* Moreno, *ante*, 403.—REP.

† Taft *v.* Morse, 4 Metcalf, 528; Sheldon *v.* Purple, 15 Pickering, 528.

‡ Fremont *v.* United States, 17 Howard, 542.

in addition to settlement and occupation, there is no pretence for saying it would have avoided the grant; much less, when it is shown that the money so received went into the treasury or to the necessary use of the government. The governor in his grant recites that he acts in virtue of *all* the power he possessed from whatever source derived. The title recites that the grantees "have rendered considerable services to the government, and also lent good assistance for the better preservation and security of the department, under guarantee of just recompense, whenever the general treasury should be released." The ninth article of the colonization law of 1824 expressly makes services a good consideration for a grant. This court recognizes such service as a good consideration for a grant.* The same consideration is recognized in the Sutter case,† as to the defence of the frontier and the civilization of the Indians,—things not specially mentioned in the colonization laws. The colonization law does not define the character of the services. They may be either personal or pecuniary. "*Servicio*" is the word used both in the law of 1824 and in these grants. It is defined by Newman: "Services, utility, benefit, advantage; a sum of money voluntarily offered to the king; service to the kings in war." It is thus evident that it includes pecuniary service, and was so intended by the act of 1824.

The Departmental Assembly seems always, in conjunction with the governor, to have exercised a large jurisdiction over the missions. They were clothed with the power of administering them as a branch of the public revenue, and as a subject of public property. It is notorious that they granted the agricultural and pastoral lands once occupied by the missions at pleasure. The regularity of these grants was always recognized by the Supreme Government of Mexico. The acts of Governor Alvarado in this respect were expressly approved in 1840. Their validity has been declared by this court.‡

* United States *v.* Larkin, 18 Howard, 557.

† Same *v.* Sutter, 21 Id., 170.

‡ Same *v.* Cruz Cervantes, 18 Id., 553.

It cannot be doubted that the 7th chapter of the Constitution of 1843, *Bases Organica*, gave very ample powers to the Departmental Assembly. The first article confers the largest power which any government can have, that of providing the means of meeting the expenses of the government, both ordinary and extraordinary. With the power to provide for ordinary and extraordinary expenses of the government, and raise revenue and means for those purposes, does it admit of doubt that the public domain might be resorted to, so that the general object of colonization and the settlement of the country were secured in these alienations? It is also well known to the court and the case shows that a decree was passed by the Supreme Government, when the war broke out, enlarging the powers of the governors of departments. In March, 1846, the government of Mexico was nearly absolute in the hands of the Federal Executive. On the 10th of that month the President directed to the Governor of California an order instructing that officer to prepare for a vigorous defence; for which purpose the governor was invested "*with full powers*" to do what *he* "judged necessary" for the defence of California. This left the means of raising funds entirely within the discretion of the governor, and operated as a repeal of the order of 14th November, 1845, known as the "Montesdeoca Decree." Besides which, the word "property" (*bienes*), used in the latter decree, referred only to the personal property, church and curate's lot. It never was intended to apply to the agricultural and grazing land formerly in use by the mission.

Mr. Justice CLIFFORD delivered the opinion of the court.

Appellees, in their petition to the commissioners, represented that Governor Pio Pico, on the eighth day of June, 1846, granted, sold, and conveyed in full property unto the first-named appellee and one Perfecto Hugo Reid, the mission of San Gabriel, with all the appurtenances appertaining to the same, whether they consisted in lands, improvements, or cattle; and they also alleged that the juridical possession was duly given to the grantees of all that property, whether

buildings, vineyards, orchards, gardens, or land, and that the grantees remained in peaceable and quiet possession of the premises until they were forcibly ejected from the same under the orders of an officer of the United States. Representation also was, that the grantees at the time of the purchase were large creditors of the Mexican government, and that the sale was in all respects fair and genuine, and for the full value of the property. Other appellee claims title as grantee under the other original purchaser, and the record shows that a copy of that conveyance was filed with the petition.

I. Claimant introduced the grant described in his petition as the foundation of his claim, and it bears date as represented in the petition, and purports to have been signed by the governor as therein set forth and alleged. Recitals of the document show that the grantees solicited the grant for their own benefit and that of their families, and yet the record furnishes no trace of any such petition. None such was introduced, nor was there any attempt made at the hearing to account for its absence. Authority to grant the property of the missions, as specified in the instrument, is claimed to have been derived from the Departmental Assembly. Reasons assigned for the exercise of the power were, that it was necessary both for the payment of their indebtedness, and to prevent their total ruin, and as if those reasons were insufficient or unsatisfactory, it is added, "and to provide resources that may assist in the common defence in case of foreign invasion, which, according to self-evident data, is very near happening." Theory of claimant is, that the sale was a public sale, but there is no evidence of the fact; and the presumption, if any, from the recitals of the grant, is clearly the other way. Had the sale been a public one, then it would have been of no importance whether the purchasers were worthy or unworthy persons, provided they were the highest bidders and competent to take, and actually paid or secured the consideration. But the representation is, that they had "rendered valuable services to the government, and furnished eminent aid for the better protection and secu-

rity of the department, under the guarantee of a just indemnification when the general treasury should be unembarrassed," and these representations are evidently put forth as considerations which influenced the granting power in acceding to the application of the grantees, and in making the grant for their own benefit and that of their families.

II. All that was necessary having been considered and examined, the recital in effect then is, that the governor, in the exercise of the powers with which he was invested, decided to execute a real sale and perpetual alienation of the mission in question to the original grantees, "with all the appurtenances recognized as thereunto belonging, consisting of lands, improvements, real estate, or self-moving property." Principal conditions were: 1. That the grantees should pay to the creditors of the mission the amounts presented against it, and properly proved within the period of two years. And 2. That they should thereafter and forever provide for the support of the father minister residing at the mission, and for the preservation of divine worship. Authenticity of the grant was proved before the commissioners by the testimony of one Nicholas A. Den, who testified that he was acquainted with the handwriting both of the governor and that of the secretary appearing on the document, and that the respective signatures were true and genuine. Evidence to show a compliance with the principal conditions is entirely wanting, or that the grantees ever went into the possession of the property under the grant. Grant bears date on the eighth day of June, 1846, but it is accompanied by a proclamation, signed by the governor, which, from its contents, though without date, must have been written at least a month later. Last-named document recites that the forces of the United States were then in the occupation of the towns of Monterey, Sonoma, San Francisco, and other frontier places north of the department, "where already waves the flag of the stars." Our forces took possession of Monterey on the seventh day of July, 1846, and the governor of the department well knew when that event occurred, for on that day the Mexican forces fled from that city, and never afterwards had posses-

sion of the place. Commissioners confirmed the claim, and the United States appealed to the District Court.

III. Deposition of the secretary of the governor was then taken by the claimant, and the witness ultimately testified that there was a written document given to the original grantees in the form of a title, but he admitted that he could not recollect the date.

United States resisted the confirmation of the claim upon several grounds. *First*, they contended that the grant was antedated and fraudulent. *Secondly*, that the evidence introduced to establish its authenticity was incompetent and insufficient to justify a finding in favor of the claimants. *Thirdly*, that the governor had no authority under Mexican law to warrant him in making the grant, and consequently that the same was void.

District Court affirmed the decree of the commissioners, and the United States appealed to this court. Questions discussed here are substantially the same as those presented in the court below, but in the view taken of the case, it will only be necessary to examine the third proposition, as we are all of the opinion that the sale was made and the grant issued without any pretence of authority.

IV. Ample authority was conferred upon the Governor of California to grant vacant lands belonging to the Supreme Government. Such authority was derived from the colonization law of the eighteenth of August, 1824, and the regulations of the twenty-first of November, 1828, as has been affirmed by repeated decisions of this court. But all of those decisions proceed upon the ground that the authority conferred is limited and restricted to the granting of unoccupied public land. Grants under those laws were required to be made subject to the approval of the Departmental Assembly, and consequently unless such approval was obtained, the title was not regarded as perfect and complete. Public establishments of the department could not be granted under those laws, nor even lands which were in the lawful possession and occupancy of persons claiming provisional title under the government. Repeated decisions of this court have au-

thorized these conclusions, and in *United States* v. *Vallejo*, 1 Black, 541, it was expressly held that the Spanish system of disposing of public lands differed so widely from that provided for by the Mexican law of the eighteenth of August, 1824, and the regulations of the twenty-first of November, 1828, that the former system must be regarded as repealed, on account of the inconsistency and repugnancy of the latter system. Effect of that ruling is to regard all prior regulations upon the subject as inoperative, but the court went farther, and held that those laws were the only laws of the Mexican Congress passed on the subject of granting the public lands which were in force in that department, with the exception of those relating to the missions and towns, which will presently be considered. All pretence of authority, therefore, may be considered at an end, unless it can be found in the laws relating to the missions, or can be regarded as conferred by the Departmental Assembly, as is assumed in the grant. Appointment of the governor of a territory emanated from the Supreme Government, and all his powers were derived from the same source. Departmental Assembly consisted of seven members, who were elected from districts previously assigned by law. Many duties were devolved upon the governor, and also upon the Departmental Assembly, where each was required to act independently of the other. But other duties were prescribed, in the performance of which the governor and the Assembly were required to act in concurrence. In the latter class the governor could not act separately, though in some instances it was competent for the Assembly to act in his absence. *United States* v. *Osio*, 23 How., 285. Powers of the governor as such emanated from the same source as that from which he derived his commission, and there is no reason whatever to conclude that his authority over the public lands or public establishments of the department could be enlarged or diminished by the Departmental Assembly. 1 Arrillago Recop., pp. 202–210.

Supreme Government, on the seventeenth day of August, 1833, issued its decree secularizing the missions in California.

Intention of that decree was to make a radical change in regard to the temporalities of the missions, by taking their management and control from the priests, and vesting them in the civil authorities.

V. Congress of Mexico, on the third day of November, 1833, passed an act authorizing the executive to adopt all measures which should secure their colonization, and for that purpose gave authority to use the property donated to pious uses, in order to facilitate the operations of the commissions and the transportation of families. Mexican Government also published another decree of secularization, on the sixteenth day of April, 1834, which provided that the missions of the republic should be secularized; that they should be converted into curacies, the limits of which were to be designated by the governors of the territories in which the missions were situated. Assembly, on the ninth day of August, 1834, adopted certain provisional rules for secularizing the missions and converting them into pueblos; but those rules were made subject to the approval of the Supreme Government. Additional regulations were also promulgated by the governor, on the third of November, in the same year, upon the same subject; but on the seventh day of November of the following year, the Supreme Government issued a decree suspending the Secularization Act until the curates should take possession of their parishes, as had been provided by the second section of the act. Bishop of California, on the seventh day of November, 1840, addressed a petition to the Supreme Government, containing eight special requests, which in effect contemplated the suspension or repeal of the Act of Secularization. Corresponding decree of the President is dated on the same day, and directs that a general order be issued to the governor for the restoration, by means of the subaltern authorities, without delay or impediment, of the possessions and property used by them under their administration for the conversion of the heathen. Proof is entirely wanting to show that that order was ever annulled. On the contrary, the clear presumption is that it

remained in full force at the treaty of peace between the two countries.

VI. Constitution of 1824 did not define the powers of Departmental Assemblies or Territorial Deputations, as they were always called while that constitution remained in force. During the administration of Santa Anna, on the twelfth day of June, 1843, the Mexican Government adopted a new organic act, known as the "*Bases Organica.*" Title seven defines the powers of the Departmental Assemblies, and the provision, among other things, contains the following, to wit: "To decree what is useful and conformable respecting the acquisition, alienation, and exchanges of the property that may belong *to the community of the department.* With regard to the alienation of lands, *the existing laws shall be observed.*" Those bodies were vested, as will be seen, with the power of acquiring, alienating, and so changing the property belonging to the department; but it is not perceived that they could confer any power upon the governor even upon that subject, while in relation to the alienation of lands, that power was expressly restricted to what was conferred by the laws of colonization, which, as is now well known, was to approve or disapprove of a grant when regularly made by the governor under those laws.

VII. First decree of the Departmental Assembly, under Governor Pio Pico, upon the subject of the missions, is dated on the twenty-first day of April, 1845, and recites that the government will demand exact information as to their debts, and will suspend until a convenient time the granting of the lands immediately contiguous to the missions. Second decree bears date on the twenty-eighth day of May following, and provides for calling together the Indians of certain missions therein named, by means of a proclamation; and also, if they fail to reunite within one month from the day of the publication of the proclamation, that they should be considered as notified that the missions would be declared vacant, and be disposed of as might best suit the general good of the department. Decree of the twenty-eighth of October, 1845, authorized the sale to the highest bidder of

certain missions therein named, which, however, did not include the one in question. Provision was also made in the same decree for renting the other missions, under certain stringent regulations. Third decree was passed on the thirtieth of March, 1846, and purports to authorize the Departmental Government in carrying into effect the object specified in the second decree, so far as respects the missions of San Gabriel, San Luis Rey, San Diego, and any others in similar circumstances, to act in such a manner as may appear most conducive to prevent their total ruin. Reference is doubtless made in the grant to this last-named decree, as the foundation of the authority for making the sale. Information, however, had reached the Supreme Government long before any such pretended authority was exercised, that the governor of the department was devising measures for the sale of these properties. Effective measures were immediately taken to prevent any such abuse of the powers committed to his charge. Those measures consisted in the order of the President suspending all proceedings respecting the alienation of the property till the determination of the Supreme Government, and was accompanied by directions given to the Departmental Government to make a report of all the particulars.

Evidence that these preventive measures were taken, consists of a despatch from the Minister of Industry and Public Instruction, addressed directly to the governor, in which those facts are very formally and fully stated.

VIII. Even suppose such a power had been conferred upon the governor by the Supreme Government, still it was clearly competent to withdraw the power and forbid its exercise; but the truth is, the governor never had any such power. Despatch of the Minister of Industry and Public Instruction was not issued to recall a power previously conferred, but to prevent the attempt to exercise a power never possessed.

Reference is also made to the despatch of the Minister of War, of the tenth of March, 1846, and also to the proclamation of the President, of the thirteenth of March, in the same year, as conferring such an authority; but it is so obvi-

ous that neither of the documents will bear any such construction that we do not think it necessary to enter into any argument upon the subject, and only advert to it that it may not appear to have been overlooked.

The decree of the District Court is therefore reversed, and the cause remanded, with directions to

DISMISS THE PETITION.

NOTE.

At the same time with the preceding case, and argued with it on one brief, another case, relating to a different mission, that of San Luis Rey, in the County of San Diego, but so far as respects the law governed by the same principles, was decided. It was thus:

UNITED STATES v. CAREY JONES.

The Governor of California had no power, on the 18th May, 1846, either under the colonization law of August 18, 1824, and the regulations of November 21, 1828, nor yet under the despatch of March 10, 1846, from Tornel, Minister of War, nor under the proclamation of Mariano Paredes y Arillaga, President ad interim of the Mexican Republic, dated March 13, 1846,—these two last made in anticipation of the invasion of California by the forces of the United States—nor under any other authority, to make a valid sale and grant of the mission of San Luis Rey.

LIKE the preceding case, this one came before the court upon appeal from a decree of the District Court of the United States for the Southern District of California, and arose originally upon a petition for the confirmation of a land claim, before the Board of Commissioners appointed under the act of the 3d March, 1851. The grant in this case was thus:

"PIO PICO, CONSTITUTIONAL GOVERNOR, &c.

"Whereas, Don Antonio Jose Cot and Don Jose Antonio Pico have presented themselves to this government, petitioning that it shall give them as a legitimate possession the mission of San Luis Rey and the rancho of Palas, with the lands which pertain to them, in payment of $2000 in money, and $437 and four reals in grain, with which they have assisted the government in its exigencies; they both obligating themselves to satisfy, in every description of produce, the debt of the said mission of San Luis Rey in the

term of four years; having in consideration the prejudices which the interested parties have had in the delay of the satisfaction of the said debt, and that the edifices, which are in a total abandonment, will not pay the other creditors: I have come to concede them, &c., *in virtue of the faculties with which I find myself invested*, they remaining responsible to satisfy the debts of the said mission, and in order, &c.

"Given in the Government House, in the city of Los Angeles, this 18th of May, 1846.

"PIO PICO.

"JOSE MARIA MORENO, *Sec. ad int'r.*"

Governor Pico, who was himself examined, testified that his signature was genuine. "I placed it there," he said, "as governor, at the time and place where and when the paper purports to be made and dated. It was made for the uses and purposes, and upon the terms and considerations, therein specified. The money and grain mentioned in said paper were furnished to the government for its uses by the original grantees."

The following questions and answers were made during Governor Pico's examination, as to the source from which he supposed that he derived authority to make the grant:

"*Question.* Was this grant or sale made in virtue of the general colonization law of the 18th of August, 1824, or of the regulations for colonization of the vacant lands of the territories of 1828, or of any other law or regulation of the Mexican Government?

"*Answer.* The sale was made in virtue of what is expressed in the document itself. The government made the sale by virtue of the authority with which it considered itself clothed from the Government of Mexico, and upon the motives and considerations expressed in the document itself.

"*Question.* Was the authority special?

"*Answer.* The governor had not received any special authority to make the particular sale in this case; but the governor had received special instructions to provide means for the defence of the country by extraordinary efforts and at every sacrifice. [See *ante*, pp. 753 and 754. REP.]

"*Question.* Did you consider the approval of the Departmental Assembly necessary to make this grant valid?

"*Answer.* I did not so consider it."

It appeared, also, that possession had been taken by the grantees, and that Carey Jones derived title from them. The Board of Land Commissioners decided in favor of the claim, and the District Court affirmed the decision, from which decree of affirmance this appeal came.

Mr. Justice CLIFFORD delivered the opinion of the court.

This was a petition for the confirmation of a land claim under the act of the third of March, 1851, and the case comes before the court upon appeal from a decree of the District Court of the United States for the Southern District of California. Appellee claims the land and property in question as purchaser from Antonio José Cot and José Antonio Pico, who, as he alleges, were the original grantees of the same under the departmental government of California. Claim is for the mission of San Luis Rey, situated in the County of San Diego, including the rancho of Palas, and is bounded as follows: North by Santa Margarita, east by the Sierra of Rauma, south by the rancho of San Francisco, and west by the sea-shore, excepting all prior valid grants within the specified boundaries. Title is claimed by virtue of an alleged sale of the property made under the authority of the governor of the department. Grant made in pursuance of the sale is dated at Los Angeles, on the eighteenth day of May, 1846, and purports to have been executed in payment of two thousand dollars in money and four hundred and thirty-seven dollars and fifty cents in grain, with which the grantees had assisted the government in its exigencies, they obligating themselves to satisfy the debt of the mission in produce within four years.

I. Concession is accordingly made of the property to the grantees "in virtue of the faculties with which I find myself invested," but the governor does not condescend to explain what those faculties were, or whence they were derived. Whether the sale was made at private or public sale does not appear, nor in the view taken of the case is it of any importance to inquire. Deposition of the governor was taken to prove the authenticity of the grant, and he testified that his signature appearing in the paper was his genuine signature. Question was put directly to the witness, whether the grant was made in virtue of the colonization law of the eighteenth of August, 1824, or of the regulations of the twenty-first of November, 1828, but his answer was evasive and unsatisfactory. He said the sale was made in virtue of what is expressed in the document itself; that the government made the sale by virtue of the authority with which it considered itself clothed from the Supreme Government, and upon the motives and considerations expressed in the document. He admitted that the governor had not received any special

authority to make the particular sale in this case, but endeavored to weaken the force of the admission by adding that he had received special instructions to provide means for the defence of the country by extraordinary efforts and every sacrifice. Instead of claiming that the power to make the grant emanated from the Departmental Assembly, as was claimed in the preceding case, he stated expressly that he did not think the approval of that Assembly was necessary to the validity of the grant. Evidence was also offered by the claimant to show that the original grantees took possession of the property and remained in possession until it was delivered to the agent of the United States.

II. Commissioners confirmed the claim, and the United States appealed to the District Court, where the decree of the commissioners was affirmed. Whereupon the United States appealed to this court. Propositions discussed in the case are substantially the same as those presented in the case just decided, and for the reasons there suggested it will only be necessary to determine the question of power. When the governor stated in his deposition that he considered the local government clothed with authority from the Supreme Government, he doubtless referred to the despatch of the Minister of War, of the tenth of March, 1846, and also perhaps to the proclamation of the President, which bears date three days later; but the views of the court have been so decidedly expressed upon that subject in the preceding case, that it seems unnecessary to add anything to what was then remarked. Suffice it to say, that we are all of the opinion that the documents will bear no such construction, nor do they afford any substantial support to any such proposition. Taken as a whole, the case is governed by the same principles as the preceding case, and we refer to the reasons there given for our conclusion in this case,—that the governor of the department had no authority to make the grant.

The decree of the District Court is therefore reversed, and the cause remanded with directions to

DISMISS THE PETITION.

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